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WHEN: Tuesday, March 13, 2012
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Presidential Documents

Title 3—

The President

Proclamation 8778 of March 1, 2012

American Red Cross Month, 2012

By the President of the United States of America

A Proclamation

After more than 130 years of providing humanitarian relief at home and abroad, the American Red Cross remains a reflection of the compassion and generosity central to our national identity. At moments of profound need, the actions of men and women across our country reflect our noblest ideals of service—from search-and-rescue teams that brave disaster zones to ordinary citizens who deliver not only lifesaving care and supplies, but also hope for a brighter tomorrow. During American Red Cross Month, we pay tribute to all those whose dedication to relieving human suffering illuminates even our darkest hours.

A visionary humanitarian and unyielding advocate for those in need, Clara Barton founded the American Red Cross in 1881 after many years of tending to soldiers and families injured in war's wake. In the generations that followed, the American Red Cross served as a force for peace and recovery during times of crisis. Presidents of the United States have called upon the American Red Cross time and again, beginning when President Woodrow Wilson proclaimed Red Cross Week during the First World War, and continuing into the 21st century.

Today, emergency response organizations like the American Red Cross continue to play a vital role in responding to disasters that cast countless lives and communities into harm's way. When devastating storms struck cities spanning the Midwest to the Eastern Seaboard this past year, the American Red Cross and other relief organizations were instrumental partners in preparedness, response, and recovery. And when a devastating earthquake shook Japan's Pacific coast, they answered by extending support to the people of Japan and standing with them as they rebuild.

We are reminded in times like these that the strength of our humanitarian response and the measure of our resilience are drawn not only from the committed action of relief organizations, but also from individuals who step forward, volunteer, or give what they can to help their neighbors in need. With generous spirits and can-do attitudes, Americans from every corner of our country have come together again and again to show the true character of our Nation. As we celebrate American Red Cross Month, let us resolve to preserve and renew that humanitarian impulse to save, to serve, and to build, and carry it forward in the year to come.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America and Honorary Chairman of the American Red Cross, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim March 2012 as American Red Cross Month. I encourage all Americans to observe this month with appropriate programs, ceremonies, and activities, and by supporting the work of service and relief organizations.

IN WITNESS WHEREOF, I have hereunto set my hand this first day of March, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-sixth.

[FR Doc. 2012–5553
Filed 3–5–12; 8:45 am]
Billing code 3295–F2–P

Presidential Documents

Proclamation 8779 of March 1, 2012

Irish-American Heritage Month, 2012

By the President of the United States of America

A Proclamation

For centuries, America and Ireland have built a proud and enduring partnership cemented by mutual values and a common history. Generations of Irish have crossed the Atlantic in pursuit of prosperity, and today nearly 40 million of their proud descendants continue to make their indelible mark on the United States of America. Their stories, as varied as our Nation's people, humble us and inspire our children to reach for the opportunities dreamed about by our forebears.

Over hundreds of years, Irish men, women, and children left the homes of their ancestors, watching the coasts of Donegal and the cliffs of Dingle fade behind them. Boarding overcrowded ships and navigating dangerous seas, these resilient travelers looked to the horizon with hope in their hearts. Many left any valuables, land, or stability they had behind, but they came instead with the true treasures of their homeland—song and literature, humor and tradition, faith and family. And when they landed on our shores, they shared their gifts generously, adding immeasurable value to towns, cities, and communities throughout our Nation.

Today, we draw on the indomitable spirit of those Irish Americans whose strength helped build countless miles of canals and railroads; whose brogues echoed in mills, police stations, and fire halls across our country; and whose blood spilled to defend a Nation and a way of life they helped define. Defying famine, poverty, and discrimination, these sons and daughters of Erin demonstrated extraordinary strength and unshakable faith as they gave their all to help build an America worthy of the journey they and so many others have taken. During Irish-American Heritage Month, we recall their legacy of hard work and perseverance, and we carry forward that singular dedication to forging a more prosperous future for all Americans.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim March 2012 as Irish-American Heritage Month. I call upon all Americans to observe this month by celebrating the contributions of Irish Americans to our Nation.

IN WITNESS WHEREOF, I have hereunto set my hand this first day of March, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-sixth.

[FR Doc. 2012–5561
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Presidential Documents

Proclamation 8780 of March 1, 2012

Women's History Month, 2012

By the President of the United States of America

A Proclamation

As Americans, ours is a legacy of bold independence and passionate belief in fairness and justice for all. For generations, this intrepid spirit has driven women pioneers to challenge injustices and shatter ceilings in pursuit of full and enduring equality. During Women's History Month, we commemorate their struggles, celebrate centuries of progress, and reaffirm our steadfast commitment to the rights, security, and dignity of women in America and around the world.

We see the arc of the American story in the dynamic women who shaped our present and the groundbreaking girls who will steer our future. Forty-one years ago, when former First Lady Eleanor Roosevelt confronted President John F. Kennedy about the lack of women in government, he appointed her the head of a commission to address the status of women in America and the discrimination they routinely faced. Though the former First Lady passed away before the commission finished its work, its report would spur action across our country and galvanize a movement toward true gender parity. Our Nation stands stronger for that righteous struggle, and last March my Administration was proud to release the first comprehensive Federal report on the status of American women since President Kennedy's commission in 1963. Today, women serve as leaders throughout industry, civil society, and government, and their outstanding achievements affirm to our daughters and sons that no dream is beyond their reach.

While we have made great strides toward equality, we cannot rest until our mothers, sisters, and daughters assume their rightful place as full participants in a secure, prosperous, and just society. With the leadership of the White House Council on Women and Girls, my Administration is advancing gender equality by promoting workplace flexibility, striving to bring more women into math and science professions, and fighting for equal pay for equal work. We are combating violence against women by revising an antiquated definition of rape and harnessing the latest technology to prevent dating violence, domestic violence, and sexual assault. From securing women's health and safety to leveling the playing field and ensuring women have full and fair access to opportunity in the 21st century, we are making deep and lasting investments in the future of all Americans.

Because the peace and security of nations around the globe depend upon the education and advancement of women and girls, my Administration has placed their perspectives and needs at the heart of our foreign policy. Last December, I released the first United States National Action Plan on Women, Peace, and Security to help ensure women play an equal role in peace-building worldwide. By fully integrating women's voices into peace processes and our work to prevent conflict, protect civilians, and deliver humanitarian assistance, the United States is bringing effective support to women in areas of conflict and improving the chances for lasting peace. In the months ahead, my Administration will continue to collaborate with domestic and international partners on new initiatives to bring economic and political opportunity to women at home and abroad.

During Women's History Month, we recall that the pioneering legacy of our grandmothers and great-grandmothers is revealed not only in our museums and history books, but also in the fierce determination and limitless potential of our daughters and granddaughters. As we make headway on the crucial issues of our time, let the courageous vision championed by women of past generations inspire us to defend the dreams and opportunities of those to come.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim March 2012 as Women's History Month. I call upon all Americans to observe this month and to celebrate International Women's Day on March 8, 2012, with appropriate programs, ceremonies, and activities that honor the history, accomplishments, and contributions of American women. I also invite all Americans to visit www.WomensHistoryMonth.gov to learn more about the generations of women who have shaped our history.

IN WITNESS WHEREOF, I have hereunto set my hand this first day of March, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-sixth.

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Rules and Regulations

Federal Register

Vol. 77, No. 44

Tuesday, March 6, 2012

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

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0107; Directorate Identifier 2007–NM–087–AD; Amendment 39–16965; AD 2012–04–09]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain The Boeing Company Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP series airplanes. This AD requires inspections for scribe lines in affected lap and butt splices, wing-to-body fairing locations, and external repair and cutout reinforcement areas; and related investigative and corrective actions if necessary. This AD was prompted by reports of scribe lines found at lap joints and butt joints, around external doublers and antennas, and at locations where external decals had been cut. We are issuing this AD to detect and correct scribe lines, which can develop into fatigue cracks in the skin and cause sudden decompression of the airplane.

DATES: This AD is effective April 10, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of April 10, 2012.

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; email *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

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: Bill Ashforth, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6432; fax: 425–917–6590; email: *bill.ashforth@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a supplemental notice of proposed rulemaking (SNPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to the specified products. That SNPRM published in the **Federal Register** on August 30, 2010 (75 FR 52907). The original NPRM (73 FR 5768, January 31, 2008) proposed to require inspections for scribe lines in affected lap and butt splices, wing-to-body fairing locations, and external repair and cutout reinforcement areas; and related investigative and corrective actions if necessary. The SNPRM proposed to revise the original NPRM by adding inspections for certain airplanes and revising certain compliance times including reducing the compliance time for certain repetitive inspections.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the proposal (75 FR 52907, August 30, 2010) and the FAA's response to each comment.

Request To Revise Certain Inspection Requirements

Boeing requested that we revise the SNPRM (75 FR 52907, August 30, 2010) to include an additional exception to the service bulletin specifications. The SNPRM referred to Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010, as the appropriate source of service information for the post-repair inspections. Revision 4 of this service bulletin includes lap joint repair instructions in the Accomplishment Instructions, and refers to post-repair instructions in Parts 17 and 18. The post-repair inspection instructions incorrectly refer to inspections per the Boeing 747 Supplemental Structural Inspection Document (SSID) D6–35022. Boeing reported that it plans to remove the reference to the SSID and update the post-repair inspections when Boeing Service Bulletin 747–53A2563 is revised. Boeing therefore requested that we revise the SNPRM to require operators to contact the FAA to request the appropriate post-repair inspections rather than follow the post-repair inspections given in Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010.

We partially agree with the request. Although we agree with the information and rationale provided by the commenter, we have determined that the inspection procedures described in Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010, are adequate for the purpose of this AD. It is not necessary to further burden the operators with a requirement to contact the FAA for post-repair inspection instructions, when adequate inspections already exist. Operators may, however, contact the FAA with an alternative method to the inspection procedures specified in Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010, in accordance with the procedures specified in paragraph (m) of this AD.

Request To Remove Certain Inspection Requirement

Boeing and Delta Airlines requested that we revise paragraph (g) of the SNPRM (75 FR 52907, August 30, 2010) to remove the requirement to inspect for scribe lines around the perimeter of the wing-to-body fairing. The commenters stated that this inspection has been removed from Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010. Boeing noted that repetitive inspections for cracks at previously discovered scribe lines along the wing-to-body fairing may still be necessary, as specified in Table 17 of paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010.

We partially agree with the request. We agree that the initial inspection of the wing-to-body fairing for scribe lines is not required; this action was removed from Boeing Service Bulletin 747–53A2563, Revision 3, dated June 11, 2009; and Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010. But we disagree that it is necessary to change the final rule to specify this provision; Note 1, which was added to the SNPRM (75 FR 52907, August 30, 2010) and retained in this final rule, accounts for this requested change. We have not changed the final rule regarding this issue.

Request To Clarify Reporting Requirement

Delta requested that we revise paragraph (j) of the SNPRM (75 FR 52907, August 30, 2010) (paragraph (k) in this final rule) to specify that the inspection report is required only for the initial inspection for scribe lines. The commenter noted that the service bulletin has no provision for reporting requirements for any repetitive inspections done during the limited return to service (LRTS) program specified in Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010.

We agree to clarify that a report is not required for any inspection accomplished per the LRTS program. We have added this clarification in paragraph (k) in this final rule.

Request To Extend Certain Compliance Times

Air New Zealand discussed the implications of scribe lines found before the applicable inspection threshold. This commenter asserted that a scribe line could be present on the airplane from its date of manufacture, and that Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010, effectively declares there is no safety implication resulting from this scribe line until the relevant inspection threshold. Yet the SNPRM (75 FR 52907, August 30, 2010) would require that a scribe line found before the inspection threshold must immediately be repaired or further inspected. Air New Zealand asserted that, if scribe lines are discovered early, this requirement would add to the maintenance burden without increasing safety.

We infer that the commenter is requesting that we revise the SNPRM (75 FR 52907, August 30, 2010) to extend the time for corrective action on known scribe lines to match the threshold specified in the service information, instead of requiring action before further flight. We disagree. We have determined that, in this case, due to the safety implications and consequences of this type of known damage, operators must repair or inspect scribed structure before further flight. We have not changed the final rule regarding this issue.

Request To Remove Certain Airplanes From Inspection Requirements

Cargolux Airlines asserted that certain airplanes should not be subject to the inspection requirement, and requested that we revise the SNPRM (75 FR 52907, August 30, 2010) to exclude airplanes delivered without fillet seals at lap joints, and airplanes with fillet seals that were applied but never removed. The operator noted that Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010, provides some exceptions for airplanes that had never been stripped or repainted, and for airplanes on which any sealant removal was always done in accordance with Appendix A of this service bulletin. The operator also noted, on the other hand, that no exception exists if fillet seals were never applied, or were applied but never removed. Paragraph 1.D. of this service bulletin specifies that scribe lines are made while fillet seals are removed during repainting. The commenter concluded that if no fillet seal was ever applied at a lap joint location, or if an applied fillet seal was never removed, no scribe line can exist.

We disagree with the commenter's request to remove certain airplanes from the inspections required by this AD. As noted in paragraph 1.E.1 of Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010, certain inspections are still necessary even if no fillet seal has ever been removed. We do not agree to exempt airplanes on which no fillet seal has ever been removed from those inspections. The valid exceptions to certain inspections are explained further in Paragraphs 1.E.1 through 1.E.4 of Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010. Note 1 of this AD states that the exemptions noted in paragraph 1.E. of Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010, apply to this AD. It is not necessary to change the final rule regarding this issue.

Request To Revise Compliance Time

British Airways (BA) requested that we revise the SNPRM (75 FR 52907, August 30, 2010) to allow low-time airplanes (with fewer than 17,500 total accumulated flight cycles) to be inspected in area 1 of the fuselage at the later of 1,500 flight cycles after the effective date of the AD, and the next ''D'' check after the airplane has accumulated 15,000 total cycles without exceeding 19,000 total flight cycles. BA noted that Boeing recommends a 15,000-flight-cycle threshold for the area 1 inspections, and that the inspections should be done during a ''D'' check to avoid unscheduled downtime. As a result, to align with a ''D'' check, the inspections for low-time airplanes may have to occur as early as 12,000 total flight cycles for long-haul airplanes, and even earlier for short-haul airplanes. The commenter added that Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010, also includes procedures for inspecting for scribe lines around external fuselage repairs, and as such, shares commonality with the need to assess repairs as detailed in Boeing SSID D6–36181, which the FAA approved in 2008. This program's threshold is the first ''D'' check after the airplane has accumulated 15,000 total flight cycles. The commenter felt it would be appropriate to carry out the scribe line inspection of area 1 and the repair assessment program at the same time. BA stated that it understands that the term ''D check'' means different things to different operators, but pointed out that in the past the FAA has been able to clarify this, for example, in paragraph 217 of FAA Advisory Circular 120–93, dated November 20, 2007 (*http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/1ab39b4ed563b08985256a35006d56af/f73fd2a31b353a71862573b000521928!OpenDocument*), which states as follows:

> Airplanes less than 75 percent of DSG [design service goal] on December 18, 2009. Operators complete a survey at the first heavy maintenance check (time limit equivalent to a ''D-check'') after an individual airplane reaches 75% of the DSG, not to exceed the DSG.

Note: A heavy maintenance check (D-check or equivalent airplane inspection) is an airplane maintenance visit where the major structural inspections are performed. In some cases, this may be a formal D-check or, in the case of a Maintenance Steering Group (MSG)–2 or –3 based maintenance program, the D-check equivalent may be the ''C-check'' multiple that contains the majority of the major structural inspections, such as a ''C–4'' which is sometimes called a heavy maintenance visit.

BA stated that its proposed variation on the threshold for area 1 would follow this convention, but have the additional safeguard that the airplane would not exceed 19,000 total flight cycles before inspection. Younger airplanes therefore would have the same or greater level of safety than airplanes currently inspected at 17,500 total flight cycles and allowed a 1,500-flight-cycle grace period. BA reported that, of 314 Model 747 airplanes that have accumulated more than 19,000 total flight cycles, none had experienced cracking from scribe lines—even though exploratory inspections to date suggest that scribe lines are commonplace.

We disagree with the request to revise the compliance time as suggested. We do not specify compliance times in terms of letter checks because, as the commenter noted, maintenance schedules vary among operators. We have determined that the compliance times as proposed are appropriate to address the identified unsafe condition. The minimum grace period for compliance with this AD is 1,500 flight cycles for airplanes with fewer than 17,500 total flight cycles, which corresponds to approximately 3 years based on a typical utilization of 500 flight cycles per year for long-haul airplanes. A 3-year grace period should be sufficient for operators to plan for the scribe line inspections, and will allow for timely data collection for use in developing final action and determining whether this AD should be revised in the future. We have not changed the final rule regarding this issue. Under the provisions of paragraph (m) in this final rule, however, we may consider requests for adjustments to the compliance time if data are submitted to substantiate that such an adjustment would provide an acceptable level of safety.

Request for Alternative Inspection Program

KLM requested that we revise the SNPRM (75 FR 52907, August 30, 2010) to exclude from the inspection program the CLAD layer of the skin (up to a certain depth/percentage, to be determined by the type certificate holder). KLM asserted that scribe lines found in the CLAD layer are not critical for continued operation and do not require repeat inspections as specified in the LRTS program. KLM also requested investigation of a single fatigue crack evolving from a scribe line found in the CLAD layer, not in the base material. KLM requested that the proposed AD be revised to allow blending scribe lines found in CLAD layers as a corrective action. KLM suggested that scribe lines might have no effect on the CLAD layer, and suggested that a program be developed for inspecting scribe lines in the CLAD layer of the skin.

We agree that additional studies on scribe lines within CLAD layers might benefit the development of new inspection programs and relieve certain inspection criteria. But we disagree to change this aspect of the SNPRM (75 FR 52907, August 30, 2010) at this time, because no such inspection program exists. To delay this action would be inappropriate, since we have determined that an unsafe condition exists and we must proceed to mandate the inspections as proposed to ensure continued safety. In the future, we might consider additional rulemaking to include new inspections, if a new inspection program is developed, approved, and available. In the meantime, under the provisions of paragraph (m) of this final rule, we will consider requests for approval of an alternative method of compliance if sufficient data are submitted to substantiate that the alternative inspection program would provide an acceptable level of safety. We have not changed the final rule regarding this issue.

Explanation of Additional Change Made to This AD

We have revised the heading for and wording in paragraph (l) of this AD; this change has not changed the intent of that paragraph.

Conclusion

We reviewed the relevant data, considered the comments 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 219 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Detailed inspections	1,020 to 1,140	$85	$86,700 to $96,900	219	$18,987,300 to $21,221,100.

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):

2012–04–09 The Boeing Company: Amendment 39–16965; Docket No. FAA–2008–0107; Directorate Identifier 2007–NM–087–AD.

(a) Effective Date

This AD is effective April 10, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SP, and 747SR series airplanes; certificated in any category; as identified in Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010.

(d) Subject

Air Transport Association (ATA) of America Code 53: Fuselage.

(e) Unsafe Condition

This AD results from reports of scribe lines found at lap joints and butt joints, around external doublers and antennas, and at locations where external decals had been cut. We are issuing this AD to detect and correct scribe lines, which can develop into fatigue cracks in the skin and cause sudden decompression 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.

(g) Inspection

At the applicable times specified in Tables 1 through 21 and Table 25 in paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010, except as provided in paragraph (h) of this AD, do detailed inspections for scribe lines of affected lap and butt splices, wing-to-body fairing locations, and external repair and cutout reinforcement areas, and do all applicable related investigative and corrective actions, by accomplishing all actions specified in the Accomplishment Instructions of Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010, except as provided by paragraph (i) of this AD.

Note 1 to paragraph (g) of this AD: The inspection exemptions noted in paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010, apply to this AD, provided that the operator meets the requirements stated in each applicable exemption.

(h) Exceptions to Service Bulletin Specifications: Compliance Time

Where Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010, specifies a compliance time after the date on that revision or any previous issue of Boeing Service Bulletin 747–53A2563, this AD requires compliance within the specified compliance time after the effective date of this AD. Where Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010, states that airplane flight-cycle time shall be calculated after the ''issue date on this service bulletin,'' this AD requires the airplane flight-cycle time to be calculated as of the effective date of this AD.

(i) Exception to Service Bulletin Specifications: Repair Method

Where Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010, specifies to contact Boeing for appropriate action, accomplish applicable actions before further flight using a method approved in accordance with the procedures specified in paragraph (m) of this AD.

(j) Report

At the applicable time specified in paragraph (j)(1) or (j)(2) of this AD: Submit a report of the findings (both positive and negative) of the inspections required by paragraphs (g) and (k) of this AD. Send the report to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. The report must contain, at a minimum, the inspection results, a description of any discrepancies including maximum scribe depth, the airplane serial number, and the number of flight cycles and flight hours on the airplane. Under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements contained in this AD and has assigned OMB Control Number 2120–0056. A report is not required for any inspection accomplished in accordance with the Limited Return to Service (LRTS) program.

(1) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(2) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(k) Additional Inspections for Previously Inspected Airplanes

For airplanes that have been inspected before the effective date of this AD in accordance with the service information specified in table 1 of this AD: At the applicable times specified in Tables 22 through 24 and Tables 26 through 29 of paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010, except as provided in paragraph (h) of this AD, do detailed inspections for scribe lines of affected lap splices, butt splices and cargo door lap splices; and do detailed and surface high frequency eddy current or ultrasonic inspections of scribe lines; and do all applicable related investigative and corrective actions; by accomplishing all the applicable actions specified in the Accomplishment Instructions of Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010, except as provided by paragraph (i) of this AD.

TABLE 1—PREVIOUS SERVICE BULLETIN REVISIONS

Document	Revision	Date
Boeing Alert Service Bulletin 747–53A2563	Original	March 29, 2007.
Boeing Service Bulletin 747–53A2563	2	January 3, 2008.
Boeing Service Bulletin 747–53A2563	3	June 11, 2009.

Note 2 to paragraph (k) of this AD: Boeing Alert Service Bulletin 747–53A2563, Revision 1, dated November 8, 2007, was published with omitted information. Actions accomplished according to Boeing Alert Service Bulletin 747–53A2563, Revision 1, dated November 8, 2007, are not considered acceptable for compliance with this AD.

(l) Credit for Previous Actions

This paragraph provides credit for the actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using the service information identified in Table 1 of this AD, except as required by paragraph (k) of this AD.

(m) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office, 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. Information may be mailed to *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/ certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by the Boeing Commercial Airplanes Organization Designation Authority (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(n) Related Information

For more information about this AD, contact Bill Ashforth, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6432; fax: 425–917–6590; email: *bill.ashforth@faa.gov.*

(o) Material Incorporated by Reference

You must use Boeing Service Bulletin 747–53A2563, Revision 4, dated May 6, 2010, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; email *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.*

(3) You may review copies of the 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.

(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 Renton, Washington, on February 17, 2012.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–4520 Filed 3–5–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0992; Directorate Identifier 2011–NM–126–AD; Amendment 39–16968; AD 2012–04–12]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Bombardier, Inc. Model CL–600–2B16 (CL–604 Variant) airplanes. This AD was prompted by reports of the air-driven generator (ADG) failing to provide power during operational/ function checks due to wires in the ADG power feeder cables being damaged. The damage was due to galvanic corrosion and inadequate silver-plating. This AD requires replacing ADG power feeder cables. We are issuing this AD to prevent galvanic corrosion on ADG power feeder cables, which could result in damage to the cable and consequently the cable may not be able to provide emergency electrical power to the airplane.

DATES: This AD becomes effective April 10, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of April 10, 2012.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Assata Dessaline, Aerospace Engineer, Avionics and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7301; fax (516) 794–5531.

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 was published in the **Federal Register** on September 23, 2011 (76 FR 59067). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> Three (3) events have occurred where the Air-Driven Generator (ADG) failed to provide power on CL–600–2B19 (CRJ) aeroplanes during their regularly scheduled operational/ functional checks. An investigation revealed that in all cases, the silver-plated copper wires within the ADG power feeder cables were damaged due to galvanic corrosion. It was subsequently determined that the silver-plating is inadequate for this application.
>
> In the event of damage to the power feeder cable wires, the ADG may not be able to provide emergency electrical power to the aeroplane.
>
> Although there have been no reported failures to date on any CL–600–2B16 (604 Variant) aeroplanes, a sampling program carried out on these aeroplanes showed signs of microscopic galvanic corrosion on the ADG power feeder cable wires.
>
> This [Transport Canada] directive is issued to correct this potentially unsafe condition by mandating the replacement of all ADG power feeder cables * * * with an ADG power feeder cable that contains tin-plated copper wires.

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

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comment received.

Request To Revise Applicability

Bombardier Aerospace (Bombardier) commented that the aircraft applicability needs to be revised to remove two of the three model designations (Model CL–601–3A and –3R) specified in the NPRM (76 FR 59067, September 23, 2011), because only airplanes of the Model CL–604 Variant are affected by the proposed actions of the NPRM.

We agree to revise the applicability of this AD as requested. The airplane serial numbers specified in Transport Canada Civil Aviation (TCCA) Airworthiness Directive CF–2011–08, dated April 28, 2011 (cited in the NPRM (76 FR 59067, September 23, 2011) as the Canadian mandatory continuing airworthiness information (MCAI)), and Bombardier Service Bulletin 604–24–024, dated January 31, 2011 (cited as the appropriate service information for accomplishing the actions proposed by the NPRM) are all of the Model CL–604

Variant. We have changed the affected airplanes specified in the applicability in the Summary and in paragraph (c) of this AD accordingly.

Conclusion

We reviewed the available data, including the comment received, and determined that air safety and the public interest require adopting the AD with the change described previously. We determined that this change will not increase the economic burden on any operator or increase the scope of the AD.

Costs of Compliance

We estimate that this AD will affect about 72 products of U.S. registry. We also estimate that it will take about 24 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $1,897 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $283,464, or $3,937 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 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 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.

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

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 the NPRM (76 FR 59067, September 23, 2011), 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.

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 AD:

2012–04–12 Bombardier, Inc.: Amendment 39–16968. Docket No. FAA–2011–0992; Directorate Identifier 2011–NM–126–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective April 10, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc. Model CL–600–2B16 (CL –604 Variant) airplanes, certificated in any category, serial numbers 5301, 5302, 5305 through 5318 inclusive, 5320 through 5328 inclusive, 5331 through 5349 inclusive, 5351 through 5367 inclusive, 5369 through 5408 inclusive, 5410, 5412 through 5426 inclusive, 5428 through 5438 inclusive, 5440 through 5489 inclusive, 5491 through 5498 inclusive, 5500 through 5517 inclusive, 5519 through 5522 inclusive, and 5524 through 5665 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 24: Electrical power.

(e) Reason

This AD was prompted by reports of the air-driven generator (ADG) failing to provide power during operational/function checks due to wires in the ADG power feeder cables being damaged. The damage was due to galvanic corrosion and inadequate silver-plating. We are issuing this AD to prevent galvanic corrosion on ADG power feeder cables, which could result in damage to the cable and consequently the cable may not be able to provide emergency electrical power to 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.

(g) Actions

Within 72 months after the effective date of this AD, replace the ADG power feeder cable, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 604–24–024, dated January 31, 2011.

(h) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, 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 ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone 516–228–7300; fax 516–794–5531. 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.

(i) Related Information

Refer to MCAI Transport Canada Civil Aviation (TCCA) Airworthiness Directive CF–2011–08, dated April 28, 2011; and Bombardier Service Bulletin 604–24–024, dated January 31, 2011; for related information.

(j) 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) Bombardier Service Bulletin 604–24–024, dated January 31, 2011, approved for IBR April 10, 2012.

(2) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.*

(3) You may review copies of the service information at the FAA, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

(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 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 Renton, Washington, on February 22, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–4805 Filed 3–5–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1230; Directorate Identifier 2011–NM–141–AD; Amendment 39–16964; AD 2012–04–08]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Model DHC–8–102, –103, and –106 airplanes and Model DHC–8–200, –300, and –400 series airplanes. This AD was prompted by reports of cracking of the DHC–8 Series 100 rudder actuator mounting bracket. This AD requires modifying the mounting adapters of the power control unit (PCU). We are issuing this AD to prevent loss of both rudder PCU actuators which could result in free play of the rudder control surface and loss of controllability of the airplane.

DATES: This AD becomes effective April 10, 2012.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of April 10, 2012.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Cesar Gomez, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7318; fax (516) 794–5531.

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 was published in the **Federal Register** on November 18, 2011 (76 FR 71470). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> Several reports have been received regarding cracking of the DHC–8 Series 100 rudder actuator mounting bracket. An investigation revealed that the mounting bracket has been under-designed based on the static and endurance loading conditions. The failure of the mounting brackets that attach the power control unit (PCU) to the airframe could result in a loss of the rudder actuating system. The loss of both rudder PCU actuators could result in free play of the rudder control surface and potentially induce a flutter condition.
>
> This [TCCA] directive mandates the installation of a new design of rudder actuator mounting bracket [adapter].

The unsafe condition is loss of controllability of the airplane. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comment received. The commenter supports the NPRM (76 FR 71470, November 18, 2011).

Explanation of Change Made to This AD

We have revised the heading for and the wording in paragraph (h) of this AD; this change has not changed the intent of that paragraph.

Conclusion

We reviewed the available data, including the comment received, and determined that air safety and the public interest require adopting the AD with the change described previously and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (76 FR 71470, November 18, 2011) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (76 FR 71470, November 18, 2011).

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 will affect about 171 products of U.S. registry. We also estimate that it will take up to 10 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost up to $2,856 per product. Based on these figures, we estimate the cost of the AD on U.S. operators to be up to $633,726, or $3,706 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 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 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.

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

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 the NPRM (76 FR 71470, November 18, 2011), 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.

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 AD:

2012–04–08 Bombardier, Inc.: Amendment 39–16964. Docket No. FAA–2011–1230; Directorate Identifier 2011–NM–141–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective April 10, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc. airplanes identified in paragraphs (c)(1) and (c)(2) of this AD, certificated in any category.

(1) Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 airplanes, serial numbers 003 through 672 inclusive.

(2) Model DHC–8–400, –401, and –402 airplanes, serial numbers 4001 through 4343 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 27: Flight controls.

(e) Reason

This AD was prompted by reports of cracking of the DHC–8 Series 100 rudder actuator mounting bracket. We are issuing this AD to prevent loss of both rudder PCU actuators which could result in free play of the rudder control surface and loss of controllability 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.

(g) Free-Play Check and Corrective Actions

Within 6,000 flight hours or 3 years after the effective date of this AD, whichever occurs first, do the actions required by paragraph (g)(1) or (g)(2) of this AD, as applicable.

(1) For Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 airplanes: Install a new CRES mounting adapter with new bolts by incorporating MODSUM 8Q101890, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 8–27–110, Revision C, dated May 13, 2011.

(2) For DHC–8–400, –401, and –402 airplanes: Replace the existing upper and lower mounting adapters of the PCU with redesigned adapters by incorporating MODSUM 4–113655, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 84–27–53, dated November 26, 2010.

(h) Credit for Previous Actions

This paragraph provides credit for actions required by paragraph (g)(1) of this AD, if those actions were performed before the effective date of this AD using Bombardier Service Bulletin 8–27–110, Revision A, dated December 3, 2010; or Bombardier Service Bulletin 8–27–110, Revision B, dated January 31, 2011.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York ACO, ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone 516–228–7300; fax 516–794–5531. 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.

(j) Related Information

Refer to MCAI Canadian Airworthiness Directive CF–2011–12, dated June 6, 2011; Bombardier Service Bulletin 8–27–110, Revision C, dated May 13, 2011; and Bombardier Service Bulletin 84–27–53, dated November 26, 2010; for related information.

(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) of the following service information under 5 U.S.C. 552(a) and 1 CFR part 51:

(i) Bombardier Service Bulletin 8–27–110, Revision C, dated May 13, 2011.

(ii) Bombardier Service Bulletin 84–27–53, dated November 26, 2010.

(2) For service information identified in this AD, contact Bombardier, Inc., Q–Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone 416–375–4000; fax 416–375–4539; email *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com.*

(3) You may review copies of the 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.

(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 Renton, Washington, on February 17, 2012.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–4494 Filed 3–5–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–0591; Airspace Docket No. 11–ASO–26]

Amendment of Class E Airspace; Springfield, TN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E Airspace in the Springfield, TN area. Aydelotte Airport has been abandoned and controlled airspace is no longer needed. Airspace reconfiguration is necessary for the continued safety and airspace management of Instrument Flight Rules (IFR) operations within the Springfield, TN airspace area. This action also makes a minor adjustment to the geographic coordinates of the Springfield Robertson County Airport.

DATES: Effective 0901 UTC, April 5, 2012. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

History

On September 22, 2011, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend Class E airspace at Springfield, TN (76 FR 58726). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Subsequent to publication, the FAA found that the geographic coordinates for Springfield Robertson County Airport needed to be adjusted. This action makes that adjustment. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9V dated August 9, 2011, and effective September 15, 2011, which is incorporated by reference in 14 CFR Part 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 amends Class E airspace extending upward from 700 feet above the surface at Springfield, TN, as the Aydelotte Airport has been abandoned and is being removed from the airspace description. This action is necessary for the safety and management of IFR operations in the Springfield, TN area. This action also adjusts the geographic coordinates of the Springfield Robertson County Airport to be in concert with the FAAs aeronautical database.

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, is non-controversial and unlikely to result in adverse or negative comments. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the 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 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 in the Springfield, TN area.

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.

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

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

* * * * *

ASO TN E5 Springfield, TN [Amended]

Springfield Robertson County Airport, TN (Lat. 36°32′14″ N., long. 86°55′15″ W.)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Springfield Robertson County Airport.

Barry A. Knight,

Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2012–5123 Filed 3–5–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AO26

Exempting In-Home Video Telehealth From Copayments

AGENCY: Department of Veterans Affairs.

ACTION: Direct final rule.

SUMMARY: The Department of Veterans Affairs (VA) is taking final action to amend its regulation that governs VA services that are not subject to copayment requirements for inpatient hospital care or outpatient medical care.

Specifically, the regulation is amended to exempt in-home video telehealth care from having any required copayment. This removes a barrier that may have previously discouraged veterans from choosing to use in-home video telehealth as a viable medical care option. In turn, VA hopes to make the home a preferred place of care, whenever medically appropriate and possible.

DATES: This final rule is effective May 7, 2012, without further notice, unless VA receives relevant adverse comments by April 5, 2012.

ADDRESSES: Written comments may be submitted through *www.Regulations.gov;* by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave. NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to ''RIN 2900–AO26—Exempting In-home Video Telehealth from Copayments.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment (this is not a toll-free number). In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Kristin J. Cunningham, Director Business Policy, Chief Business Office, Department of Veterans Affairs, 810 Vermont Ave. NW., Washington, DC 20420; (202) 461–1599. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Many of our nation's veterans must travel great distances in order to obtain health care at a VA hospital or medical center. To improve veterans' access to VA health care, VA established community-based outpatient clinics (CBOCs) located in local communities. VA has continued its efforts to improve veterans' access to VA medical care by establishing ''telehealth'' services. Telehealth allows VA to provide certain medical care without requiring the veteran to be physically present with the examining or treating medical professional. Telehealth helps ensure that veterans are able to get their care in a timely and convenient manner by reducing burdens on the patient as well as appropriately reducing the utilization of VA resources without sacrificing the quality of care provided. The benefits of using this technology include increased access to specialist consultations, improved access to primary and ambulatory care, reduced waiting times, and decreased veteran travel.

VA provides various telehealth services, including clinical video telehealth and in-home video telehealth care. Clinical video telehealth, as the name implies, occurs between two clinical settings, such as two VA Medical Centers (VAMCs), a VAMC and a CBOC, or two CBOCs. Clinical video telehealth may also connect patient and provider between VAMCs and VA Centers of Specialized Care, such as those established for Spinal Cord Injury (SCI), Traumatic Brain Injury (TBI) and Multiple Sclerosis (MS). Clinical video telehealth uses real-time interactive video conferencing, sometimes with supportive peripheral devices, such as a camera to closely examine skin. This allows a specialist located in another facility to assess and treat a veteran by providing care remotely.

Like clinical video telehealth, in-home video telehealth care is used to connect a veteran to a VA health care professional using real-time videoconferencing, and other equipment as necessary, as a means to replicate aspects of face-to-face assessment and care delivery that do not require the health care professional to make an examination requiring physical contact. However, in-home video telehealth care is provided in a veteran's home, eliminating the need for the veteran to travel to a clinical setting. Using telehealth capabilities, a VA clinician can assess elements of a patient's care, such as wound management, psychiatric or psychotherapeutic care, exercise plans, and medication management. The clinician may also monitor patient self-care by reviewing vital signs and evaluating the patient's appearance on video.

Prior to this rulemaking, veterans have been required to pay a copayment for in-home video telehealth care. We believe that VA has authority by statute to discontinue charging copayments for these services.

Section 1710(g)(1) of 38 U.S.C. states:

> The Secretary may not furnish medical services (except if such care constitutes hospice care) under subsection (a) of this section (including home health services under section 1717 of this title) to a veteran who is eligible for hospital care under this chapter by reason of subsection (a)(3) of this section unless the veteran agrees to pay to the United States in the case of each outpatient visit the applicable amount or amounts established by the Secretary by regulation.

VA has interpreted section 1710(g)(1) to mean that VA has the discretion to establish the applicable copayment amount in regulation, even if such amount is zero. One such implementing regulation is 38 CFR 17.108.

Generally, VA calculates the amount of a copayment based on the complexity of care provided and the resources needed to provide that care. In addition, VA may exempt certain care from the copayment requirement in an effort to make health care more accessible to veterans, or to encourage veterans to become more actively involved in their medical care, and thereby improve health care outcomes (which, in turn, lowers overall health care costs). VA has determined that in-home video telehealth care should be exempt from copayments because it is not used to provide complex care and its use significantly reduces impact on VA resources compared to an in-person, outpatient visit. It also reduces any potential negative impact on the veteran's health that might be incurred if the veteran were required to travel to a VA hospital or medical center to obtain the care provided via in-home video telehealth. VA also wants to encourage veterans to use the in-home video telehealth care option when their provider finds it appropriate because we believe that it will help ensure that veterans comply with outpatient treatment plans by regularly following up with physicians and medical professionals, taking medication in appropriate doses on a regular basis, and generally being more engaged with their VA health care providers.

As previously stated in this rulemaking, in-home video telehealth allows a VA clinician to assess the elements of a veteran's care, while the veteran remains at home. Conversely, clinical video telehealth assess the veteran's medical condition in a clinical setting using resources and technology that allows a medical specialist, who may be hundreds of miles away, to interact with the veteran and provide the level of care needed to treat the medical condition. VA will not exempt clinical video telehealth services from the copayment requirement because the type of care a veteran receives in clinical video telehealth requires not just the use of CBOC's technological resources, but also patient interaction between the attending physician that may be hundreds of miles away, and the medical staff in the CBOC. The attending medical staff in the CBOC follows the attending physician's instructions in the placement of the adapted equipment that is used in clinical video telehealth in order to assess the veteran's medical condition,

to include the set up of the conference, use of the teleconference room, etc. All of these additional services provide a veteran a higher level of care than the level of care that the veteran receives through in-home video telehealth.

Paragraph (e) of § 17.108 contains a list of services that are not subject to copayment requirements for inpatient hospital care or outpatient medical care.

Based on the rationale set forth in this preamble, VA amends § 17.108(e) by adding a new paragraph (e)(16) to include in-home video telehealth care as exempt from copayment requirements.

Administrative Procedure Act

VA anticipates that this non-controversial rule will not result in adverse or negative comment and, therefore, is issuing it as a direct final rule. Previous actions of this nature, which remove restrictions on VA medical benefits to improve health outcomes, have not been controversial and have not resulted in significant adverse comments or objections. However, in the ''Proposed Rules'' section of this **Federal Register** publication we are publishing a separate, substantially identical proposed rule document that will serve as a proposal for the provisions in this direct final rule if significant adverse comments are filed. (See RIN 2900–AO27).

For purposes of the direct final rulemaking, a significant adverse comment is one that explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or why it would be ineffective or unacceptable without change. If significant adverse comments are received, VA will publish a notice of receipt of significant adverse comments in the **Federal Register** withdrawing the direct final rule.

Under direct final rule procedures, unless significant adverse comments are received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, VA will publish a document in the **Federal Register** indicating that no adverse comments were received and confirming the date on which the final rule will become effective. VA will also publish a notice withdrawing the proposed rule, RIN 2900–AO27.

In the event the direct final rule is withdrawn because of receipt of significant adverse comments, VA can proceed with the rulemaking by addressing the comments received and publishing a final rule. The comment period for the proposed rule runs concurrently with that of the direct final rule. Any comments received under the direct final rule will be treated as comments regarding the proposed rule. Likewise, significant adverse comments submitted to the proposed rule will be considered as comments to the direct final rule. VA will consider such comments in developing a subsequent final rule.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as revised by this rulemaking, represents VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

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

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action,'' which requires review by the Office of Management and Budget (OMB), as ''any regulatory action 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 this Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

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

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program number and title for this rule are as follows: 64.007 Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; and 64.022, Veterans Home Based Primary Care.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on February 28, 2012, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Health care, Health facilities, Mental health programs, Nursing homes, Veterans.

Dated: March 1, 2012.

Robert C. McFetridge,

Director, Office of Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons set forth in the preamble, we are amending 38 CFR part 17 as follows:

PART 17—MEDICAL

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

■ 2. Amend § 17.108 by adding paragraph (e)(16) to read as follows:

§ 17.108 Copayments for inpatient hospital care and outpatient medical care.

* * * * *

(e) * * *

(16) In-home video telehealth care.

* * * * *

[FR Doc. 2012–5354 Filed 3–5–12; 8:45 am]

BILLING CODE 8320–01–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3020

[Docket Nos. CP2012–6; CP2012–7; CP2012–8; CP2012–15; MC2011–29; MC2012–2; MC2012–3; MC2012–4; MC2012–5, CP2012–10 and CP2012–11; MC2012–6, CP2012–12 and CP2012–13; MC2012–7; and R2011–6]

Product List Update

AGENCY: Postal Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Commission is updating the market dominant and competitive product lists. This action reflects a publication policy adopted in a recent Commission order. The referenced policy assumes periodic updates. The updates are identified in the body of this document. The product lists, which are re-published in their entirety, include these updates.

DATES: *Effective Date:* March 6, 2012.

Applicability Dates: February 23, 2012 Priority Mail Contract 36 (MC2012–2 and CP2012–6); Priority Mail Contract 37 (MC2012–3 and CP2012–7); Priority Mail Contract 38 (MC2012–7 and CP2012–15); First-Class Package Service; Global Expedited Package Services Non-published Rates 3 (MC2012–4 and CP2012–8); Global Plus 1C (MC2012–6, CP2012–12 and CP2012–13); Global Plus 2C (MC2012–5, CP2012–10 and CP2012–11); and Inbound Market Dominant Exprès Service Agreement 1 (R2011–6).

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel at 202–789–6820.

SUPPLEMENTARY INFORMATION: This document identifies an update to the market dominant and competitive product lists, which appear as 39 CFR Appendix A to Subpart A of Part 3020—Mail Classification Schedule. Publication of updated product lists in the **Federal Register** is addressed in the Postal Accountability and Enhancement Act (PAEA) of 2006.

Authorization. The Commission process for periodic publication of updates was established in Order No. 445, April 22, 2010.

Changes. Since publication of the product lists in the **Federal Register** on April 22, 2011 (76 FR 22618), an addition to the competitive product list that was previously overlooked has been made:

- Global Expedited Package Services 4 (CP2011–54) (Order No. 657), added January 24, 2011.

In addition, a correction to the market dominant product list, replacing The Strategic Bilateral Agreement Between United States Postal Service and Koninklijke TNT Post BV and TNT Post Pakketservice Benelux BV, collectively ''TNT Post'' and China Post Group—United States Postal Service Letter Post Bilateral Agreement (MC2010–35, R2010–5 and R2010–6) with Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1, has been made.

Updated product lists. The referenced change to the market dominant and competitive product lists are identified following the Secretary's signature.

List of Subjects in 39 CFR Part 3020

Administrative practice and procedure, Postal services.

By the Commission.

Shoshana M. Grove,

Secretary.

For the reasons discussed in the preamble, the Postal Regulatory Commission amends chapter III of title 39 of the Code of Federal Regulations as follows:

PART 3020—PRODUCT LISTS

■ 1. The authority citation for part 3020 continues to read as follows:

Authority: 39 U.S.C. 503; 3622; 3631; 3642; 3682.

■ 2. Revise Appendix A to Subpart A of Part 3020—Mail Classification Schedule to read as follows:

Appendix A to Subpart A of Part 3020—Mail Classification Schedule

Part A—Market Dominant Products

1000 Market Dominant Product List

First-Class Mail
- Single-Piece Letters/Postcards
- Bulk Letters/Postcards
- Flats
- Parcels
- Outbound Single-Piece First-Class Mail International
- Inbound Single-Piece First-Class Mail International

Standard Mail (Regular and Nonprofit)
- High Density and Saturation Letters
- High Density and Saturation Flats/Parcels
- Carrier Route
- Letters
- Flats
- Not Flat-Machinables (NFMs)/Parcels

Periodicals
- Within County Periodicals
- Outside County Periodicals

Package Services
- Single-Piece Parcel Post
- Inbound Surface Parcel Post (at UPU rates)
- Bound Printed Matter Flats
- Bound Printed Matter Parcels
- Media Mail/Library Mail

Special Services
- Ancillary Services
- International Ancillary Services
- Address Management Services
- Caller Service
- Change-of-Address Credit Card Authentication
- Confirm
- Customized Postage
- International Reply Coupon Service
- International Business Reply Mail Service
- Money Orders
- Post Office Box Service
- Stamp Fulfillment Services

Negotiated Service Agreements

Bookspan Negotiated Service Agreement
- Bank of America Corporation Negotiated Service Agreement
- Discover Financial Services 1
- HSBC North America Holdings Inc. Negotiated Service Agreement
- Inbound Market Dominant Exprès Service Agreement 1 (R2011–6)
- The Bradford Group Negotiated Service Agreement
- Inbound International
- Canada Post—United States Postal Service Contractual Bilateral Agreement for Inbound Market Dominant Services (MC2010–12 and R2010–2)
- Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1

Market Dominant Product Descriptions

First-Class Mail
- Single-Piece Letters/Postcards
- Bulk Letters/Postcards
- Flats
- Parcels
- Outbound Single-Piece First-Class Mail International

Inbound Single-Piece First-Class Mail International
Standard Mail (Regular and Nonprofit)
High Density and Saturation Letters
High Density and Saturation Flats/Parcels
Carrier Route
Letters [Reserved for Product Description]
Flats
Not Flat-Machinables (NFMs)/Parcels
Periodicals
Within County Periodicals
Outside County Periodicals
Package Services
Single-Piece Parcel Post
Inbound Surface Parcel Post (at UPU rates)
Bound Printed Matter Flats
Bound Printed Matter Parcels
Media Mail/Library Mail
Special Services
Ancillary Services
Address Correction Service
Applications and Mailing Permits
Business Reply Mail
Bulk Parcel Return Service
Certified Mail
Certificate of Mailing
Collect on Delivery
Delivery Confirmation
Insurance
Merchandise Return Service
Parcel Airlift (PAL)
Registered Mail
Return Receipt
Return Receipt for Merchandise
Restricted Delivery
Shipper-Paid Forwarding
Signature Confirmation
Special Handling
Stamped Envelopes
Stamped Cards
Premium Stamped Stationery
Premium Stamped Cards
International Ancillary Services
International Certificate of Mailing
International Registered Mail
International Return Receipt
International Restricted Delivery
Address List Services
Caller Service
Change-of-Address Credit Card Authentication
Confirm
International Reply Coupon Service
International Business Reply Mail Service
Money Orders
Post Office Box Service [Reserved for Product Description]
Negotiated Service Agreements
HSBC North America Holdings Inc. Negotiated Service Agreement
Bookspan Negotiated Service Agreement
Bank of America Corporation Negotiated Service Agreement
The Bradford Group Negotiated Service Agreement

Part B—Competitive Products

2000 Competitive Product List

Express Mail
Express Mail
Outbound International Expedited Services
Inbound International Expedited Services
Inbound International Expedited Services 1 (CP2008–7)
Inbound International Expedited Services 2 (MC2009–10 and CP2009–12)
Inbound International Expedited Services 3 (MC2010–13 and CP2010–12)
Inbound International Expedited Services 4 (MC2010–37 and CP2010–126)
First-Class Package Service
Priority Mail
Priority Mail
Outbound Priority Mail International
Inbound Air Parcel Post (at non-UPU rates)
Royal Mail Group Inbound Air Parcel Post Agreement
Inbound Air Parcel Post (at UPU rates)
Parcel Return Service
Parcel Select
International
International Priority Airlift (IPA)
International Surface Airlift (ISAL)
International Direct Sacks—M–Bags
Global Customized Shipping Services
Inbound Surface Parcel Post (at non-UPU rates)
Canada Post—United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services (MC2010–14 and CP2010–13—Inbound Surface Parcel Post at Non-UPU Rates and Xpresspost-USA)
International Money Transfer Service—Outbound
International Money Transfer Service—Inbound
International Ancillary Services
Special Services
Address Enhancement Service
Competitive Ancillary Services
Greeting Cards and Stationery
Premium Forwarding Service
Shipping and Mailing Supplies
Negotiated Service Agreements
Domestic
Express Mail Contract 1 (MC2008–5)
Express Mail Contract 2 (MC2009–3 and CP2009–4)
Express Mail Contract 3 (MC2009–15 and CP2009–21)
Express Mail Contract 4 (MC2009–34 and CP2009–45)
Express Mail Contract 5 (MC2010–5 and CP2010–5)
Express Mail Contract 6 (MC2010–6 and CP2010–6)
Express Mail Contract 7 (MC2010–7 and CP2010–7)
Express Mail Contract 8 (MC2010–16 and CP2010–16)
Express Mail Contract 9 (MC2011–1 and CP2011–2)
Express Mail Contract 10 (MC2011–12 and CP2011–48)
Express Mail Contract 11 (MC2011–14 and CP2011–50)
Express Mail & Priority Mail Contract 1 (MC2009–6 and CP2009–7)
Express Mail & Priority Mail Contract 2 (MC2009–12 and CP2009–14)
Express Mail & Priority Mail Contract 3 (MC2009–13 and CP2009–17)
Express Mail & Priority Mail Contract 4 (MC2009–17 and CP2009–24)
Express Mail & Priority Mail Contract 5 (MC2009–18 and CP2009–25)
Express Mail & Priority Mail Contract 6 (MC2009–31 and CP2009–42)
Express Mail & Priority Mail Contract 7 (MC2009–32 and CP2009–43)
Express Mail & Priority Mail Contract 8 (MC2009–33 and CP2009–44)
Parcel Select & Parcel Return Service Contract 1 (MC2009–11 and CP2009–13)
Parcel Return Service Contract 1 (MC2009–1 and CP2009–2)
Parcel Return Service Contract 2 (MC2011–6 and CP2011–33)
Parcel Select Contract 1 (MC2011–16 and CP2011–53)
Parcel Select & Parcel Return Service Contract 2 (MC2009–40 and CP2009–61)
Priority Mail Contract 1 (MC2008–8 and CP2008–26)
Priority Mail Contract 2 (MC2009–2 and CP2009–3)
Priority Mail Contract 3 (MC2009–4 and CP2009–5)
Priority Mail Contract 4 (MC2009–5 and CP2009–6)
Priority Mail Contract 5 (MC2009–21 and CP2009–26)
Priority Mail Contract 6 (MC2009–25 and CP2009–30)
Priority Mail Contract 7 (MC2009–25 and CP2009–31)
Priority Mail Contract 8 (MC2009–25 and CP2009–32)
Priority Mail Contract 9 (MC2009–25 and CP2009–33)
Priority Mail Contract 10 (MC2009–25 and CP2009–34)
Priority Mail Contract 11 (MC2009–27 and CP2009–37)
Priority Mail Contract 12 (MC2009–28 and CP2009–38)
Priority Mail Contract 13 (MC2009–29 and CP2009–39)
Priority Mail Contract 14 (MC2009–30 and CP2009–40)
Priority Mail Contract 15 (MC2009–35 and CP2009–54)
Priority Mail Contract 16 (MC2009–36 and CP2009–55)
Priority Mail Contract 17 (MC2009–37 and CP2009–56)
Priority Mail Contract 18 (MC2009–42 and CP2009–63)
Priority Mail Contract 19 (MC2010–1 and CP2010–1)
Priority Mail Contract 20 (MC2010–2 and CP2010–2)
Priority Mail Contract 21 (MC2010–3 and CP2010–3)
Priority Mail Contract 22 (MC2010–4 and CP2010–4)
Priority Mail Contract 23 (MC2010–9 and CP2010–9)
Priority Mail Contract 24 (MC2010–15 and CP2010–15)
Priority Mail Contract 25 (MC2010–30 and CP2010–75)
Priority Mail Contract 26 (MC2010–31 and CP2010–76)
Priority Mail Contract 27 (MC2010–32 and CP2010–77)
Priority Mail Contract 28 (MC2011–2 and CP2011–3)
Priority Mail Contract 29 (MC2011–3 and CP2011–4)
Priority Mail Contract 30 (MC2011–9 and CP2011–44)
Priority Mail Contract 31 (MC2011–10 and CP2011–46)
Priority Mail Contract 32 (MC2011–11 and CP2011–47)
Priority Mail Contract 33 (MC2011–13 and CP2011–49)

Priority Mail Contract 34 (MC2011–17 and CP2011–56)
Priority Mail Contract 35 (MC2011–18 and CP2011–57)
Priority Mail Contract 36 (MC2012–2 and CP2012–6)
Priority Mail Contract 37 (MC2012–3 and CP2012–7)
Priority Mail Contract 38 (MC2012–7 and CP2012–15)
Priority Mail—Non-Published Rates
Priority Mail—Non-Published Rates 1 (MC2011–15 and CP2011–51)
Outbound International
Direct Entry Parcels Contracts
Direct Entry Parcels 1 (MC2009–26 and CP2009–36)
Global Direct Contracts (MC2009–9, CP2009–10, and CP2009–11)
Global Expedited Package Services (GEPS) Contracts
GEPS 1 (CP2008–5, CP2008–11, CP2008–12, CP2008–13, CP2008–18, CP2008–19, CP2008–20, CP2008–21, CP2008–22, CP2008–23 and CP2008–24)
Global Expedited Package Services 2 (CP2009–50)
Global Expedited Package Services 3 (MC2010–28 and CP2010–71)
Global Expedited Package Services 4 (CP2011–54)
Global Expedited Package Services—Non-published Rates 2 (MC2010–29 and CP2011–45)
Global Expedited Package Services Non-published Rates 3 (MC2012–4 and CP2012–8)
Global Plus Contracts
Global Plus 1 (CP2008–8, CP2008–46 and CP2009–47)
Global Plus 1A (MC2010–26, CP2010–67 and CP2010–68)
Global Plus 1B (MC2011–7, CP2011–39 and CP2011–40)
Global Plus 1C (MC2012–6, CP2012–12 and CP2012–13)
Global Plus 2 (MC2008–7, CP2008–48 and CP2008–49)
Global Plus 2A (MC2010–27, CP2010–69 and CP2010–70)
Global Plus 2B (MC2011–8, CP2011–41 and CP2011–42)
Global Plus 2C (MC2012–5, CP2012–10 and CP2012–11)
Global Reseller Expedited Package Services 1 (MC2010–21 and CP2010–36)
Inbound International
Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 (MC2010–34 and CP2010–95)
Inbound Direct Entry Contracts with Foreign Postal Administrations
Inbound Direct Entry Contracts with Foreign Postal Administrations (MC2008–6, CP2008–14 and MC2008–15)
Inbound Direct Entry Contracts with Foreign Postal Administrations 1 (MC2008–6 and CP2009–62)
International Business Reply Service Competitive Contract 1 (MC2009–14 and CP2009–20)
International Business Reply Service Competitive Contract 2 (MC2010–18, CP2010–21 and CP2010–22)

Competitive Product Descriptions

Express Mail
Express Mail
Outbound International Expedited Services
Inbound International Expedited Services
Priority
Priority Mail
Outbound Priority Mail International
Inbound Air Parcel Post
Parcel Select
Parcel Return Service
International
International Priority Airlift (IPA)
International Surface Airlift (ISAL)
International Direct Sacks—M-Bags
Global Customized Shipping Services
International Money Transfer Service
Inbound Surface Parcel Post (at non-UPU rates)
International Ancillary Services
International Certificate of Mailing
International Registered Mail
International Return Receipt
International Restricted Delivery
International Insurance
Negotiated Service Agreements
Domestic
Outbound International

Part C—Glossary of Terms and Conditions [Reserved]

Part D—Country Price Lists for International Mail [Reserved]

[FR Doc. 2012–5320 Filed 3–5–12; 8:45 am]

BILLING CODE 7710–FW–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R06–RCRA–2011–0478; FRL–9643–7]

Texas: Final Authorization of State Hazardous Waste Management Program Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Immediate final rule.

SUMMARY: The State of Texas has applied to the EPA for Final authorization of the changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA has determined that these changes satisfy all requirements needed to qualify for Final authorization, and is authorizing the State's changes through this immediate final action. The EPA is publishing this rule to authorize the changes without a prior proposal because we believe this action is not controversial and do not expect comments that oppose it. Unless we receive written comments which oppose this authorization during the comment period, the decision to authorize Texas' changes to its hazardous waste program will take effect. If we receive comments that oppose this action, we will publish a document in the **Federal Register** withdrawing this rule before it takes effect, and a separate document in the proposed rules section of this **Federal Register** will serve as a proposal to authorize the changes.

DATES: This final authorization will become effective on May 7, 2012 unless the EPA receives adverse written comment by April 5, 2012. If the EPA receives such comment, it will publish a timely withdrawal of this immediate final rule in the **Federal Register** and inform the public that this authorization will not take effect.

ADDRESSES: Submit your comments by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
2. *Email: patterson.alima@epa.gov.*
3. *Mail:* Alima Patterson, Region 6, Regional Authorization Coordinator, State/Tribal Oversight Section (6PD–O), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733.
4. *Hand Delivery or Courier:* Deliver your comments to Alima Patterson, Region 6, Regional Authorization Coordinator, State/Tribal Oversight Section (6PD–O), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733.

Instructions: Do not submit information that you consider to be CBI or otherwise protected through regulations.gov, or email. The Federal regulations.gov Web site is an ''anonymous access'' system, which means the 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 the EPA without going through regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the 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 the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the 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. You can view and copy Texas' application and associated

publicly available materials from 8:30 a.m. to 4 p.m. Monday through Friday at the following locations: Texas Commission on Environmental Quality, (TCEQ) 12100 Park S. Circle, Austin, TX 78753–3087, (512) 239–6079 and EPA, Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, phone number (214) 665–8533. Interested persons wanting to examine these documents should make an appointment with the office at least two weeks in advance.

FOR FURTHER INFORMATION CONTACT:

Alima Patterson, Region 6 Regional Authorization Coordinator, State/Tribal Oversight Section (6PD–O), Multimedia Planning and Permitting Division, (214) 665–8533, EPA Region 1445 Ross Avenue, Dallas, Texas 75202–2733, and email address *patterson.alima@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. Why are revisions to State programs necessary?

States which have received final authorization from the EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal program. As the Federal program changes, States must change their programs and ask the EPA to authorize the changes. Changes to State programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, States must change their programs because of changes to the EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 268, 270, 273, and 279.

B. What decisions have we made in this rule?

We conclude that the State of Texas' application to revise its authorized program meets all of the statutory and regulatory requirements established by RCRA. Therefore, we grant the State of Texas Final Authorization to operate its hazardous waste program with the changes described in the authorization application. The State of Texas has responsibility for permitting treatment, storage, and disposal facilities within its borders (except in Indian Country) and for carrying out the aspects of the RCRA program described in its revised program application, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New Federal requirements and prohibitions imposed by Federal regulations that the EPA promulgates under the authority of HSWA take effect in authorized States before they are authorized for the requirements. Thus, the EPA will implement those requirements and prohibitions in Texas including issuing permits, until the State is granted authorization to do so.

C. What is the effect of today's authorization decision?

The effect of this decision is that a facility in the State of Texas subject to RCRA will now have to comply with the authorized State requirements instead of the equivalent Federal requirements in order to comply with RCRA. The State of Texas has enforcement responsibilities under its State hazardous waste program for violations of such program, but the EPA retains its authority under RCRA sections 3007, 3008, 3013, and 7003, which include, among others, authority to:

- Do inspections, and require monitoring, tests, analyses, or reports;
- Enforce RCRA requirements and suspend or revoke permits; and
- Take enforcement actions after notice to and consultation with the State.

This action does not impose additional requirements on the regulated community because the regulations for which the State of Texas is being authorized by today's action are already effective under State law, and are not changed by today's action.

D. Why wasn't there a proposed rule before today's rule?

The EPA did not publish a proposal before today's rule because we view this as a routine program change and do not expect comments that oppose this approval. We are providing an opportunity for public comment now. In addition to this rule, in the proposed rules section of today's **Federal Register** we are publishing a separate document that proposes to authorize the State program changes.

E. What happens if the EPA receives comments that oppose this action?

If the EPA receives comments that oppose this authorization, we will withdraw this rule by publishing a document in the **Federal Register** before the rule becomes effective. The EPA will base any further decision on the authorization of the State program changes on the proposal mentioned in the previous paragraph. We will then address all public comments in a later final rule. You may not have another opportunity to comment. If you want to comment on this authorization, you must do so at this time. If we receive comments that oppose only the authorization of a particular change to the State hazardous waste program, we will withdraw only that part of this rule, but the authorization of the program changes that the comments do not oppose will become effective on the date specified in this document. The **Federal Register** withdrawal document will specify which part of the authorization will become effective, and which part is being withdrawn.

F. For what has Texas previously been authorized?

The State of Texas initially received final authorization on December 26, 1984 (49 FR 48300), to implement its Base Hazardous Waste Management Program. This authorization was clarified in a notice published March 26, 1985 (50 FR 11858). Texas received authorization for revisions to its program, effective October 4, 1985 (51 FR 3952), February 17, 1987 (51 FR 45320), March 15, 1990 (55 FR 7318), July 23, 1990 (55 FR 21383), October 21, 1991 (56 FR 41626), December 4, 1992 (57 FR 45719), June 27, 1994 (59 FR 16987), June 27, 1994 (59 FR 17273), November 26, 1997 (62 FR 47947), December 3, 1997 (62 FR 49163), October 18, 1999 (64 FR 44836), November 15, 1999 (64 FR 49673), September 11, 2000 (65 FR 43246), June 14, 2005 (70 FR 34371), December 29, 2008, (73 FR 64252), and July 13, 2009 (74 FR 22469). The EPA incorporated by reference Texas' then authorized hazardous waste program effective December 3, 1997 (62 FR 49163), November 15, 1999 (64 FR 49673), December 29, 2008 (73 FR 64252) and March 7, 2011 (76 FR 12285) effective May 6, 2011.

On March 24, 2010, Texas submitted a final complete program revision application, seeking authorization of its program revision in accordance with 40 CFR 271.21. In 1991, Texas Senate Bill 2 created the Texas Natural Resource Conservation Commission (TNRCC) which combined the functions of the former Texas Water Commission and the former Texas Air Control Board. The transfer of functions to the TNRCC from the two agencies became effective on September 1, 1993. House Bill 2912, Article 18 of the 77th Texas Legislature, 2001, changed the name of the TNRCC to the Texas Commission on Environmental Quality (TCEQ) and directed the TNRCC to adopt a timetable for phasing in the change of the agency's name. The TNRCC decided to make the change of the agency's name to the TCEQ effective September 1, 2002. The change of name became effective September 1, 2002, and the legislative history of the name change is documented at (See, Act of June 15, 2001, 77th Leg. R. S., Ch 965, Section 18.01, 2001 Tex. Gen. Laws 1985). The

TCEQ may perform any act authorized by law either as the TNRCC or as the TCEQ. *Id.* Therefore, references to the TCEQ are references to TNRCC and to its successor, the TCEQ.

The TCEQ has primary responsibility for administration of laws and regulations concerning hazardous waste. The official State regulations may be found in Title 30, Texas Administrative Code, Chapters 305 and 335, effective October 29, 2009. Some of the State rules incorporate the Federal regulations by reference. Texas Water Code Section 5.102 confers on the Texas Commission on Environmental Quality the powers to perform any acts necessary and convenient to the exercise of its jurisdiction. The TCEQ is authorized to administer the RCRA program. However, the Railroad Commission (RRC) has jurisdiction over the discharge, storage, handling, transportation, reclamation, or disposal of waste materials (both hazardous and non hazardous) that result from the activities associated with the exploration, development, or production of oil or gas or geothermal resources and other activities regulated by the RRC. A list of activities that generate wastes that are subject to the jurisdiction of the RRC is found at 16 Tex. Admin. Code Section 3.8(a)(30) and at 30 Tex. Admin. Code § 335.1. Such wastes are termed ''oil and gas wastes.'' The TCEQ has responsibility to administer the RCRA program, however, hazardous waste generated at natural gas or natural gas liquids processing plants or reservoir pressure maintenance or repressurizing plants are subject to the jurisdiction of the TCEQ until the RRC is authorized by EPA to administer those waste under RCRA. The TCEQ jurisdiction over Solid waste can be found at Chapter 361 of the Texas Health and Safety Code Sections 361.001 through 361.754. The TCEQ's jurisdiction encompasses both hazardous and nonhazardous, industrial and municipal Solid waste. The definition of Solid waste can be found at Texas Health and Safety Code Section 361.003(34). When the RRC is authorized by EPA to administer the RCRA program for these wastes, jurisdiction over such hazardous waste will transfer from the TCEQ to the RRC. The EPA has designated the TCEQ as the lead agency to coordinate RCRA activities between the two agencies. The EPA is responsible for the regulation of any hazardous waste for which TCEQ has not been previously authorized.

Further clarification of the jurisdiction between the TCEQ and the RRC can be found in a separate document. This document, a Memorandum of Understanding (MOU), became effective on May 31, 1998.

The TCEQ has the rules necessary to implement EPA's RCRA Clusters XVI through XVIII including Post-Closure Permit Requirement and Closure Process (Checklist 174) and also Hazardous Air Pollutant Standards for Combustors: Interim Standards (Checklist 197) revisions to the Federal Hazardous Waste Program promulgated from October 22, 1998, February 13, 2002 and July 1, 2005 through June 30, 2008. The adoption for RCRA Clusters XVI through XVIII with Checklists 174 and 197 include changes to 30 Texas Administrative Code Chapters 305 and 335. The Commissioners adopted these rules on July 25, 2007 and the rules became effective on October 29, 2009. The TCEQ authority to incorporate Federal rules by reference can be found at Texas Government Code Annotated Section 311.027 (Vernon 1998) and adoption of the hazardous waste rules in general are pursuant to the following statutory provisions: Tex. Water Code Ann. Sections 5.1032000), effective September 1995, as amended (TCEQ's authority to adopt any rules necessary to carry out its powers and duties). Texas did not adopt the Federal regulations 40 CFR part 266, subpart N, Appendix III and also Appendices IV through XIII. Therefore, the State is not authorized for those regulations. The State has not made program revisions to the Federal Used Oil regulations in Checklist 214 therefore, EPA is excluding this portion of the Federal regulations from this **Federal Register** notice.

G. What changes are we approving with today's action?

On March 24, 2010, the State of Texas submitted a final complete program application, seeking authorization of their changes in accordance with 40 CFR 271.21. We now make an immediate final decision, subject to receipt of written comments that oppose this action, that the State of Texas' hazardous waste program revision satisfies all of the requirements necessary to qualify for final authorization. The State of Texas revisions consist of regulations which specifically govern Federal Hazardous Waste revisions promulgated from October 22, 1998, February 13, 2002 and July 1, 2005 through June 30, 2008. The adoption for RCRA Clusters XVI through XVIII with Checklists 174 and 197 are included in a chart with this document.

Description of federal requirement (include checklist #, if relevant)	**Federal Register** date and page (and/or RCRA statutory authority)	Analogous state authority
1. Post-Closure Permits Requirement and Closure Process. (Checklist 174).	63 FR 56710–56735, October 22, 1998.	Texas Water Code Annotated Sections 5.103 and 5.105, 7.031, Texas Health & Safety Code Annotated Section 361.024, 361.082; Texas Administrative Code, Chapter 335.151(d), 335.2(m), 335.151(e) and 335.156(a)(3) intro, 335.156(a)(3)(A), 335.1(9), 335.151(e)(2) and 335.156(a)(3)(B), IBR at 335.152(a)(5), 335.151(e) intro, 335.151(f) and 335.156(a)(4), 335.151(e)(1), 335.151(e)(2), 335.7, 335.167(c), 335.179(a), 37.11, 37 Subchapter P (37.6001 *et seq.*), IBR at 335.112(a)(5) and 335.116(g) intro, 335.116(g)(1), 335.116(g)(2), 335.112(a)(6), 335.111(e)(1) intro, 335.111(e)(2), 335.111(d) intro, 335.111(d)(1), 335.111(d)(2), 336.167(c), 335.111(d)(3), Chapter 39 Subpart N, 335.118(c), 335.119(c), Chapter 39 Subchapter N, 335.7, 335.111(d)(4), 335.167(c), 335.179(a), 37.11, 37 Subchapter P (37.6001 *et seq.*), 335.2(i), 305.2(28), 335.1(117), 305.41, 305.50(a) intro, 305.50(a)(4)(A) and 305.50(b) intro, 305.50(b)(1)–(3), 305.2(1), 305.42(a), 305.43(b), 305.47, 305.50(b)(5)–(b)(7), 305.156(a)(1) & (a)(2), as amended effective through October 29, 2009.
2. Hazardous Air Standards for Combustors: Interim Standards. (Checklist 197).	67 FR 6792–6818 February 13, 2002.	Texas Water Code Annotated Sections 5.103 and 5.105, Texas Health & Safety Code Annotated Section 361.017 and 361.024; Texas Administrative Code, Chapters 335.152(a)(13), 335.112(a)(14), 335.221(a)(1), 305.50(a)(4)(A), 305.571(b), 305.175, 305.571(b) and 305.572(a)(6), as amended effective through October 29, 2009.
3. Universal Waste Rule: Specific Provisions for Mercury Containing Equipment. (Checklist 209).	70 FR 45508–45522, August 5, 2005.	Texas Water Code Annotated Sections 5.103 and 5.105, Texas Health & Safety Code Annotated Section, 361.017 and 361.024, Texas Administrative Code, Chapters 335.261(b)(16)(F)(iii), 335.1(162), 335.431(b)(3), and 335.261(a), as amended effective through October 29, 2009.
4. Standardized Permit for RCRA Hazardous Waste Management facilities. (Checklist 210).	70 FR 53420–53478, September 8, 2005.	Texas Water Code Annotated Sections 5.103 and 5.105 Texas Health & Safety Code Annotated Sections 361.017 and 361.024 Texas Administrative Code, Chapters 39.503, 39.403(b)(1), 335.1(111), 335.602, 335.1(142), 335.1, 305.661, 39.503(a), 39.503(a)(2), 39.503(c), 305.650, 305.651, 305.42(f), 50.133, 305.651, 305.653(b), 55.156 and 50.117(f), 50.139, 305.661, 335.1(59), 305.150 and 335.31, 335.504, 335.601, 335.602(a)(1)–(6), 335.602(c), 335.602(a)(7)–(9), 335.2(c), 305.42(b), 305.63(a), 305.64(g), 305.69(b)(1)(c), 305.66(a), 305.65, 305.650, 305.651, 305.652, 305.653, 305.654, 305.655, 305.656, 305.657, 305.658, 305.659, 305.660 and 305.661, as amended effective through October 29, 2009.
5. Revision of Wastewater Treatment Exemptions for Hazardous Waste Mixtures (''Headworks exemption''). (Checklist 211).	70 FR 57769–57785, October 4, 2005.	Texas Water Code Annotated Sections 5.103 and 5.105, Texas Health & Safety Code Annotated Sections 361.017 and 361.024, Texas Administrative Code Chapter 335.504, as amended effective through October 29, 2009.
6. NESHAP: Final Standards for Hazardous Waste Combustors (Phase I Final Replacement Standards and Phase II). (Checklist 212).	70 FR 59402–59579, October 12, 2005.	Texas Water Code Annotated Sections 5.103 and 5.105, Texas Health & Safety Code Annotated Sections 361.017 and 361.024, Texas Administrative Code, Chapters 305.150, 335.152(a)(13), 335.112(a)(14), 335.221(a)(3), 305.150, 305.50(a)(15), 305.50(a)(4)(A), 305.571(b) and 305.50(a)(4)(A), 305.50(a)(16), 305.69(i)(1), 305.69(k)(L)(10), 305.175, 305.571, and 305.572(a)(6), as amended effective through October 29, 2009.
7. Burden Reduction Initiative. (Checklist 213).	71 FR 16862–16915, April 4, 2006	Texas Water Code Annotated Sections 5.103 and 5.105, Texas Health & Safety Code Annotated Sections 361.017 and 361.024, Texas Administrative Code, Chapters 335.504, 335.1(134)(A)(iv), IBR 335.2(g), 335.152(a)(1), 335.152(a)(3)–(4), 335.164(7)(B)–(C), 335.165(6)–(7), 335.166(7), 335.152(a)(5)–(8), 335.152(a)(10), 335.172(b), 335.175(a), 335.175(b)–(d), 335.175(c), 335.152(a)(13)–(15), 335.152(a)(18), 335.152(a)(20), 335.112(a)(1), 335.112(a)(3)–(13), 335.125(a), 335.125(b)–(f), 335.125(f), 335.112(a)(18), 335.112(a)(20), 335.112(a)(22), 335.221(a)(6), 335.224(11), 335.221(a)(14), 335.431(c)(1), 305.45(a)(6) and 305.50(a)(1), 305.144(1), 305.69(k)(O) Appendix I, as amended effective through October 29, 2009.

Description of federal requirement (include checklist #, if relevant)	**Federal Register** date and page (and/or RCRA statutory authority)	Analogous state authority
8. Corrections to Errors in the Code of Federal Regulations. (Checklist 214).	71 FR 40254–40280, July 14, 2006.	Texas Water Code Annotated Sections 5.103 and 5.105, Texas Health & Safety Code Annotated Sections 361.017 and 361.024, Texas Administrative Code, Chapters 335.1(76), 335.1(112), 335.1(162), 335.1(167), 335.29(4), 335.22, 335.23, 335.504(1), 335.504(1), 335.504(3), 335.504(2), 335.29(4), 335.29(3), 335.69(a)(1)(D), 335.13, 335.13(h), 335.76, 335.41(d)(4), 335.76(h), 335.24(b), 335.152(a)(1), 335.163(1)(A), 335.163(1)(A)(i), 335.163(9)(E), 335.164(1)(B), 335.164(7)(D)(i), 335.165(11), 335.152(a)(5), 335.179(b), 37.211(f), 37.211(g), 37.241(f), 37.201(f)(1)-(2), 37.231(f), 37.261(a)–(e), 37.231(a), 37.211(c), 37.651, 37.351, 37.661(2), 37.661(13)–(14), 37.531(c)–(d), 37.621, 37.311, 37.611, 37.671(a), 37.671(3), 37.671(12), 37.671(16), 335.152(a)(8), 335.168(c), 335.29(2) 335.168(e)(1)(A)–(C), 335.152(a)(9)–(10), 335.170(a)(1), 335.152(a)(10), 335.172(c)(7), 335.172(d), 335.152(a)(11), 335.173(a)(3), 335.173(e)(1)(b), 335.152(a)(12), 335.175(d)(2), 335.152(a)(13)–(20) 335.112, 335.112(a)(1), 335.112(a)(3), 335.116(d), 335.118(b), 335.112(a)(6), 37.6001, 37.6021, 37.531, 335.112(a)(8)–(13), 335.125, 335.112(a)(16), 335.112(a)(18)–(19), 335.112(a)(21), 335.112(a)(22), 335.112(a)(24)(A), (D), and (E), 334.241(a), 335.251, 335.221(a)(1), 335.223(a), 335.221(a)(6), 335.221(a)(8), 335.221(a)(10), 335.224(5), 335.221(a)(11), 335.221(a)(13), 335.221(a)(17), 335.221(a)(20), 37.351, 335.431(c)(1), Chapter 335 Index, 335.2(a)–(c), 335.47(a)(1), 335.41(d)(2), 335.1(105), 335.1(123), 305.50(a)(8), 305.44(b), 305.45(a)(7)(G), 305.50(a)(4)(A), 305.122(a), 335.201(a), 305.69(e)(2)(A), 306.69 Appendix I, 305.42(b), 335.261(b)(16)(F), 335.261(a), Chapter 324, as amended effective through October 29, 2009.
9. Cathode Ray Tubes Rule. (Checklist 215).	71 FR 42928–42949, July 28, 2006.	Texas Water Code Annotated Sections 5.103 and 5.105, 7.031, Texas Health & Safety Code Annotated Section 361.024, 361.082; Texas Administrative Code, Chapters 335.1(17), 335.1(35), 335.1(36), 335.1(37), 335.1(138)(A)(iv), as amended effective through October 29, 2009.
10. Exclusion of Oil-Bearing Secondary Materials Processed in a Gasification System to Produce Synthesis Gas. (Checklist 216).	73 FR 57–72, January 2, 2008	Texas Water Code Annotated Sections 5.103 and 5.105, Texas Health & Safety Code Annotated Section 361.017 and 361.024; Texas Administrative Code, Chapter 335.1(64), 335.504(1), as amended effective through October 29, 2009.
11. NESHAP: Final Standards for Hazardous Waste Combustors (Phase I Final Replacement Standards and Phase II) Amendments. (Checklist 217).	73 FR 18970–18984, April 8, 2008	Texas Water Code Annotated Sections 5.103 and 5.105, Texas Health & Safety Code Annotated Section 361.017 and 361.024; Texas Administrative Code, Chapter 335.152(a)(13) and 335.221(a), as amended effective through October 29, 2009.
12. F019 Exemption for Wastewater Treatment Sludges from Auto Manufacturing Zinc Phosphating Processes. (Checklist 218).	73 FR 31756–31769, June 4, 2008.	Texas Water Code Annotated Sections 5.103 and 5.105, Texas Health & Safety Code Annotated Section 361.017 and 361.024; Texas Administrative Code, Chapter 335.504(2), as amended effective through October 29, 2009.

H. Where are the revised State rules different from the Federal rules?

The State hazardous waste program is at least as equivalent to the Federal program in all areas, except where the State program is more stringent and broader in scope. The State of Texas Section 305.50(b)(1) is more stringent than the Federal program, because the State request from the owner/operator additional information that the executive director determines is necessary from 40 CFR 270.14 including post-closure cost estimates. Chapters 39.503, 305.653(b) through 305.661, 55.25 and 50.117(f) are more stringent than the Federal regulations at 40 CFR 124.207, 124.208 and 124.209 regarding public notice, public comments and hearing on draft permit decisions and the requirements for responding to comments. Other State regulations that are also more stringent than the Federal regulations can be found at Sections 335.175(b)–(d), 335.175(c). There are also some rules that are broader in scope because they cover both hazardous waste and Class 1 non-hazardous waste, whereas the Federal regulations cover only hazardous waste. Other differences contained in the current authorization application are that of the Standard Permit public notice and financial assurance requirements are broader in scope. Therefore, EPA cannot authorize broader in scope provisions because the Agency cannot enforce those regulations.

I. Who handles permits after the authorization takes effect?

The State of Texas will issue permits for all the provisions for which it is authorized and will administer the permits it issues. The EPA will continue to administer any RCRA hazardous waste permits or portions of permits which we issued prior to the effective date of this authorization. We will not issue any more new permits or new portions of permits for the provisions listed in the Table in this document after the effective date of this authorization. The EPA will continue to implement and issue permits for HSWA requirements for which Texas is not yet authorized.

J. How does today's action affect Indian Country (18 U.S.C. 1151) in Texas?

The State of Texas Hazardous Program is not being authorized to operate in Indian Country.

K. What is codification and is the EPA codifying Texas' hazardous waste program as authorized in this rule?

Codification is the process of placing the State's statutes and regulations that comprise the State's authorized hazardous waste program into the CFR. We do this by referencing the authorized State rules in 40 CFR part 272. We reserve the amendment of 40 CFR part 272, subpart SS for this authorization of Texas' program changes until a later date. In this authorization application the EPA is not codifying the rules documented in this **Federal Register** notice.

L. Administrative Requirements

The Office of Management and Budget (OMB) has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993), and therefore this action is not subject to review by OMB. This action authorizes State requirements for the purpose of RCRA 3006 and imposes no additional requirements beyond those imposed by State law. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this action authorizes preexisting requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). For the same reason, this action also does not significantly or uniquely affect the communities of Tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action 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 (64 FR 43255, August 10, 1999), because it merely authorizes State requirements as part of the State RCRA hazardous waste program without altering the relationship or the distribution of power and responsibilities established by RCRA. This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks. This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

Under RCRA 3006(b), the EPA grants a State's application for authorization as long as the State meets the criteria required by RCRA. It would thus be inconsistent with applicable law for the EPA, when it reviews a State authorization application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, the EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. The EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the Executive Order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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. The EPA will submit a report containing this document 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 in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This action will be effective May 7, 2012.

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: February 17, 2012.

Al Armendariz,

Regional Administrator, EPA Region 6.

[FR Doc. 2012–5376 Filed 3–5–12; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register
Vol. 77, No. 44
Tuesday, March 6, 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 ENERGY

10 CFR Part 1046

[Docket No. DOE–HQ–2012–0002]

RIN 1992–AA40

Protective Force Personnel Medical, Physical Readiness, Training, and Access Authorization Standards

AGENCY: Department of Energy.

ACTION: Notice of proposed rulemaking and public hearings.

SUMMARY: The Department of Energy (DOE or Department) proposes to revise the regulation governing the standards for medical, physical performance, training, and access authorizations for protective force (PF) personnel employed by contractors providing security services to the Department. The existing version of this regulation was promulgated in 1993 and substantial portions of the regulation date to the mid-1980s. Since 1993 DOE policy has placed greater reliance upon technology, vehicular response, and increased firepower and, correspondingly, has reduced its reliance upon the ability of PF personnel to perform the running tasks required in the current regulation. Furthermore, this shift in emphasis has placed a greater premium upon the retention of mature, tactically experienced, and technically sophisticated personnel, particularly since these personnel represent a considerable investment by DOE in security background investigations and training. The proposed revisions bring DOE PF medical and physical readiness requirements in line with these tactical and organizational priorities. The proposed revisions reduce the exposure of the PF population to injuries related to physical readiness testing. They would create a PF readiness classification designed specifically to encourage the retention of experienced personnel. The revisions would further ensure that PF personnel would be evaluated on a case-by-case basis on their ability to perform the essential functions of their positions without posing a direct threat to themselves or site personnel, the facility, or the general public. The proposed revisions would further ensure that reasonable accommodations would be considered before a determination is made that an individual cannot perform the essential functions of a particular position. The proposed rule also would provide for new medical review processes for PF personnel disqualified from medical certification. The proposed rule would ensure that DOE PF medical and physical readiness requirements would be compliant with the Americans with Disabilities Act (ADA) of 1990, as amended by the Americans with Disabilities Amendment Act of 2009 (ADAAA), the Privacy Act and DOE implementing regulations, and changes in DOE policy regarding PF operations made since the publication of the last version of this rule. In addition, the proposed rule would promote operational efficiency through greater emphasis on aligning training with mission-essential tasks and the increased use of simulation technologies. Finally, the proposed revision would update the regulation to reflect organizational changes in the Office of Health, Safety and Security and the creation of the National Nuclear Security Administration (NNSA).

DATES: Written comments must be received by DOE on or before April 5, 2012. Oral views, data, and arguments may be presented at the public hearings, which are scheduled as follows:

- March 15, 2012, in Germantown, MD, from 1:30 to 4:30 p.m.
- March 21, 2012, in Albuquerque, New Mexico, from 1:30 to 4:30 p.m.

ADDRESSES: The public hearings will be held at the following addresses:

- Germantown, MD: DOE Germantown Auditorium, 19901 Germantown Road, 20874 Albuquerque, NM: Technology Ventures Corporation—McCorkle Room, 1155 University Blvd., SE

Written comments should be addressed to: Mr. Glenn S. Podonsky, Chief Health, Safety and Security Officer, Office of Health, Safety and Security, HS–1/Forrestal Building, Department of Energy, Docket No. DOE–HQ–2012–0002, 1000 Independence Avenue SW., Washington, DC 20585 or via email at *1992–AA40@hq.doe.gov.* Questions concerning submitting written comments should be addressed to: Mr. John Cronin, Office of Security Policy, Office of Health, Safety and Security, Department of Energy, HS–51/Germantown Building, 1000 Independence Avenue SW., Washington, DC 20585–1290, (301) 903–6209 or via email at *1992–AA40@hq.doe.gov.* You may submit comments, identified by [DOE–HQ–2012–0002 and/or 1992–AA40], by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: 1992-AA40@hq.doe.gov.* Include [DOE–HQ–2012–0002 and/or 1992–AA40] in the subject line of the message.
- *Mail:* [Mailing Address for paper, disk, or CD–ROM submissions: Department of Energy, Office of Security Policy, (HS–51, Attn: John Cronin), 1000 Independence Ave. SW., Washington, DC 20585–1290].
- *Hand Delivery/Courier:* [Street Address: Department of Energy, Office of Security Policy, (HS–51, Attn: John Cronin), 1000 Independence Ave. SW., Washington, DC 20585–1290].

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to [*http://www.regulations.gov*], including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to [*http://www.regulations.gov* or contact John Cronin at (301) 903–6209 prior to visiting Department of Energy, Office of Security Policy, (HS–51), 19901 Germantown Rd., Germantown, MD 20874].

FOR FURTHER INFORMATION CONTACT: Mr. John Cronin, Office of Security Policy at (301) 903–6209; *John.Cronin@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background
II. Section by Section Analysis
III. Regulatory Review and Procedural Requirements
A. Review Under Executive Order 12866
B. Review Under the Regulatory Flexibility Act
C. Review Under Paperwork Reduction Act
D. Review Under the National Environmental Policy Act

E. Review Under Executive Order 13132
F. Review Under Executive Order 12988
G. Review Under the Unfunded Mandates Reform Act of 1995
H. Review Under Executive Order 13211
I. Review Under the Treasury and General Government Appropriations Act of 1999
IV. Opportunity for Public Comment

I. Background

Pursuant to the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*) and DOE Organization Act of 1977 (42 U.S.C. 7101 *et seq.*), DOE owns and leases defense nuclear and other facilities in various locations in the United States. These facilities are operated by contractors (including subcontractors at all tiers) with DOE oversight or are operated by DOE. Protection of the DOE facilities is provided by armed and unarmed PF personnel employed by Federal Government contractors. These PF personnel are required to perform both routine and emergency duties, which include patrolling DOE sites, manning security posts, protecting government and contractor employees, property, and sensitive and classified information, training for potential crisis or emergency situations, and responding to security incidents. PF personnel are required to meet various job-related minimum medical and physical readiness qualification standards designed to ensure they are capable of performing all essential functions of normal and emergency PF duties without posing a direct threat to themselves or others.

DOE has developed the proposed modifications to 10 CFR part 1046 to update training and qualification criteria, clarify remediation requirements, ensure compliance with the Privacy Act (5 U.S.C. 552a) and DOE regulations implementing the Privacy Act (10 CFR part 1008), and ensure that medical and readiness qualifications for DOE PF personnel established in these regulations are in compliance with the ADA as amended by the ADAAA. The ADA, as amended by the ADAAA, and its implementing regulations provide that an individual with a disability is qualified for a position if he or she satisfies the skill, experience, education and other job-related requirements of the position and can perform the ''essential functions'' of the position with or without reasonable accommodation. An employer must make ''reasonable accommodation'' to the known physical or mental limitations of a qualified individual with a disability, unless the employer can demonstrate that a particular accommodation would impose ''undue hardship'' on the operation of its business. Further, an employer may require, as a qualification standard, that an individual not pose a ''direct threat'' to that individual or others. This rule proposes the minimum medical and physical readiness performance standards for PF personnel, and the criteria required to develop, record, and communicate a medical opinion of each individual's ability to perform, with or without accommodation, all essential functions of normal and emergency PF duties without posing a direct threat to that individual or to others.

The proposed modifications to 10 CFR part 1046 are described in the Section by Section Analysis in section II below.

II. Section by Section Analysis

The heading for this part would be revised to *Protective Force Personnel Medical, Physical Readiness, Training and Access Authorization Standards.* The revision is intended to more accurately reflect the contents of the regulation.

Subpart A—General

1. Proposed changes for § 1046.1, Purpose, would revise the language of this section for clarity, but would not change it substantively.

2. Proposed changes for § 1046.2, Scope, would revise for clarity, but would not change it substantively except to provide the process for Department-approved exemptions from the requirements of these regulations. Language has been added to indicate that part 1046 would encourage the use of a single physician to fill multiple roles as required by this part and title. In addition, the requirements of part 1046 could be fulfilled in the course of compliance with other DOE regulations. This is intended to facilitate efficiency, avoid duplicative examinations and testing, and the appropriate sharing of medical information related to PF personnel.

3. Proposed changes for § 1046.3, Definitions, would add the following.

The terms ''direct threat'' and ''essential functions of the job'' would be defined consistent with the definitions of these terms in the ADAAA.

The terms ''defensive combative standard'' and ''offensive combative standard'' would be replaced with ''basic readiness standard'' (BRS) and ''advanced readiness standard'' (ARS) personnel to better identify the requirements of these standards. Additionally, a new physical readiness standard which identifies requirements for personnel staffing stationary posts, the ''fixed post readiness standard'' (FPRS) has been added.

The terms ''guard'' and ''security inspector'' would be replaced with ''security officer'' (SO) and ''security police officer'' (SPO) to conform to current usage for the names of these positions. The term ''PF personnel'' would also be added to encompass SOs, SPOs and special response team (SRT)-qualified personnel.

The term ''Designated Physician'' and its definition would be updated.

The term ''field organization'' would be replaced with ''field element'' to conform to current usage.

The term ''applicants'' as pertains to PF personnel would be added as a result of the use of this term in proposed section 1046.11.

The term ''corrective devices'' as pertains to reasonable accommodation would be added as a result of the use of this term in proposed section 1046.13.

The term ''emergency conditions'' as an aspect of PF personnel performance requirements would be added due to the use of this term in proposed section 1046.17.

The terms ''medical certification'' and ''medical certification disqualification'' would be added as a result of the use of these terms in proposed sections 1046.13, 1046.14, and 1046.15.

The term ''medical examination'' is added and its related requirements would be described in section 1046.13.

The terms ''Chief Medical Officer,'' ''Site Occupational Medical Director'' (SOMD), and ''Physical Protection Medical Director'' (PPMD) would be added to section 1046.3 and related requirements would be described in the new proposed section 1046.4.

The term ''semi-structured interviews'' associated with examining PF personnel would be added to section 1046.3 and related provisions provided in section 1046.13.

The terms ''Independent Review'' and ''Final Review'' would be added to section 1046.3 and the process associated with medical certification would also be added to section 1046.15 in this proposed update of the regulations.

The term ''medical condition'' is outdated and would therefore no longer be used in the regulations.

4. Proposed changes for § 1046.4 to include addressing the PPMD.

DOE proposes to delete the existing section 1046.4, Use of Number and Gender, as unnecessary. Standard rules of construction acknowledge that words in the singular also include the plural and words in the masculine also include the feminine, and vice versa, as the use may require. The new section 1046.4 proposes the required qualifications of

the PPMD and the responsibilities of the PPMD to oversee site physical protection medical activities and to nominate and evaluate the performance of the Designated Physician. The required qualifications for Designated Physicians to be nominated are also proposed in this section. This section would also enhance DOE oversight of the PPMD and Designated Physicians DOE facilities.

5. Proposed changes for § 1046.5 Designated Physician.

This new section proposes the roles and responsibilities for the position of Designated Physician. Among other duties, the Designated Physician would be responsible for the medical examination of SOs and SPOs and would determine whether portions of each certification examination could be performed by other qualified personnel.

Subpart B—PF Personnel

1. Proposed changes for § 1046.11 Essential functions of PF personnel

This new section proposes the essential functions for SOs, SPOs and SRT-qualified PF personnel. Specific requirements for FPRS, BRS, and ARS SPO personnel are proposed.

2. Proposed changes for § 1046.12 Medical, physical readiness, and training requirements for PF personnel.

This section proposes to establish the medical certification requirements for PF personnel to support their meeting the physical readiness qualification requirements proposed in section 1046.16; to have the required knowledge, skills and abilities; and to meet the requirements of a physical training program as proposed in section 1046.17.

3. Proposed changes for § 1046.13 Medical certification standards and procedures.

This section proposes to update language in the existing Appendix A to Subpart B and require all applicant and incumbent PF personnel to satisfy the applicable medical certification standards; proposes the medical standards for SOs and SPOs; and proposes that Field Elements may develop more stringent medical qualification requirements or additional medical or physical tests, in collaboration with the PPMD, where special assignment duties may require such additional testing.

The required frequency of medical certification would remain unchanged. Incumbent SOs would be reexamined by the Designated Physician every two years (24 months) after beginning work. Incumbent SPOs would be reexamined by the Designated Physician every 12 months. The recertification requirement for both SOs and SPOs would be clarified to require recertification within thirty days of the 24-month or 12-month anniversary of the previous qualification. In addition, this section proposes that the medical examination include a review by the Designated Physician of essential functions of the position, as provided by PF management and a requirement that a semi-structured interview with a psychologist who meets standards established by DOE be conducted for SOs and SPOs, as part of the initial medical evaluation and periodically thereafter. The proposed changes in this section also will allow the Designated Physician to require any other medical examination, test, consultation or evaluation he/she deems necessary.

There are several changes proposed by DOE for compliance purposes with the ADA, as amended by the ADAAA, which does not permit blanket medical disqualification standards based on the presence of a particular medical condition. Individuals must be evaluated on a case-by-case basis to determine their ability to perform the essential functions of the job without posing a direct threat to themselves or others. Moreover, the ADAAA requires employers to make ''reasonable accommodations'' for individuals with disabilities unless it creates an undue hardship for the employer. Language has been added to paragraph (a) referring to ''essential functions'' as set forth in section 1046.11 and ''direct threat.'' The section would also require, consistent with ADAAA, that each member of the PF be medically certified as able to perform the essential functions of that individual's job. Finally, as a result of the proposed 1046.13, the reference to waivers of medical qualification standards would be deleted from the existing section 1046.11, because each individual will be evaluated on a case-by-case basis to determine the individual's ability to perform the essential functions of the individual's specific position. This section also adds a requirement for a health status exit review for all employees leaving PF service.

This section also amends the language regarding the use of corrective devices and reasonable accommodations that must be made to modify emergency and protective equipment to be compatible with these devices. Paragraph (g)(3) proposes that a determination regarding the compatibility of such devices with emergency and protective equipment be made by a designated supervisor in conjunction with the Designated Physician. Paragraph (g)(4) proposes to require that management personnel take reasonable steps to accommodate protective equipment for individuals with corrective devices.

The ability of PF personnel to engage in physical training and testing without undue risk, and to safely and efficiently perform essential job functions, with or without reasonable accommodation, without posing a direct threat to their own or others' safety, depends on the ability of those individuals to meet physical and medical standards (medical certification). Failure to comply with these medical standards will result in denial of medical certification for employment.

• *§ 1046.14 Medical certification disqualification.*

This new section proposes the process for medical certification disqualification. Such disqualification is the determination by the PPMD that an individual, with or without reasonable accommodation, is unable to perform the essential functions of an SO or SPO job position, including the required physical fitness training and physical readiness qualifications (for SPOs), without creating a direct threat to that individual or others.

A new provision has been added that would require responsible employers to offer an SPO medical removal if the Designated Physician determines in a written medical opinion that it is medically appropriate to remove the SPO from PF duties as a result of injuries sustained while engaging in required physical fitness or training activities (*e.g.,* preparing for or participating in a physical readiness standard qualification attempt). The provision would require that the Designated Physician's determination, approved by the PPMD, be based on an examining physician's recommendation or any other signs or symptoms that the PPMD deems medically sufficient to remove an SPO.

• *§ 1046.15 Review of medical certification disqualification.*

This new section would permit an individual denied medical certification for employment in a particular position to request in writing that an Independent Review of his/her case be conducted. If the Independent Review of an individual's case results in an unfavorable decision from the Office of Health, Safety and Security, the individual would be able to petition the DOE Office of Hearings and Appeals for a Final Review. Procedures for the proposed review process are described in detail in this section.

• *§ 1046.16 SPO physical readiness qualification program requirements.*

This section proposes the program requirements (FPRS, BRS, and ARS) for

individual SPO fitness assessments, physical readiness maintenance, remedial physical fitness training, and safety. The FPRS level is proposed to be added, which would be required to be physically demonstrated every year but would not require a running standard. These changes would result in an overall 90 percent reduction in exposure to potential injuries associated with physical readiness qualification running tests for the population of BRS and ARS SPOs. While the previous physical readiness running standards would be retained for the BRS and ARS levels, the number of officers annually asked to demonstrate that readiness would be reduced. Greater reliance would be placed on medical evaluation to determine physical readiness of BRS and ARS SPOs. In addition to the medical evaluation process, which is analogous to that used as the physical readiness evaluation by law enforcement agencies, the DOE evaluation program would be validated by testing of randomly selected BRS and ARS SPOs.

• *§ 1046.17 Training standards and procedures.*

DOE proposes to modify the language of this section from the existing section 1046.15, incorporating standards currently set forth in Appendix B to Subpart B, and DOE Order 473.3, *Protection Program Operations, https://www.directives.doe.gov/directives/current-directives/473.3-BOrder/view*. Specific training requirements and knowledge, skills, and abilities would be replaced with the requirement that PF personnel and their supervisors possess the knowledge, skills and abilities necessary to protect DOE security interests. The knowledge, skills and abilities that would be required would be developed based on the applicable Job Analysis (JA) or Mission Essential Task List (METL). This proposal would ensure that training requirements comport readily to existing conditions and essential job functions as dictated by the site-specific JA or METL.

Firearms qualification requirements would be modified regarding how SPOs are required to qualify with the individually-issued and primary weapons required by their duty assignment (*i.e.,* specialty weapon, long gun and/or handgun). These requirements would also require that to operate post-assigned site-specific specialized or crew-served weapons, the SPO must be trained and demonstrate proficiency in the safe use of such weapons in a tactical environment.

DOE also proposes to clarify the procedure for developing site-specific and/or specialized courses of fire.

• *§ 1046.18 Access authorization.*

The language of this section would be modified from the existing 1046.14 rule for clarity and to eliminate the requirement for all armed PF members to have a minimum ''L'' access authorization. The revised provision would instead require that, at a minimum, a favorably adjudicated background investigation including national agency check with local agency and credit check (NACLC) be conducted to ensure the individual's suitability for arming. A ''Q'' access authorization would continue to be required under certain circumstances.

• *§ 1046.19 Medical/fitness for duty status reporting requirements.*

This new section proposes to restate the reporting requirements for PF personnel but has not changed substantially from the requirements in Appendix A of the existing rule. The section would clarify the requirement that PF personnel advise their supervisors when they have an unspecified change in their health status that might impair their ability to perform job duties. PF personnel would also be required to provide a detailed report identifying the change to the Designated Physician. This section would also require PF personnel to advise their supervisors when a corrective device is not functioning properly.

In addition, this section would restate the requirement that management report to the Designated Physician any physical, behavioral, or health changes or deterioration in work performance in PF personnel under their jurisdiction. The section contains new language requiring the Designated Physician to be informed of all anticipated job transfers involving either upward or downward recategorization (*e.g.,* from SO to armed status, from armed status to SO, or from PF to other assignments).

• *§ 1046.20 Medical record maintenance requirements.*

This section proposes to clarify record retention and confidentiality requirements contained in Appendix A, section C, of the existing version of the rule. This rule would substitute language on the inability to perform the essential functions of the job for the term ''disqualifying defects.'' Language has been added to make it clear that access to medical information developed pursuant to the requirements of this part can be appropriately shared to satisfy the requirements of other parts of this or other titles. Thus duplicative testing or examinations can be avoided. Additionally, a more explicit discussion of medical records confidentiality has been added for consistency with the requirements of the Privacy Act and DOE's implementing regulations.

• *§ 1046.21 Materials incorporated by reference.*

This section lists the industry standards proposed to be incorporated by reference in DOE's PF regulations.

• Appendix A to Subpart B of Part 1046—*Medical and Physical Fitness Qualifications Standards* and Appendix B to Subpart B of Part 1046—*Training Qualification for Security Skills and Knowledge.*

These Appendices have been removed and necessary elements have been incorporated into the rule for clarity and completeness, as described in the preceding discussion.

III. Rulemaking Requirements

A. Review Under Executive Order 12866

This action does not constitute a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735).

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of a regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking'' (67 FR 53461, Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. DOE has made its procedures and policies available on the Office of the General Counsel's Web site (*www.gc.doe.gov).*

DOE has reviewed today's proposed rule under the Regulatory Flexibility Act and certifies that, if adopted, the rule would not have a significant impact on a substantial number of small entities. This proposed action would amend an existing rule which establishes medical and physical training requirements and standards for DOE PF personnel. The rule would affect approximately twenty private firms (*e.g.,* integrated Management and Operating contractors, security services contractors and subcontractors) at the Department's facilities around the United States. Some of those firms

which provide protective services are classified under NAICS Code 561612, Security Guards and Patrol Services. To be classified as a small business, they must have average annual receipts of $18.5 million or less. Some of the private firms affected by these standards and requirements would be classified as small businesses.

The proposed rule would update the medical certification and physical readiness requirements for PF personnel and require PF contractors to make reasonable accommodations to modify emergency and protective equipment for qualified individuals. The rule would also set forth the essential functions that PF personnel would be required to meet, with or without such reasonable accommodation. Medical certification and physical readiness requirements are currently set forth in Appendix A to subpart B of 10 CFR part 1046, and the proposed updates, which are applicable to individual PF personnel rather than their employer, are not expected to impose a significant cost impact. While these essential functions for PF personnel have not previously been specified by regulation, DOE has determined that PF personnel must already be able to perform these functions to adequately perform their job responsibilities. In addition, while the reasonable accommodation provisions are not currently specified by the current regulation, such accommodations are already required by the ADA, as amended by the ADAAA.

The rule also proposes a process for review of a medical certification disqualification and for medical removal protection benefits in certain circumstances. The proposed review process would be conducted by the DOE Office of Health Safety and Security (independent review) and the DOE Office of Hearings and Appeals (final review), and as such are therefore not expected to result in a significant impact on affected small businesses. Any medical removal protection benefits would be reduced to the extent worker's compensation is provided and will be reimbursable to the contractor under the applicable contract with DOE.

The rule would also update the training standards and procedures for PF officers, and makes minor updates to existing reporting and records maintenance requirements. The training standards and procedures are currently set forth at Appendix B to subpart B of 10 CFR part 1046. The proposed updates, intended to tailor training requirements to existing conditions and essential job functions specified in a site-specific JA or METL, are not expected to result in significant increases in costs to meet these requirements. Medical records are maintained by the designated physician and the evaluating psychologist, and the proposed updates would require PF personnel management to develop plans to ensure the confidentiality of medical information. Such confidentiality is already required by other existing regulations.[1]

Because these standards and requirements are primarily clarifications and updates to existing standards and requirements, DOE does not believe that the impact on these firms would be significant. DOE seeks comment on its estimate of the number of small entities and the expected impacts of today's proposed rule. DOE emphasizes that these firms are under contract to DOE either directly or indirectly, so any costs incurred while meeting the standards and requirements proposed in this rule would be invoiced and may be reimbursable in accordance with the terms of the contract and applicable law.

For the above reasons, DOE certifies that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities.

C. Review Under Paperwork Reduction Act

No new information collection requirements subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* are imposed by this regulatory action.

D. Review Under the National Environmental Policy Act

This proposed rule amends existing policies and procedures establishing medical and physical readiness standards for DOE PF personnel and has no significant environmental impact. Consequently, the Department has determined that this rule is covered under Categorical Exclusion A–5, of Appendix A to Subpart D, 10 CFR part 1021, which applies to a rulemaking that addresses amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' (64 FR 43255, August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to develop a formal process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have ''federalism implications.'' Policies that have federalism implications are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' On March 7, 2011, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735, March 14, 2000).

DOE has examined the proposed and revised rule and has determined that it does 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. No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Section 3 of Executive Order 12988, (61 FR 4729, February 7, 1996), instructs each agency to adhere to certain requirements in promulgating new regulations. These requirements, set forth in section 3(a) and (b), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards for affected legal conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation describes any administrative proceeding to be available prior to judicial review and any provisions for the exhaustion of administrative remedies. The Department has determined that this regulatory action meets the requirements of section 3(a) and (b) of Executive Order 12988.

[1] DOE notes that the rule would also set forth qualification requirements for the PPMD and designated physicians. While many Management and Operations contractors may have medical professionals on staff, subcontractor firms that employ physicians, psychologists, and psychiatrists may be classified under NAICS Codes 621111, Offices of Physicians (except Mental Health Specialists), 621112, Offices of Physicians, Mental Health Specialists, and 621330, Offices of Mental Health Practitioners (except Physicians). To be classified as small businesses, these firms must have average annual receipts of $10 million, $10 million, and $7 million, respectively. Because individuals employed by these firms likely meet the proposed qualification requirements already in order to practice in the field, DOE does not believe that these requirements would result in a significant impact on any small firms employing these individuals.

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 action on state, local and tribal governments and the private sector. For proposed regulatory actions likely to result in a rule that may cause expenditures 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 estimates of the resulting costs, benefits, and other effects on the national economy. UMRA also requires Federal agencies to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate.'' In addition, UMRA requires an agency plan for giving notice and opportunity for timely input to small governments that may be affected before establishing a requirement that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA (62 FR 12820, March 18, 1997). (This policy is also available at *http://www.gc.doe.gov*). Today's proposed 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. While the rule would require certain private sector employers and employees (*i.e.,* DOE security contractors and certain PF personnel employed by them) to meet certain job-related medical and physical training standards and requirements, the impact is not likely to result in the expenditure of $100 million or more in any year. In addition, any costs incurred by employers in meeting these requirements would be invoiced and may be reimbursable in accordance with the terms of the contract and applicable law.

H. 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 the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to the 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 proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternates to the action and their expected benefits on energy supply, distribution, and use.

This proposed rule is not a significant energy action, nor has it been designated as such by the Administrator of OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects.

I. 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 proposed rule or policy that may affect family well-being. Today's proposed rule would 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.

IV. Opportunity for Public Comment

A. Participation in Rulemaking

DOE encourages the maximum level of public participation in this rulemaking. Interested persons are encouraged to participate in the public hearings at the times and places indicated at the beginning of this proposed rulemaking.

DOE has established a period of thirty days following publication of this proposed rulemaking for persons and organizations to comment. All public comments, hearing transcripts, and other docket material will be available for review and copying at the DOE offices at each of the hearing sites. The docket material will be filed under ''DOE–HQ–2012–0002.''

B. Written Comment Procedures

Interested persons are invited to participate in this proceeding by submitting written data, views or arguments with respect to the subjects set forth in this proposed rulemaking. Instructions for submitting written comments are set forth at the beginning of this notice and below. Where possible, comments should identify the specific section they address.

Comments should be labeled both on the envelope and on the documents, ''Docket No. DOE–HQ–2012–0002'' and must be received by the date specified at the beginning of this proposed rulemaking. All comments and other relevant information received by the date specified at the beginning of this proposed rulemaking will be considered by DOE in the subsequent stages of the rulemaking process.

Pursuant to the provisions of 10 CFR part 1004, any person submitting information or data that is believed to be confidential and exempt by law from public disclosure should submit one complete copy of the document and three copies, if possible, from which the information believed to be confidential has been deleted. DOE will make its own determination with regard to the confidential status of the information or data and treat it according to its determination.

C. Public Hearings

The dates, times and places of the public hearings are indicated at the beginning of this proposed rulemaking. DOE invites any person or organization who has an interest in these proceedings to make a request to make an oral presentation at one of the public hearings. Requests can be phoned in advance to the telephone number indicated at the beginning of this proposed rulemaking. The person making the request should provide a telephone number where he or she may be contacted.

DOE reserves the right to schedule the presentations, and to establish the procedures governing the conduct of the hearings. Each presentation is limited to ten minutes.

A DOE official will be designated to preside at the hearings and ask questions. The hearings will not be judicial or evidentiary-type hearings, but will be conducted in accordance with section 501 of the DOE Organization Act, 42 U.S.C. 7191. At the conclusion of all initial oral statements, each person who has made an oral statement will be given the opportunity to make a rebuttal or clarifying statement, subject to time limitations. Any further procedural rules regarding proper conduct of the hearings will be announced by the presiding official.

Transcripts of the hearings will be made and the entire record of this rulemaking, including the transcripts, will be retained by DOE and made available for inspection as provided at the beginning of this proposed

rulemaking. Any person may also purchase a copy of a transcript from the transcribing reporter.

List of Subjects in 10 CFR Part 1046

Government contracts, Incorporation by reference, Reporting and recordkeeping requirements, Security measures.

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

Daniel B. Poneman,

Deputy Secretary of Energy.

For the reasons set out in the preamble, the Department of Energy (DOE) proposes to amend Chapter X of Title 10 of the Code of Federal Regulations by revising part 1046 to read as follows:

PART 1046—MEDICAL, PHYSICAL READINESS, TRAINING, AND ACCESS AUTHORIZATION STANDARDS FOR PROTECTIVE FORCE PERSONNEL

Subpart A—General

Sec.
1046.1 Purpose.
1046.2 Scope.
1046.3 Definitions.
1046.4 Physical Protection Medical Director (PPMD).
1046.5 Designated Physician.

Subpart B—Protective Force (PF) Personnel

1046.11 Essential functions of PF positions.
1046.12 Medical, physical readiness, and training requirements for PF personnel.
1046.13 Medical certification standards and procedures.
1046.14 Medical certification disqualification.
1046.15 Review of medical certification disqualification.
1046.16 SPO physical readiness qualification standards and procedures.
1046.17 Training standards and procedures.
1046.18 Access authorization.
1046.19 Medical and fitness for duty status reporting requirements.
1046.20 Medical records maintenance requirements.
1046.21 Materials incorporated by reference.

Authority: 42 U.S.C. 2011, *et seq.;* 42 U.S.C. 7101, *et seq.;* 50 U.S.C. 2401, *et seq.*

Subpart A—General

§ 1046.1 Purpose.

This part establishes the medical, physical readiness, training and performance standards for contractor protective force (hereinafter ''PF'') personnel who provide security services at Department of Energy (DOE) facilities including the National Nuclear Security Administration (NNSA). DOE and NNSA may choose to incorporate elements of these standards into Federal protective force programs.

§ 1046.2 Scope.

(a) This part applies to DOE, including NNSA, hereinafter ''DOE'' or the ''Department,'' contractor employees and applicants for contractor protective force positions at government-owned or government leased facilities, regardless of whether the facility is privately operated. This part provides for the establishment of physical security programs based on uniform standards for medical, physical performance, training, and access authorizations for PF personnel providing physical security services to the Department.

(b) Use of a single, suitably qualified individual is encouraged when it is operationally, fiscally, or otherwise appropriate to perform multiple roles as required in this part (*e.g.,* Designated Physician and Protection Program Medical Director). Similarly, when appropriate medical, psychological, or other examinations, evaluations, or testing required by other DOE regulations can be used to satisfy the requirements of multiple parts of this title; nothing in this part is intended to require duplicative examinations, evaluations, or testing as long as the requirements of this part are met.

(c) The Department is authorized to grant such exemptions from the requirements of this part as it determines are authorized by law. Exemptions may not be granted from the requirement to meet any essential function of a position notwithstanding that reasonable accommodation must be granted as required by this part and the Americans with Disabilities Act of 1990 (ADA), as amended by the Americans with Disabilities Act Amendment Act of 2009 (ADAAA), and its implementing regulations. Exemptions from non-medical requirements are allowed only on a case-by-case basis for a specific requirement covered under this part. The Department must document that the exemption will not endanger life or property or the common defense and security, and is otherwise in the public interest. The exemption process required by DOE must be used. Exemptions must be made from this part in consultation with the Chief Health, Safety and Security Officer and approved by the Secretary, Deputy Secretary, or for the National Nuclear Security Administration, the Administrator. Granting of equivalencies is not authorized.

(d) Requests for technical clarification of the requirements of this part by organizations or individuals affected by its requirements must be made in writing through the appropriate program or staff offices of the Department. Such requests must be coordinated with the Office of Health, Safety and Security or its successor organization. The Office of Health, Safety and Security is responsible for providing a written response to such requests. Requests for interpretations of the requirements of this part may be made to the General Counsel. The General Counsel is responsible for providing responses to such requests.

§ 1046.3 Definitions.

The following definitions apply to this part:

Active shooter means an individual actively engaged in killing or attempting to kill a person or persons in a confined and populated area.

Advanced Readiness Standard (ARS) means a qualification standard that includes the requirements of the Fixed Post Readiness Standard (FPRS), but also requires the completion of a one mile run with a maximum qualifying time of 8 minutes 30 seconds, and a 40-yard dash from the prone position in 8.0 seconds and any other site-specific measure of physical readiness prescribed by site management and approved by the respective program office. This standard applies to SPOs who staff security posts that normally require extensive tactical movement on foot or are assigned Special Response Team duties.

Applicant means a person who has applied for and been conditionally offered a position as a Security Officer (SO) or a Security Police Officer (SPO), but who has not yet begun the active SO or SPO duties for which the person has applied.

Basic Readiness Standard (BRS) means a qualification standard that includes the requirements of the FPRS, but also requires the completion of a one-half mile run with a maximum qualifying time of 4 minutes, 40 seconds, and a 40-yard dash from the prone position in 8.5 seconds and any other site-specific measure of physical readiness prescribed by site management and approved by the respective program office. This standard applies to SPOs with mobile defensive duties in support of facility protection strategies.

Chief Medical Officer means a Federal employee who is a doctor of medicine (MD) or doctor of osteopathic medicine (DO) who is licensed without restriction and qualified in the full range of occupational medicine services employed by the Department's health, safety, and security programs. This individual provides leadership and technical support for these programs and must be identified in writing.

Contractor means a contractor for the Department and includes subcontractors at all tiers.

Corrective device means devices, such as eyeglasses or hearing aids, which are necessary to enable an examinee to meet medical qualification standards, and which the supervisor responsible for the performance of the examinee and the Designated Physician have determined are compatible with the performance of the essential functions of the position.

Designated Physician means an MD or DO, licensed without restriction in the state of practice, who has been approved by the Physical Protection Medical Director (PPMD). The Office of Health Safety and Security must be consulted regarding an individual's suitability prior to appointment as a Designated Physician.

Direct threat means a significant risk of substantial harm to the health or safety of the individual or others. The risk must be based on an assessment of the individual's present ability to perform safely the essential functions of the job, and it must be determined that the risk cannot be eliminated or reduced by reasonable accommodation.

DOE facility means any facility required by DOE to employ PF personnel and used by DOE, including NNSA, and its contractors for the performance of work under DOE jurisdiction.

Efficiency, for the purposes of this part, pertains to the individual's physical efficiency rather than operational efficiency.

Emergency conditions are those conditions that could arise at a DOE facility as a result of a breach of security (*e.g.,* sabotage or terrorism) or accident (*e.g.,* fire, explosion, storm, or earthquake) and threaten the security or integrity of DOE facilities, assets, personnel, the environment or the general public. For the purposes of this rule, emergency conditions include PF drills and exercises relating to search, rescue, crowd control, fire suppression and special operations, including response to the scene of the incident, and all functions performed at the scene.

Essential functions of the job are the fundamental job duties of PF members as set out in § 1046.11.

Field element means the management and staff elements of DOE, including NNSA, with delegated responsibility for oversight and program management of major facilities, programs, and site operations.

Final review means the process for an individual disqualified from medical certification to have a second and ultimate review of the individual's case conducted by the DOE Office of Hearings and Appeals.

Fixed Post Readiness Standard (FPRS) means a standard that requires an SPO to demonstrate the ability to assume and maintain the variety of cover positions associated with effective use of firearms at entry portals and similar static environments to include prone, standing, kneeling, and barricade positions; to use site specific intermediate force weapons and weaponless self-defense techniques; to effect arrest of suspects and place them under restraint, *e.g.,* with handcuffs or other temporary restraint devices; and any other site-specific measure of physical readiness prescribed by site management and approved by the respective program office.

Independent Physician means a physician who possesses an MD or DO degree, is licensed without restriction and board certified, and has experience in a relevant field of medicine. The Independent Physician must not have served as the requestor's personal physician in any capacity or have been previously involved in the requestor's case on behalf of the Department or a Department contractor.

Independent review means the process through which a medically disqualified individual may appeal to have an independent review of his/her case conducted by an Independent Physician.

Job analysis (JA) is a systematic method used to obtain a detailed listing of the tasks of a specific job. JAs will be derived from criteria determined and published by the DOE National Training Center or identified and documented through a site-specific Mission Essential Task List (METL)-based process based on a set of Departmental Nuclear Security Enterprise-wide standards. A METL-based process that identifies and formally documents duties, tasks, and sub-tasks to be trained is commensurate with the process to develop JAs.

Medical approval means a determination by a Designated Physician that it is medically appropriate for an individual to attempt the physical performance qualification test.

Medical certification means a determination by a Designated Physician approved by the PPMD that an individual is medically qualified for a particular category of PF positions, including the performance of the essential functions of an SO or SPO, and the required ongoing physical readiness training.

Medical certification disqualification means a determination by a Designated Physician and approved by the PPMD that an individual, with or without reasonable accommodation, is unable to perform the essential functions of an SO or SPO job position, including the required physical readiness training, without creating a direct threat to that individual or others.

Medical evaluation means the analysis of information generated by medical examinations and psychological evaluations and assessments of an individual to determine medical certification.

Medical examination means an examination performed or directed by the Designated Physician that incorporates the components described in section 1046.13.

Mission Essential Task List (METL) means a list of common tasks required for PF assignments based on site-specific protection plans to defend against adversary capabilities as defined by DOE.

Officially designated Federal security authority (ODFSA) means the Departmental Federal authority at the Field or Headquarters (HQ) Element with the primary and delegated responsibility for oversight of a site PF. Also may be referred to as the Department cognizant security authority.

Pertinent negative means the absence of a sign or symptom that helps substantiate or identify a patient's condition.

Physical Protection Medical Director (PPMD) means the physician programmatically responsible for the overall direction and operation of the site medical program supporting the requirements of this part.

Primary weapon as used in this part means any weapon individually assigned or available at the majority of posts/patrols to which the SPO may be assigned.

Protective Force personnel means Special Response Team members, SPOs, and SOs who are employed to protect Department security interests.

Qualification means the determination that an individual meets the applicable medical, physical, and as appropriate, firearms training standards, and possesses the knowledge, skills, abilities and clearances required for a particular SO or SPO position.

Randomly selected means any process approved by the ODFSA, which ensures each member of the SPO population has an equal chance to be chosen every time the selection process is used.

Reasonable accommodation means corrective devices and medications which allow the examinee to meet medical qualification standards, are compatible with the performance of the

essential functions of the position, and are documented in writing.

Requalification date means the date of expiration of current qualification at which demonstration of knowledge, skills and/or abilities is required to maintain specific job status.

Security interests include any Department asset, resource or property which requires protection from malevolent acts and/or unpermitted access. These interests may include (but are not limited to) Department personnel; sensitive technology; classified matter; nuclear weapons, components, and assemblies; special nuclear material (SNM) and other nuclear materials; secure communications centers; sensitive compartmented information facilities; automated data processing centers or facilities storing and transmitting classified information; vital equipment; or other Department property.

Security Officer (SO) means an unarmed uniformed PF member who has no Departmental arrest or detention authority, used to support SPOs and/or to perform duties (*e.g.,* administrative, access control, facility patrol, escort, assessment and reporting of alarms) where an armed presence is not required.

Security Police Officer (SPO) means a uniformed PF member who is authorized under section 161(k) of the Atomic Energy Act of 1954, as amended, section 661 of the DOE Organization Act, or other statutory authority, to carry firearms and to make arrests without warrant for specifically enumerated offenses and who is employed for, and charged with, the protection of Department security interests.

Semi-structured interview means, for the purpose of this part, an interview by a Psychologist who meets standards established by DOE and who has the latitude to vary the focus and content of the questions depending upon the interviewee's responses.

Site occupational medical program means the comprehensive occupational health services and basic worker protection requirements for contractor employees.

Special Response Team (SRT) *Member* means SPOs who meet the Advanced Readiness Standard, with additional training and qualification requirements as necessary, and who are assigned to a Special Response Team that trains and responds as a team to perform recapture and recovery and to augment denial missions, *e.g.,* those that require adversaries be denied proximity to the protected property.

Special Response Team, commonly referred to as SRT, means a PF special operations unit comprised of SPOs whose primary mission is to resolve incidents that require activities and force options that exceed the capability of existing physical security systems (*e.g.,* performance of recapture/recovery operations and augmentation of denial missions).

Weapons proficiency demonstration means a process based on a predetermined, objective set of criteria approved by the respective program office in consultation with the Office of Health, Safety and Security that results in a grade (*e.g.,* pass/fail). The process must ensure that an individual (or team, for crew-served weapons) demonstrates the ability to perform all weapons-handling and operational manipulations necessary to load, operate, and discharge a weapon system accurately and safely (to include clearing/returning to safe mode the weapons system at the conclusion of firing), without the necessity for scoring targets during the course of fire. Proficiency courses of fire must include tactically-relevant time constraints. Demonstrations of proficiency are allowed with the actual weapon and assigned duty load, with alternate loads (*e.g.,* frangible or dye-marking rounds), or with authorized weapons system simulators, as defined in this section. Proficiency courses of fire must be tactically relevant.

Weapons qualification is a formal test of weapons proficiency that includes, in addition to all specified elements of proficiency demonstration, the achievement of a prescribed qualification score according to a Departmentally-approved course of fire. Weapons qualification courses of fire must be constrained by time.

Weapons system simulator means a device that closely simulates all major aspects of employing the corresponding actual firearm/weapons system, without firing live ammunition. The simulator should permit all weapons-handling and operational actions required by the actual weapon, and should allow the use of sight settings similar to the corresponding actual weapon with assigned duty loads. Additionally, when weapons or weapons system simulators are used for qualification testing of protective force officers, the operation of the simulated weapon must closely approximate all weapons handling and operational manipulation actions required by the actual weapon. The simulation system must precisely register on-target hits and misses with accuracy comparable to the actual weapon at the same shooting distances. The weight, balance, and sighting systems should replicate those of the corresponding actual weapon, and noise signatures and felt recoil should be simulated to the extent technically feasible. Additionally, when used for qualification testing of protective force officers, the weight and balance of the simulated weapon with assigned duty loads must be closely approximated.

§ 1046.4 Physical Protection Medical Director (PPMD).

(a) *General.* The PPMD is the physician programmatically responsible for the overall direction and operation of site medical programs supporting the requirements of this part. Appropriate contractual arrangements must ensure that the PPMD's authority applies to all site contractors.

(1) *Nomination.* The name of each PPMD candidate must be submitted by the contractor to the officially designated Federal security authority who in turn must consult with the Office of Health, Safety and Security prior to the PPMD's approval. At the time of initial nomination for the PPMD designation, the nominee shall submit to the Office of Health, Safety and Security, through his or her employer and the Federal security authority, the following documents or copies thereof, translated into English if written in another language:

(i) Applicable diplomas;

(ii) Certificate of any postgraduate professional training (*e.g.,* internship, residency, fellowship); and

(iii) Current medical license in the state in which duties will be performed. If determined necessary by the Office of Health, Safety and Security, certification of good standing by all medical licensing bodies from which the applicant has held medical licenses, as well as documentation of any restrictions or limitations to practice medicine, past or present (such documentation may be obtained in written form or electronically) may be requested. The nominee may be requested to instruct the licensing body to send such certifications to the Office of Health, Safety and Security. Under no circumstances will such certifications of good standing be accepted directly from the applicant. Additionally, notice of certification by any additional American specialty board, if applicable, and/or current curriculum vitae may be requested. The curriculum vitae, if requested, must provide a discussion of any gaps in employment..

(2) *Other roles and responsibilities.* Nothing in this part is intended to preclude the PPMD from fulfilling similar or related roles under other parts, including providing occupational medical services under 10 CFR part 851, ''Worker Safety and Health Program.''

Additionally, the PPMD may fulfill the role of Designated Physician.

(3) *Qualifications.* The PPMD shall possess an MD or DO degree; be board certified in or have equivalent advanced training, in occupational medicine; be a professionally qualified physician in good standing in his or her professional community, to include all medical licensing bodies from which the applicant has held medical licenses; demonstrate past professional performance and personal conduct suitable for a position of responsibility and trust; read, write, speak, and understand the English language proficiently; and possess an unrestricted license to practice medicine in the state in which the designation is sought or meet the medical licensing requirements of the applicable military or Federal service to which he/she belongs.

(b) *Nominations.* The PPMD must nominate in writing, through the local officially designated Federal security authority, to the Office of Health, Safety and Security, one or more Designated Physicians.

(1) Each nomination must describe the relevant training and experience of the nominee.

(2) Each nominee must be professionally qualified in good standing in his or her professional community, to include all medical licensing bodies from which the applicant has held medical licenses; demonstrate past professional performance and personal conduct suitable for a position of responsibility and trust; read, write, speak, and understand the English language proficiently; and possess the applicable unrestricted license to practice in the state in which the designation is sought or meet the medical licensing requirements of the applicable military or Federal service to which he/she belongs.

(3) To be nominated, a Designated Physician shall possess an MD or DO degree and be board certified or have equivalent advanced training in occupational medicine.

(c) *Documentation.* At the time of initial nomination, the nominee shall submit to the PPMD the following documents or copies thereof, translated into English if written in another language:

(1) Applicable diplomas;

(2) Certificate of any postgraduate professional training (*e.g.,* internship, residency, fellowship); and

(3) Current medical license in the state in which duties will be performed. If determined necessary by the PPMD, certification of good standing by all medical licensing bodies from which the applicant has held medical licenses, as well as documentation of any restrictions or limitations to practice medicine, past or present (such documentation may be obtained in written form or electronically) may be requested. The PPMD may request the nominee to instruct the licensing body to send such certifications to the PPMD. Under no circumstances will such certifications of good standing be accepted directly from the applicant. Additionally, the PPMD may request notice of certification by any additional American specialty board, if applicable, and/or a current curriculum vitae. The curriculum vitae, if requested, must provide a discussion of any gaps in employment.

(d) *Self reporting.* Each individual covered under paragraphs (a) and (b) of this section must agree to report the following information about him/herself as a condition of his/her designation. PPMDs must report to their employer, who must forward the information to the Office of Health, Safety and Security through the Federal security authority. Designated Physicians must report to the PPMD:

(1) Any change in status or initiation of an adverse action by any state medical licensing board or any other professional licensing board;

(2) Initiation of an adverse action by any Federal or state regulatory board;

(3) Being named a defendant in any criminal proceedings (felony or misdemeanor);

(4) Being named in a civil suit alleging professional malpractice;

(5) Being evaluated or treated for alcohol use disorder or drug dependency or abuse;

(6) Occurrence of a physical disorder, a mental disorder, or any other health condition that might affect his or her ability to perform professional duties; and

(7) Any adverse action against the medical license(s) of the individual, past or present (these may be obtained in written form or electronically). The incumbent or nominee may be instructed to request the licensing body to provide such information to the appropriate individual. Under no circumstances will such information be accepted directly from the incumbent or nominee. All such actions must be submitted to DOE for consideration and possible action which may result in rejection of, or termination of, the applicable designation.

(e) *Annual activity report.* The PPMD must send an annual activity report to the Office of Health, Safety and Security through the appropriate field element, reporting on the current credentials of each incumbent Designated Physician and recommending the retention or replacement of each incumbent.

(f) *Retention or replacement.* The PPMD's supervisor of record must send an annual letter to, the Office of Health, Safety and Security reporting on the current credentials of the PPMD recommending retention or replacement. Immediate notification must be made to the Office of Health Safety and Security if a PPMD is relieved of his duties or replaced.

(g) *Medical activity summary.* The PPMD must submit an annual letter summarizing the medical activity during the previous year conducted under this part to the Chief Health, Safety and Security Officer or his or her designee through the manager of the Field Element. The PPMD must comply with applicable DOE requirements specifying report content.

§ 1046.5 Designated Physician.

(a) *Responsibilities.* The Designated Physician is responsible for the conduct of medical examinations, evaluations, and medical certification of SOs and SPOs. The Designated Physician must:

(1) Annually determine whether to approve an individual's participation in programmed training programs required under this rule and determine the individual's ability to perform the physical readiness and training qualification tests without undue risk. Medical approval must be obtained within thirty days prior to the individual's beginning such training or attempting the qualifying tests;

(2) With the assistance of a psychologist or psychiatrist meeting standards established by DOE, determine:

(i) An individual's medical capability, with or without reasonable accommodation, to perform the essential functions of PF job duties without creating a direct threat to the individual or others; and

(ii) Whether to certify that the individual meets the applicable medical and physical readiness standards as set forth herein for their position.

(3) Determine whether any portion of any medical examination may be performed by other qualified personnel, such as another physician, physician's assistant, or a nurse practitioner;

(4) Be responsible for case management, including supervising, interpreting, and documenting PF personnel medical conditions; and

(5) Be familiar with the required essential functions of the job duties for PF personnel, as set forth in § 1046.11.

(b) *Approval in lieu of nomination.* If the Designated Physician has been

approved under the provisions of 10 CFR part 712, ''Human Reliability Program,'' that approval will satisfy the requirement for nomination to, and approval by, DOE under this part.

Subpart B—Protective Force (PF) Personnel

§ 1046.11 Essential functions of PF positions.

Nothing in this part is intended to preclude emergency use of any available protective force personnel by an on-scene commander to successfully resolve a national security emergency.

(a) *Essential functions.* The essential functions described in paragraphs (b) through (g) of this section and other site-specific essential functions must be communicated in writing by the manager of the Field Element to the PPMD and the Designated Physician. The Designated Physician is required to ensure applicant and incumbent PF members are aware that these essential physical and mental functions in paragraphs (b) through (g), as appropriate, are the elements against which the initial and annual evaluations for PF personnel will be conducted.

(b) *SO essential functions.* (1) The control of voluntary motor functions, strength, range of motion, neuromuscular coordination, stamina, and dexterity needed to meet physical demands associated with routine and emergency situations of the job;

(2) The ability to maintain the mental alertness necessary to perform all essential functions without posing a direct threat to self or others; and

(3) The ability to understand and share essential, accurate communication by written, spoken, audible, visible, or other signals while using required protective equipment.

(c) *Additional SO essential functions.* SOs may be required to support SPOs and assist in the routine physical protection of DOE facilities, personnel, classified information, and property, as warranted by DOE facility operations, staff security posts used in controlling access to DOE facilities, conduct routine foot and vehicular patrols, escort visitors, check rooms and facilities, assess and report alarms, and perform basic first aid. Therefore, all SOs must also be able to:

(1) Understand and implement post and patrol operations and access control systems;

(2) Understand and implement departmental and site policies and procedures governing the SO's role in site protection;

(3) Understand and implement inspection techniques for persons, packages and vehicles, as well as detect and identify prohibited articles and site-specific security interests;

(4) Work in locations where assistance may not be available;

(5) Spend extensive time outside exposed to the elements and working in wet, icy, hot, or muddy areas;

(6) Make frequent transitions from hot to cold, cold to hot, dry to humid, and from humid to dry atmospheres;

(7) Walk, climb stairs and ladders, and stand for prolonged periods of time;

(8) Safely operate motor vehicles when their use is required by local missions and duty assignments;

(9) Use clear and audible speech and radio communications in other than quiet environments;

(10) Read and understand policies, procedures, posted notices, and badges;

(11) Rely on the senses of smell, sight, hearing and touch to: detect the odor of products of combustion and of tracer and marker gases to detect prohibited articles; inspect persons; packages and vehicles; and in general determine the nature of emergencies; maintain personal safety; and report the nature of emergencies;

(12) Employ weaponless self-defense;

(13) Be fitted with and use respirators other than self-contained breathing apparatus when the use of such equipment is required by local assignment.

(d) *FPRS SPO essential functions.* FPRS SPO personnel may be assigned only to fixed posts where there is no planned requirement for response away from that post. In addition to the SO essential functions listed in paragraphs (b) and (c) of this section, FPRS SPOs must be able to:

(1) Apply basic tactics (to include use of intermediate force weapons) necessary to engage and neutralize armed adversaries and determine probable capabilities and motivations of potential adversaries;

(2) Use site-specific hand tools and weapons required for the performance of duties;

(3) Perform complex tasks, and make life or death decisions under stressful conditions while armed and authorized to use deadly force;

(4) Perform physically demanding work under adverse weather and temperature conditions (extreme heat and extreme cold) on slippery or hazardous surfaces with the prolonged use of protective equipment and garments such as respirators, air supply hoods, or bullet-resistant garments, as required by site protection strategies;

(5) Be fitted for and properly utilize personal duty equipment;

(6) Work for long periods of time in conditions requiring sustained physical activity and intense concentration in environments of high noise, poor visibility, limited mobility, at heights, and in enclosed or confined spaces;

(7) Accommodate to changing work and meal schedules or to a delay in meals without potential or actual incapacity;

(8) Have no known significant abnormal intolerance to chemical, mechanical (*e.g.,* heat, light or water), and other physical agent exposures to the skin that may be encountered during routine and emergency duties, as specified at the site; and

(9) Make critical decisions and take appropriate actions in a confused and potentially life-threatening environment throughout the duration of an emergency situation, *e.g.,* active shooter scenarios.

(e) *BRS SPO essential functions.* In addition to the FPRS SPO essential functions listed above, BRS SPOs must be able to:

(1) Have night vision sufficient to read placards and street signs while driving or to see and respond to imminently hazardous situations in conditions of darkness;

(2) Be capable of operating armored vehicles with an expectation of employing the capabilities of the vehicle;

(3) Staff security posts which normally require movement on foot, by vehicle, watercraft, or aircraft in response to alarms and any breach of security; and to support site protection strategies;

(4) Provide interdiction, interruption, neutralization, and support the recapture of a DOE asset/site/facility/location;

(5) Make rapid transitions from rest to near maximal exertion without warm-up; and

(6) Otherwise act as needed to protect Department sites, personnel, classified information, and nuclear weapons, nuclear weapons components, and SNM, to apprehend suspects, and to participate in the armed defense of a Department site against a violent assault by adversaries.

(f) *ARS SPO essential functions.* The essential functions of an ARS SPO include those of a BRS SPO. Security posts which normally, or are expected to, require extensive tactical movement on foot must be staffed by ARS SPOs. In addition, an ARS SPO must be able to support the pursuit/recovery of a Department security interest.

(g) *SRT member essential functions.* The essential functions of an SRT member include those of an ARS SPO. The primary role of SRTs is the recapture, pursuit, and/or recovery of

Department security interests. In addition, an SRT member must be trained to resolve incidents that require activities and force options that exceed the capabilities of other site PF members, as determined by site-specific analysis. An SRT SPO also must:

(1) Successfully complete a Departmental advanced tactical qualification course designed to provide the minimum level of skills and knowledge needed to completely perform all tasks associated with SRT job responsibilities;

(2) Have knowledge and skills to provide additional protection capability as demanded by the particular targets, threats, and vulnerabilities existing at their assigned Departmental facility;

(3) Operate special weapons, tactical vehicles, and other equipment necessary to protect a particular facility or to effectively engage an adversary with advanced capabilities; and

(4) Possess the ability to act successfully as a member of an aggressive and readily mobile response team as dictated by site-specific vulnerability assessments, using force options and tactical response team techniques necessary for recapture and recovery operations directed against an adversary and to support site-specific protection strategies.

§ 1046.12 Medical, physical readiness, and training requirements for PF personnel.

Department PF personnel must be individuals who:

(a) Are medically certified by the PPMD pursuant to the procedures set out in section 1046.13 as meeting the medical certification standards to perform all of the applicable essential functions of the job, as set forth in § 1046.11;

(b) Meet the physical readiness qualification standards set forth in § 1046.16; and

(c) Are determined to be qualified as having the knowledge, skills, abilities and completed the requirements of a formal training program as set out in § 1046.17.

§ 1046.13 Medical certification standards and procedures.

(a) *PF medical certification standards.* All applicant and incumbent PF personnel must satisfy the applicable Medical Certification Standards set forth in this section.

(b) *Requirements of the medical evaluation to determine medical certification.* (1) The medical evaluation must be made by the Designated Physician without delegation (*e.g.,* to a physician's assistant or nurse practitioner).

(2) An evaluation of incumbent security police officer must include a medical history, the results of the examination, and a formal written determination.

(3) A site standard form approved by the Chief Medical Officer must be used, and pertinent negatives must be documented on the form.

(4) The Medical Certification Standards are the minimum medical standards to be used in determining whether applicants and incumbent PF personnel can effectively perform, with or without reasonable accommodation, all essential functions of normal and emergency duties without imposing an undue hardship on the employer or posing a direct threat to the PF member or others, the facility, or the general public. All reasonable accommodations as defined in this part must be approved in writing by the PPMD.

(c) *General medical standards for PF personnel.* The examinee must possess the mental, sensorial, and motor skills to perform safely and efficiently all applicable essential job functions described in § 1046.11 and those designated in the job analysis submitted by PF management prior to each examination. Specific qualifications for SOs and SPOs are set forth in paragraphs (d) and (e), respectively, of this section.

(d) *Specific medical standards for SOs*—(1) *Head, face, neck, and scalp.* Configuration suitable for fitting and effective use of personal protective equipment when the use of such equipment is required by assigned normal or emergency job duties.

(2) *Sense of smell.* Ability to detect the odor of combustion products and of tracer or marker gases.

(3) *Speech.* Capacity for clear and audible speech as required for effective communications on the job.

(4) *Hearing.* Hearing loss with or without aids not to exceed 30 decibels (db) average at 500, 1000, and 2000 Hertz (Hz), with no loss greater than 40 db at any one of these frequencies and a difference of not more than 15 db average loss between the two ears; the ability to recognize speech as demonstrated by a Speech Recognition Threshold of 20 db or less (by ANSI S3.6, 2010audiometry (incorporated by reference, see § 1046.21)). If a hearing aid is necessary, suitable testing procedures shall be used to ensure auditory acuity equivalent to the above requirement.

(5) *Vision.* Near and distant visual acuity, with or without correction, of at least 20/25 in one eye and no worse than 20/40 in the other eye.

(6) *Color vision.* Ability to distinguish red, green, and yellow. Acceptable measures of color discrimination include the Ishihara; Hardy, Rand, & Rittler; and Dvorine pseudoisochromatic plates (PIP) when administered and scored according to the manufacturer's instructions. Tinted lenses such as the X-Chrom contact lenses or tinted spectacle lenses effectively alter the standard illumination required for all color vision tests, thereby invalidating the results and are not permitted during color vision testing.

(7) *Cardiorespiratory.* Capacity to use a respirator other than self-contained breathing apparatus (SCBA).

(8) *Nutritional/metabolic.* Status adequate to meet the stresses and demands of assigned normal and emergency job duties. Ability to accommodate to changing work and meal schedules without potential or actual incapacity.

(e) *Specific medical standards for SPOs.* In addition to the criteria identified in section 1046.16(f) the following standards must be applied.

(1) *Head, face, neck and scalp.* Configuration suitable for fitting and effective use of personal protective equipment when the use of such equipment is required by assigned normal or emergency job duties.

(2) *Sense of Smell.* The ability to detect the odor of combustion products and of tracer or marker gases.

(3) *Speech.* Capacity for clear and audible speech as required for effective communications on the job.

(4) *Hearing.* Hearing loss without aids not to exceed 30 db average at 500, 1000, 2000 Hz, with no loss greater than 40 db at any of these frequencies and a difference of not more than 15 db average loss between the two ears; the ability to recognize speech as demonstrated by a Speech Recognition Threshold of 25 db or less (by ANSI S3.6, 2010 audiometry (incorporated by reference, see § 1046.21)). Hearing loss beyond indicated level would interfere with ability to function and respond to commands in emergency situations. Use of a hearing aid is allowed for one ear only with the remaining ear qualifying for no more than an average of 30 db loss at all speech frequencies. If a hearing aid is necessary, suitable testing procedures must be used to assure auditory acuity equivalent to the above requirement for the difference between two ears.

(5) *Vision.* (i) Near and distant vision. Near and distant visual acuity sufficient to effectively perform emergency-related essential functions:

(A) With or without correction, vision of 20/25 or better in the better eye and 20/40 in the other eye.

(B) If uncorrected distant vision in the better eye is not at least 20/25 and the SPO wears corrective lenses, the SPO must carry an extra pair of corrective lenses.

(ii) *Color vision.* Ability to distinguish red, green, and yellow. Acceptable measures of color discrimination include the Ishihara; Hardy, Rand, & Rittler; and Dvorine pseudoisochromatic plates (PIP) when administered and scored according to the manufacturer's instructions. Tinted lenses such as the X-Chrom contact lenses or tinted spectacle lenses effectively alter the standard illumination required for all color vision tests, thereby invalidating the results and are not permitted during color vision testing.

(iii) *Field of vision.* Field of vision in the horizontal meridian at least a total of 140 degrees, contributed to by at least 70 degrees from each eye.

(iv) *Depth perception.* Ability to judge the distance of objects and the spatial relationship of objects at different distances.

(6) *Cardiorespiratory.* (i) *Respiratory.* Capacity and reserve to perform physical exertion in emergencies at least equal to the demands of the job assignment. This will be measured by annual pulmonary function test, with no less than a 90 percent predicted forced vital capacity and forced expiratory volume. There must be no diagnosis of respiratory impairment requiring continuous or continual medications such as bronchodilators or beta agonists. A full evaluation and approval by the PPMD is required whenever there is a past history of sleep apnea, with or without treatment.

(ii) *Cardiovascular.* (A) Capacity for tolerating physical and high levels of exertion during emergencies. Normal configuration and function, normal resting pulse, regular pulse without arrhythmia, full symmetrical pulses in extremities, and normotensive, with tolerance for rapid postural changes on rapid change from lying to standing position. The use of hypertensive medications is acceptable if there are no side effects present that would preclude adequate functions as herein specified.

(B) If an examination reveals significant evidence of cardiovascular abnormality or significantly increased risk for coronary artery disease (CAD) as determined by the examining physician, an evaluation by a specialist in internal medicine or cardiology may be required and evaluated by the Designated Physician. An electrocardiogram is required at entry, at age 40 and annually thereafter, which must be free from significant abnormality. If such abnormalities are detected, then a stress electrocardiogram with non-ischemic results must be provided, or the individual must be referred to a cardiologist for a fitness for duty examination. A stress electrocardiogram must be performed every other year beginning at age 50 with the results reviewed by the Designated Physician.

(7) *Neurological, mental, and emotional.* Absence of central and peripheral nervous system conditions that could adversely affect ability to perform normal and emergency duties or to handle firearms safely. A tuning fork test for peripheral neuropathy at fingers and toes is required anually. Absence of neurotic or psychotic conditions which would affect adversely the ability to handle firearms safely or to act safely and efficiently under normal and emergency conditions. Psychologists and psychiatrists identified to conduct evaluations, assessments, testing, and/or diagnoses associated with medical qualifications of this part must meet standards established by DOE.

(8) *Musculoskeletal.* Absence of conditions that could reasonably be expected to interfere with the safe and effective performance of essential physical activities such as running, walking, crawling, climbing stairs, and standing for prolonged periods of time. All major joint range of motion limits must have no significant impairments in the performance of essential functions. This includes overhead reaching and the ability for full squatting. No history of spine surgery, a documented diagnosis of herniated disc, or mechanical back pain that has not been certified to have normal functional recovery with no activity limitations.

(9) *Skin.* Have no known significant abnormal intolerance to chemical, mechanical, and other physical agent exposures to the skin that may be encountered during routine and emergency duties, as specified at the site. Capability to tolerate use of personal protective covering and decontamination procedures when required by assigned job duties. Facial hair cannot be allowed to interfere with respirator fitting, and any such growth or a skin condition precluding respirator fit is not acceptable.

(10) *Endocrine/nutritional/metabolic.* Status adequate to meet the stresses and demands of assigned normal and emergency job duties. Ability to accommodate to changing work and meal schedules without potential or actual incapacity. A full evaluation and approval of reasonable accommodation by the PPMD is required for hiring and retention when metabolic syndrome is identified and/or when diabetes is controlled by other than diet.

(f) *Additional medical or physical tests.* For those facilities where it is necessary to determine the medical qualification of SPOs or SPO applicants to perform special assignment duties which might require exposure to unusually high levels of stress or physical exertion, Field Elements may develop more stringent medical qualification requirements or additional medical or physical tests, in collaboration with the PPMD, as necessary for such determinations. All such additional qualification requirements must be coordinated with the Office of Health Safety and Security prior to application.

(g) *Medical examination procedures and requirements.* (1) The medical examinations required for certification must be performed at the following intervals:

(i) Applicants for PF member positions must undergo a comprehensive medical examination, as specified herein. The Chief Health, Safety and Security Officer or designee, the Chief, Defense Nuclear Security in the case of NNSA, and/or the PPMD may require additional evaluations.

(ii) After initial certification, each SO must be medically examined and recertified at least every two years or more often if the PPMD so requires. Medical certification remains valid through the end of the twenty-fourth month following each certification or for the period indicated by the PPMD if less than twenty-four months.

(iii) After initial certification, each SPO must be medically examined and recertified every twelve months or more often (pursuant to § 1046.14 or otherwise if the PPMD so requires). Medical certification remains valid through the end of the twelfth month following each qualification or for the time indicated by the PPMD if less than twelve months.

(2) The medical examination must include a review of the essential functions of the job to which the individual is assigned. Medical examinations of SPO and SO applicants and incumbents must include the following evaluations of whether the individual meets the Medical Certification Standards for the applicable position:

(i) An updated medical and occupational history, complete physical examination, vision testing, audiometry, and spirometry. In addition, laboratory testing must be performed, including a complete blood count (CBC), basic

blood chemistry, a fasting blood glucose, and a fasting lipid panel (the examination and testing is to identify baseline abnormalities, as well as trends); and

(ii)(A) A psychologist who meets standards established by DOE must be used to fulfill the requirements of this part. A personal, semi-structured interview at the time of the pre-placement medical evaluation and during the biennial or annual medical examination must be conducted by a psychologist. At the pre-placement medical examination and every third year for SPOs and every fourth year for SOs thereafter, a Minnesota Multi-Phasic Personality Inventory (MMPI) (available only to appropriate medical professionals at, *e.g., http://psychcorp.pearsonassessments.com*) or its revised form will be administered in order to:

(*1*) Establish a baseline psychological profile;

(*2*) Monitor for the development of abnormalities; and

(*3*) Qualify and quantify abnormalities.

(B) The information gathered from paragraph (g)(2)(i) of this section, together with the results of the semi-structured interview, psychiatric evaluations (if required), and reviews of job performance may indicate disqualifying medical conditions. Additional generally-accepted psychological testing may be performed as required to substantiate findings of the MMPI. If medically indicated and approved by the PPMD, an additional evaluation by a psychiatrist who meets standards established by DOE may be required. Additional or more frequent psychological evaluations as determined by the psychologist, psychiatrist, Designated Physician, or the PPMD may be required. Unless otherwise indicated, a psychological evaluation performed in accordance with the other DOE requirements may satisfy the requirements of this part.

(C) The Designated Physician may request any additional medical examination, test, consultation or evaluation deemed necessary to evaluate an incumbent SO's or SPO's ability to perform essential job duties or the need for temporary work restrictions.

(3) When an examinee needs the use of corrective devices, such as eyeglasses or hearing aids, to enable the examinee to successfully meet medical qualification requirements, the supervisor responsible for the examinee's performance, in conjunction with the Designated Physician, must make a determination that the use of any such device is compatible with all required emergency and protective equipment that the examinee may be required to wear or use while performing assigned job duties. This determination must be made before such corrective devices may be used by the examinee to meet the medical, physical readiness, or training requirements for a particular position.

(4) Contractor management must provide reasonable accommodations to a qualified individual by taking reasonable steps to modify required emergency and protective equipment to be compatible with corrective devices or by providing equally effective, alternate equipment, if available.

(5) The Designated Physician must discuss the results of the medical and physical readiness examinations with the individual. The results of the medical examinations also must be communicated in writing to PF management and to the individual and must include:

(i) A statement of the certification status of the individual, including any essential functions for which the individual is not qualified, with or without reasonable accommodations, and an assessment of whether the individual would present a direct threat to self or others in the position at issue;

(ii) If another medical appointment is required, the date of the next medical appointment; and

(iii) Recommended remedial programs or other measures that may restore the individual's ability to perform the essential functions or may negate the direct threat concern, if the individual is not qualified for physical training, testing, or the relevant position.

(6) PF management must request from the PPMD a health status exit review for all employees leaving PF service. This review must include all of the medical standards for the PF position being vacated.

§ 1046.14 Medical certification disqualification.

(a) *Removal.* An individual is disqualified from medical certification by the PPMD if one or more of the medical certification standards contained in § 1046.13 are not met. An individual, temporarily or permanently, disqualified from medical certification by the PPMD must be removed from the protective force job classification by his or her employer when the employer is notified by the PPMD of such a determination.

(b) *Medical removal protection.* The employer of a disqualified SPO must offer the SPO medical removal protection if the PPMD determines in a written medical opinion that it is medically appropriate to remove the SPO from PF duties as a result of injuries sustained while engaging in required physical readiness activities (*e.g.,* preparing for or participating in a physical readiness standard qualification attempt) or training activities requiring physical exertion. The PPMD's determination must be based on an examining physician's recommendation or any other signs or symptoms that the Designated Physician deems medically sufficient to remove an SPO. The employee pay benefits specified in this part for combined temporary and permanent medical removal shall not be provided for more than one year from the date of the initial PPMD written determination regarding the same injury.

(1) *Temporary removal pending final medical determination.* The employer of a disqualified SPO must offer the SPO temporary medical removal from PF duties on each occasion that the PPMD determines in a written medical opinion that the worker should be temporarily removed from such duties pending a final medical determination of whether the SPO should be removed permanently.

(i) In this section, ''final medical determination'' means the outcome of the Independent Review process or the Final Review process provided for in § 1046.15(c) and (d), as appropriate.

(ii) If an SPO is temporarily removed from PF duties pursuant to this section, the SPO's employer must not remove the employee from the active payroll unless alternative duties for which the worker is qualified or can be trained in a short period of time are refused or alternative duties are performed unsatisfactorily.

(iii) When the SPO remains on the active payroll pursuant to paragraph (b)(1)(ii) of this section, the SPO's employer must maintain for the duration of the temporary assignment the SPO's total base pay, seniority, and other worker rights and benefits as if the worker had not been removed.

(iv) If there are no suitable alternative duties available as described in paragraph (ii), the SPO's employer must provide to the SPO the medical removal protection benefits specified in paragraph (c)(1) of this section until alternative duties become available, the SPO has recovered, or for one year, whichever comes first.

(2) *Permanent medical removal resulting from injuries.* If the PPMD determines in a written medical opinion that the worker should be permanently removed from PF duties as a result of injuries sustained while engaging in required physical readiness activities

(*e.g.,* preparing for or participating in a physical readiness standard qualification attempt) or training activities requiring physical exertion, employer Human Resources policies, disability insurance, and/or collective bargaining agreements will dictate further employment status and compensation.

(3) *Worker consultation before temporary or permanent medical removal.* If the PPMD determines that an SPO should be temporarily or permanently removed from PF duties, the PPMD must:

(i) Advise the SPO of the determination that medical removal is necessary to protect the SPO's health and well-being or prevent the SPO from being a hazard to self or others;

(ii) Provide the SPO the opportunity to have any questions concerning medical removal answered; and

(iii) Obtain the SPO's signature or document that the SPO has been advised on the benefits of medical removal as provided in this section and the risks of continued participation in physically demanding positions.

(4) *Return to work after medical removal.* (i) The SPO's employer, subject to paragraph (b)(4)(ii) of this section, must not return an SPO who has been permanently removed under this section to the SPO's former job status unless the PPMD first determines in a written medical opinion that continued medical removal is no longer necessary to protect the SPO's health and well-being or to prevent the SPO from being a direct threat to self or others.

(ii) If, in the PPMD's opinion, continued participation in PF duties will not pose an increased risk to the SPO's health and well-being or an increased risk (beyond those normally associated with SPO duties) of the SPO being a direct threat to self or others, the PPMD must fully discuss these matters with the SPO and then, in a written determination, may authorize the SPO's employer to return the SPO to former job status.

(c) *Medical removal protection benefits.* If an SPO has been removed from duty pursuant to paragraph (b)(2) of this section as a result of injuries sustained while engaging in required physical readiness activities (*e.g.,* preparing for or participating in a physical readiness standard qualification attempt) or other training activities requiring physical exertion, the SPO's employer must provide the SPO the opportunity to transfer to another available position, or one which later becomes available, for which the SPO is qualified (or for which the SPO can be trained in a short period), subject to collective bargaining agreements, as applicable;

(1) If required by this section to provide medical removal protection benefits, the SPO's employer must maintain for a period of one year, beginning from the date of the PPMD's determination as described in paragraph (b)(1) of this section, the removed worker's total base pay, and seniority, as though the SPO had not been removed.

(2) If a removed SPO files a claim for workers' compensation payments for a physical disability, then the SPO's employer must continue to provide medical removal protection benefits pending disposition of the claim, the claimant has recovered, or one year, whichever comes first. The SPO's employer will receive no credit towards the SPO's base pay for the SPO's compensation payments received by the SPO for treatment related expenses.

(3) The SPO's employer's obligation to provide medical removal protection benefits to an SPO is reduced to the extent that the worker receives compensation for earnings lost during the period of removal either from a publicly or employer-funded compensation program, or from employment with another employer made possible by virtue of the worker's removal.

(d) *Collective Bargaining Agreements.* For the purposes of this section, the requirement that the SPO employer provide medical removal protection benefits is not intended to expand upon, restrict, or change any rights to a specific job classification or position under the terms of an applicable existing collective bargaining agreement.

§ 1046.15 Review of medical certification disqualification.

(a) *Temporary medical and physical conditions.* Should the PPMD determine that an individual is disqualified from medical certification because of a temporary medical or physical condition which results in the individual not being able to perform any of the essential functions of the job classification, the employer may assign the individual to alternate, limited duty, if available, until the individual is determined by the PPMD to be removed from a disqualification status. This limited duty may include assignment to duties in any job classification where all essential functions can be safely and efficiently performed. A temporary medical certification disqualification may not exceed a period of twelve months. During or by the end of the twelve-month period, the PPMD must determine whether the individual is permanently disqualified from medical certification because of a continuing medical or physical condition which results in the individual not being able to perform all essential functions of the job classification. The individual may request an Independent Review of the disqualification at the initial notification of disqualification, and at any time during or at the end of the twelve-month period.

(b) *Permanent medical and physical conditions.* If the PPMD determines that an individual is disqualified from medical certification because of a permanent medical or physical condition which results in the individual not being able to perform all essential functions of the job classification, and the individual requests an Independent Review, the employer may assign the individual to alternate, limited duty, if available. This limited duty may include assignment to duties in any job classification where all essential functions can be safely and efficiently performed. Subject to the one year limit as identified in § 1046.14, assignment to alternate, limited duty, may remain in effect until an Independent Review determination, and if applicable, the Final Review determination by the DOE Office of Hearings and Appeals.

(c) *Independent Review.* An individual PF member disqualified from medical certification, temporarily or permanently, by the PPMD may request an Independent Review of his case. The individual initiating such a review must submit the request for an Independent Review in writing to the Office of Health, Safety and Security within ten working days of the date of notification (date of written correspondence) of disqualification. A copy of the request must be sent to the individual's employer and to the local officially designated Federal security authority: For DOE HQ sites, to the Director, Office of Security Operations; for NNSA sites, to the cognizant NNSA Security Director; and for any other DOE sites, to the cognizant DOE Security Director.

(1) The Office of Health, Safety and Security, in coordination with the respective PPMD, must provide for the Independent Review. The Independent Review must be conducted within sixty calendar days of the receipt of the request for an Independent Review. The Independent Review must include a complete review of the record of the case.

(2) The disqualified individual may select a representative of his/her choice during the Independent Review process. The individual or representative may

provide additional evidence relating solely to the medical or physical readiness of the individual. The individual must execute a consent document authorizing the release of relevant medical information to the Office of Health, Safety and Security.

(3) The disqualified individual must provide a copy of the request for Independent Review and the signed consent document for the release of medical information to the respective PPMD and the individual's employer within ten working days of the submission of the request to the Office of Health, Safety and Security.

(4) Within ten working days of receipt of a copy of the request for an Independent Review, the disqualified individual's employer must provide the Office of Health, Safety and Security with the following:

(i) A copy of the job analysis (JA)/mission essential task list (METL) available to the respective Designated Physician at the time of the individual's medical evaluation;

(ii) A listing of the essential functions for the individual's PF job classification; and

(iii) Any additional information relating to the medical or physical readiness of the requestor that the Office of Health, Safety and Security may request.

(5) The Office of Health, Safety and Security must provide the information in paragraph (c)(4) to the Independent Physician for use in the independent review.

(6) A medical examination of the disqualified individual must be conducted by an Independent Physician approved by the Office of Health, Safety and Security. The Independent Physician must not have served as the requestor's personal physician in any capacity. The Independent Review must confirm or disagree with the medical certification disqualification and must consider:

(i) The validity of the stated physical requirements and essential function(s) for the applicable job classification;

(ii) The PPMD's medical determination of the individual's inability to perform essential functions or to undertake training or the physical readiness qualification test without undue medical risk to the health and safety of the individual;

(iii) The completeness of the medical information available to the PPMD; and

(iv) If applicable, the determination by the PPMD that the performance of the individual poses a direct threat to self or others.

(7) The results of the Independent Physician's medical examination of the individual must be provided to the Office of Health, Safety and Security for review. The Office of Health, Safety and Security must then recommend a final determination confirming or reversing the medical certification disqualification. The recommendation of the Office of Health, Safety and Security must be forwarded to the applicable local Federal authority for security: For DOE HQ sites, the Director, Office of Security Operations; for NNSA sites, the cognizant local NNSA Security Director; for any other DOE sites, the cognizant local DOE Security Director; and the respective PPMD. This individual will either adopt or reject the recommendation of the Office of Health, Safety and Security.

(8) The Office of Health, Safety and Security must provide the results of the Independent Review and the final determination regarding the individual's medical disqualification to the requestor, the respective PPMD, the respective local ODFSA, and the requestor's employer.

(9) If the Independent Review determination confirms the individual is disqualified from medical certification, the individual must be removed from the PF job classification by the individual's employer. If the Independent Review disagrees with the medical certification disqualification, the individual must be reinstated to the PF job classification by the individual's employer, subject to successful completion of any required qualifications or training requirements that were due during the temporary disqualification.

(d) *Final Review.* An individual receiving an unfavorable Independent Review Determination may request a Final Review of the Independent Review Determination by the Office of Hearings and Appeals. The individual must submit his or her request for a Final Review to the Office of Hearings and Appeals, in writing, within 30 days of receiving an unfavorable determination, and notify the Office of Health, Safety and Security of his or her appeal. In the request for a Final Review, the individual must state with specificity why he or she disagrees with the Independent Review confirming his or her medical certification disqualification. The Office of Health, Safety and Security will transmit the complete record in the case to the Office of Hearings and Appeals within five business days of receiving notice from the individual that he or she has filed an appeal of the Independent Review Determination. The Office of Hearings and Appeals may request additional information, if necessary, to clarify any issue on appeal. Within 45 days of the closing of the record, the Office of Hearings and Appeals will issue a Decision and Order setting forth its findings on appeal and its conclusions based on the record before it. Upon receipt of the unfavorable results of a Final Review determination by the Office of Hearings and Appeals, the individual must be permanently removed from that PF job classification, SO or SPO (FPRS, BRS, ARS, or SRT member) by his or her employer. However, nothing in this determination shall prevent the employee from being allowed to qualify for a less strenuous physical readiness job classification given the availability of said position subject to successful completion of any other required qualifications or training requirements. Upon receipt of the favorable results of a Final Review determination from the Office of Hearings and Appeals, the individual must be reinstated to the PF job classification by his or her employer, subject to successful completion of any required qualifications or training requirements due during the temporary disqualification and future ability to be medically certified for the PF job classification.

§ 1046.16 SPO physical readiness qualification standards and procedures.

(a) *General.* Employers must provide SPOs with a copy of the applicable physical readiness standards, a copy of these regulations, and must inform SPOs of their rights associated with the physical readiness requirements.

(1) All SPO applicants must satisfy the applicable physical readiness standard for their assigned position and must physically demonstrate the physical training and skills, knowledge and abilities set out in paragraph (g) of this section, as required for their assigned position before beginning active duty in that position.

(2) All incumbent SPOs must requalify every year according to their applicable readiness standard, pursuant to paragraph (d)(1), (f), or (g) of this section. Requalification must occur no later than the twelfth month following the previous annual qualification. The requalification may be accomplished at any time during, or prior to, the requalification month.

(3) All qualification and requalification activities must be conducted under the supervision of personnel knowledgeable of DOE physical readiness program requirements and approved by the local officially designated Federal security authority.

(b) *Physical readiness training program.* Each SPO must engage in a year-round physical readiness training program to:

(1) Achieve and maintain the cardio-respiratory and musculoskeletal fitness necessary to safely perform all essential functions of normal and emergency PF duties at any time, without posing a direct threat to self or others; and

(2) Enable the individual SPO to pass (on an annual basis) the applicable SPO physical readiness standard without any undue risk of physical injury.

(c) *Training program requirements.* (1) The training program must include the following elements:

(i) Activities with appropriate durations which address aerobic, agility, flexibility, and strength conditioning.

(ii) Instruction on techniques and exercises designed to ensure SPOs can safely rise quickly from the prone position, and if required by qualification standard, transition into a run.

(iii) Appropriate stretching/warm-up and cool down activities designed by certified exercise physiologists to support injury free workouts and physical readiness testing.

(2) An SPO physical readiness training and maintenance program must be developed by the employing organization and approved by the PPMD in consultation with the local officially designated Federal security authority.

(3) After initial training and qualification, each SPO must participate in the physical readiness training and maintenance program on a continuing basis. The physical readiness maintenance program must be based on assessment of the individual SPO's physical readiness levels and be tailored to the individual SPO's physical readiness maintenance requirements and improvement needs. The SPO's participation in this training program must be validated by the SPO's employing organization.

(4) Assessments of an SPO's level of physical readiness must be conducted at least every six months by personnel knowledgeable of DOE requirements and be based upon recognized assessment standard values (*e.g.*, American College of Sports Medicine [*http://www.acsmstore.org/*], Cooper Fitness Institute [*http://www.cooperinstitute.org/*], and Rockport Walk Protocol [available online from a variety of Web sites]). Though not a qualification, the assessment must include an evaluation of the SPO's level of physical readiness and provide recommendations for maintenance requirements and improvement needs, if any. Ability to summon appropriate medical emergency response must be available at the assessment site. An individual trained in cardio-pulmonary resuscitation and automatic external defibrillator equipment must be present.

(5) An SPO who fails to requalify during the twelfth month following the anniversary of the date of initial or previous qualification must be removed from armed SPO status and must participate in a remedial physical readiness training program. No additional training or time extension to meet the standards is permitted except for unusual circumstances based on a temporary medical or physical condition as certified by the PPMD that causes the SPO to be unable to satisfy the physical readiness standards within the required time period without suffering undue physical harm.

(6) SPOs must maintain physical readiness standards on a continuing basis. Employees must notify the employer when the requirements of the training program cannot be successfully completed on a recurring basis (*e.g.*, exercises cannot be completed and/or completed within time limits several times in a row due to injury and/or conditioning issues). The employer must provide access to a work hardening or rehabilitation program upon PPMD medical evaluation validating the need for such a program.

(7) An SPO may be required to demonstrate the ability to meet the applicable physical readiness qualification standard during a Headquarters or field audit/inspection/survey or other similar activity, as directed by the local officially designated Federal security authority. Failure to meet the physical readiness standard will be treated as if the SPO failed the first attempt during routine qualification, and the procedures of paragraphs (g)(3), (4) and (5) of this section will apply.

(d) *Physical readiness standards for SPOs.* The physical readiness standards for SPOs are as follows:

(1) *Fixed Post Readiness Standard (FPRS).* This standard applies to all SPOs and must be physically demonstrated every year. The standard is sufficient agility and range of motion to: Assume, maintain, and recover from the variety of cover positions associated with effective use of firearms at entry portals and similar static environments to include prone, standing, kneeling, and barricade positions; use site-specific deadly and intermediate force weapons and employ weaponless self-defense techniques; effect arrest of suspects and place them under restraint, *e.g.*, with handcuffs or other physical restraint devices; and meet any other site-specific measure of physical readiness prescribed by site management and approved by the respective program office.

(2) *Basic Readiness Standard (BRS).* In addition to demonstrating the FPRS requirements as stated in paragraph (d)(1) of this section, the BRS consists of a one-half mile run with maximum qualifying times of 4 minutes 40 seconds and a 40-yard dash from the prone position in 8.5 seconds, and any other site-specific measure of physical readiness prescribed by site management and approved by the respective program office.

(3) *Advanced Readiness Standard (ARS).* In addition to demonstrating the FPRS requirements as stated in paragraph (d)(1) of this section, the ARS consists of a one mile run with maximum qualifying times of 8 minutes 30 seconds and a 40-yard dash from the prone position in 8.0 seconds, and any other site-specific measure of physical readiness prescribed by site management and approved by the respective program office.

(e) *Administrative Procedure Act.* The Department may revise the physical readiness standards or establish new standards consistent with the Administrative Procedure Act and other applicable law.

(f) *Evaluation and documentation.* The Designated Physician's evaluation and documentation that an incumbent BRS or ARS SPO has reasonable expectation of meeting the appropriate physical readiness standard will be deemed to have met the annual physical readiness qualification requirement without having to take the appropriate BRS or ARS test. The following procedures apply regarding the Designated Physician's evaluation and documentation that an incumbent BRS or ARS SPO has a reasonable expectation of meeting the appropriate physical readiness standard. The physical readiness capability evaluation must be made by the Designated Physician without delegation (*e.g.*, to a physician's assistant or nurse practitioner). A site standard form must be used, and pertinent negatives must be documented on the form.

(1) Evaluation of BRS and ARS SPOs must include consideration of normative data where it is available for individuals deemed to be physically capable. The following criteria must be evaluated: Cardiac function to include resting pulse rate, pulse recovery after exertion; neuromuscular function to include assessments of strength, range/freedom of motion, and movement without pain.

(2) The designated physician may clear the BRS or ARS SPO medically for

SPO duties and document that the SPO has a reasonable expectation of meeting the appropriate physical readiness standard. In this case, the SPO is deemed to have met the annual physical readiness qualification requirement without having to take the appropriate BRS or ARS test.

(3) The designated physician may indicate the BRS or ARS SPO meets medical standards for SPO duties but indicate that the SPO does not appear to have the physical capability to pass the appropriate physical readiness test. In this case, the file will be immediately forwarded to the PPMD for review.

(4) If the PPMD concurs with the Designated Physician, the SPO may challenge the decision by taking and passing the appropriate physical readiness test, which must be accomplished successfully within 30 days of the date of the physical evaluation for the SPO to remain in status. Should the SPO fail to meet the standard, the retesting process described below in paragraph (g) of this section must be followed. Ultimate return to work would require following the new hire process for medical clearance and physical readiness testing.

(5) Should the PPMD determine that the SPO does appear to have a reasonable expectation of meeting the appropriate physical readiness standard, the SPO will be deemed to have met the annual qualification requirement for the appropriate physical readiness standard.

(6) The Designated Physician may find that the SPO cannot be medically cleared for SPO duties. In this case, the SPO will be removed from status with appropriate PPMD review and medical intervention provided.

(7) Each year, 10 percent of the BRS and ARS SPO populations at each site will be randomly selected by the employer for physical testing pursuant to paragraph (g). The identity of an individual as the selectee shall be kept confidential by the employer in a manner that ensures this information does not become known to the selected individual and the Designated Physician until after the individual SPO has been deemed to have a reasonable expectation of meeting the appropriate physical readiness standard pursuant to paragraphs (f) (2) or (f)(5) of this section. The selected individuals must successfully complete the applicable physical readiness standard in order to retain SPO status. During a given year's testing, at least 90 percent of those tested in each physical readiness category must meet the requirements.

(8) Should the passing percentage of those randomly selected in a particular physical readiness category at a particular site drop below 90 percent on their first attempts at annual qualification, then subsequently all incumbent SPOs in that category at that site must be tested against their appropriate physical readiness standard when their anniversary date occurs. This testing will continue until a 95 percent successful completion rate for that category of physical readiness is achieved at the site. Once a 95 percent successful completion rate on the first attempt is achieved for a given testing year, the required testing ratio will return to 10 percent for that category.

(g) *Physical testing for BRS and ARS SPOs.* The following procedures apply to an individual physically demonstrating the physical readiness standards for applicants and incumbent SPOs.

(1) Incumbent BRS and ARS SPOs randomly selected for physical testing pursuant to paragraph (f) in any given year, shall physically meet the applicable physical readiness standard during the month of, or prior to, their anniversary date.

(2) Incumbent SPOs shall physically meet the applicable physical readiness standard prior to their assignment to duties which require a more stringent standard.

(3) All newly hired SPOs must physically meet the most stringent standard required at the site.

(4) SPOs returning after an absence of more than one year from protective force duties must physically meet the standard they were required to meet when they left SPO duties, should such a position requiring that standard be available.

(5) Each applicant and incumbent SPO must be medically approved by the Designated Physician and have successfully completed a physical readiness assessment within thirty days prior to initial participation in any physical readiness training program and prior to attempting the applicable standard to determine whether the individual can undertake the standard without undue medical risk to the health and safety of the individual.

(6) SPOs must qualify on the applicable standard annually either by medical clearance or by physically passing the required test. The testing protocol shall include mandated participation by the officer being tested in pre-test stretching, warm-up, and cool-down activities as described in paragraph (c) of this section. The responsible person in charge of the qualification activity must ensure that the SPO understands the attempt will be for qualification. Once this has been communicated by the person in charge, the attempt will constitute a qualification attempt. Ability to summon appropriate medical emergency response must be available at the testing site. An individual trained in cardio pulmonary resuscitation and automatic external defibrillator equipment must be present.

(7) Physical readiness requalification must occur not later than during the twelfth month from the previous annual qualification. Failure to qualify within this one-month period, or earlier, must result in removal from SPO status. All attempts must be made within 30 days of the medical approval required in § 1046.16 (g)(5). Not more than five attempts may be allowed during the 30-day period.

(8) Remedial training program: Each incumbent SPO who has not met the applicable physical readiness qualification standards as set forth herein for reasons other than injury or illness must participate in a supervised physical readiness remedial training program.

(i) Supervision of the physical readiness remedial training program may be accomplished by direct observation of the SPO during the training program by personnel knowledgeable of Department physical readiness program requirements, or by these personnel monitoring the SPO's progress on a weekly basis.

(ii) The remedial training program must be based upon an assessment of the SPO's individual physical readiness deficiencies and improvement needs which precluded the SPO from successfully completing the applicable physical readiness standard.

(iii) The remedial training program must not exceed a period of 30 days.

(9) Re-testing after completion of remedial training program.

(i) Once an incumbent SPO has begun a remedial training program, it must be completed before the SPO may attempt the applicable standard.

(ii) Upon completion of the remedial training the incumbent SPO must be assessed using the same process that is used for the required semiannual assessment as required in (b)(4) of this section with the results indicating the SPO is ready to take the test.

(iii) The incumbent SPO has seven days from the completion date of the remedial training program to meet the applicable physical readiness qualification standard. Only one attempt during this seven-day period may be made unless circumstances beyond the testing organization or participant's control (*e.g.,* severe weather, equipment failure, or injury) interrupt the attempt.

When the attempt is interrupted, it may then be rescheduled within seven days.

(iv) The SPO's original anniversary qualification date will remain the same.

(10) Extensions: The physical readiness standards set forth in this part may not be waived or exempted. Time extensions, not to exceed six months, may be granted on a case-by-case basis for those individuals who, because of a temporary medical or physical condition certified by the Designated Physician, are unable to satisfy the physical readiness standards within the required period without suffering injury. When an extension is granted:

(i) The granting of such a time extension does not eliminate the requirement for the incumbent SPO to be removed from SPO status during the time extension.

(ii) When an extension is granted because of an inability to qualify without a certified medical or physical condition, the PF member is not entitled to temporary removal protection benefits.

(iii) Upon completion of the time extension period and requisite physical readiness training, as applicable, the incumbent SPO must be assessed using the same process that is used for the required semiannual assessment as required in (b)(4) of this section with the results indicating the SPO is ready to take the test.

(iv) For time extensions exceeding three months, the SPO's original anniversary qualification date may be revised to reflect the date for passing the applicable standard, which will become the new anniversary qualification date.

§ 1046.17 Training standards and procedures.

(a) Department contractors responsible for the management of PF personnel must establish training programs and procedures for PF members to develop and maintain the knowledge, skills and abilities required to perform assigned tasks. The qualification and training programs must be based upon criteria approved by the officially designated Federal security authority.

(b) Department contractors responsible for training PF personnel must prepare and annually review mission essential tasks from which a JA or mission essential task list (METL). The JAs or METLs must be prepared detailing the required actions or functions for each specific PF job assignment. When a generic Department JA or METL does not exist for a site-specific PF assignment (*e.g.,* dog handler, investigator, flight crew, pilot, etc.) the site must develop a site-specific JA or METL. The JA or METL must be used as the basis for local site-specific training programs.

(c) The Designated Physician must approve in advance the participation by individuals in training and examinations of training competence prior to an individual's beginning employment as a PF member and annually thereafter.

(d) The formal PF training program must:

(1) Be based on identified essential functions and job tasks, with identified levels of knowledge, skills and abilities needed to perform the tasks required by a specific position;

(2) Be aimed at achieving a well-defined, minimum level of competency required to perform each essential function and task acceptably, with or without reasonable accommodations;

(3) Employ standardized lesson plans with clear performance objectives as the basis for instruction;

(4) Include valid performance-based testing to determine and certify job readiness;

(5) Be documented so that individual and overall training status is easily accessible. Individual training records and certifications must be retained for at least one year after termination of the employee from employment as a member of the PF;

(6) Incorporate the initial and maintenance training and training exercise requirements expressly set forth in this part and as otherwise required by DOE;

(7) Be reviewed and revised, as applicable, by PF management on an annual basis; and

(8) Be reviewed and approved by the local officially designated Federal security authority on an annual basis.

(e) *SOs*—(1) *SO initial training requirements.* (i) Prior to initial assignment to duty, each SO must successfully complete a basic SO training course, approved by the local officially designated Federal security authority, designed to provide the minimum level of skills, knowledge and ability needed to competently perform all essential functions and tasks associated with SO job responsibilities.

(ii) The essential functions and minimum competency levels must be determined by a site-specific JA or METL. The essential functions and minimum competency levels will include, but are not limited to, the knowledge, skills, and abilities required to perform the essential functions set forth in this part, task areas as specified by DOE; and any other site specific task areas that will ensure the SO's ability to perform all aspects of the assigned position under normal and emergency conditions without posing a direct threat to themselves or to others.

(2) *SO maintenance training.* Each SO must successfully complete an annual course of maintenance training to maintain the minimum level of competency required for the successful performance of tasks and essential functions associated with SO job responsibilities. The type and intensity of training must be based on a site-specific JA or METL. Failure to achieve a minimum level of competency must result in the SO's placement in a remedial training program. The remedial training program must be tailored to provide the SO with the necessary training to afford a reasonable opportunity to meet the level of competency required by the job analysis. Failure to demonstrate competency at the completion of the remedial program must result in loss of SO status.

(3) *SO knowledge, skills, and abilities.* Each SO must possess the knowledge, skills, and abilities necessary to protect Department security interests from the theft, sabotage, and other acts that may harm national security, the facility, its employees, or the health and safety of the public. The requirements for each SO to demonstrate proficiency in, and familiarity with, the knowledge, skills, and abilities and the responsibilities necessary to perform the essential functions of the job must be based on the JA or METL.

(f) *SPOs*—(1*) SPO initial training requirements.* Prior to initial assignment to duty, in addition to meeting SO training requirements described above in paragraph (e)(1), each SPO must successfully complete the approved Department basic SPO training course. In addition to the basic SPO training course, SPO initial training must include successful completion of site-specific training objectives derived from a site-specific JA or METL, task areas as specified by DOE, and any other site specific task areas that will ensure the SPO's ability to perform all aspects of the assigned position under normal and emergency conditions without posing a direct threat to themselves or to others.

(2) *SPO maintenance training.* In addition to meeting the SO maintenance training requirements described in paragraph (e)(2) of this section, each SPO must successfully complete an annual course of maintenance training to maintain the minimum level of competency required for the successful performance of essential functions and tasks associated with SPO job responsibilities. The type and intensity of training must be determined by a site-

specific JA or METL. Failure to achieve a minimum level of competency will result in the SPO being placed in a remedial training program. The remedial training program must be tailored to provide the SPO with necessary training to afford a reasonable opportunity to meet the level of competency required by the JA or METL within clearly established time frames. Failure to demonstrate competency at the completion of the remedial program must result in loss of SPO status.

(3) *SPO knowledge, skills and abilities.* In addition to meeting the SO knowledge, skills and ability requirements described in paragraph (e)(3) of this section, the requirements for each SPO to demonstrate proficiency in, and familiarity with, the responsibilities identified in the applicable JA or METL and proficiency in the individual and collective knowledge, skills, and abilities necessary to perform the essential functions and the job tasks based on their applicable JA or METL.

(g) *SRT Members.* In addition to satisfying the initial and maintenance training requirements for SPOs and meeting the SPO knowledge, skill, and ability requirements, SRT members must meet the following requirements.

(1) *SRT initial training requirements.* Prior to initial assignment to duty, each SRT-qualified SPO must successfully complete the current approved SRT basic qualification course designed to provide the minimum level of skills, knowledge and ability needed to competently perform all the identified essential functions of the job and tasks associated with SRT job responsibilities. After completion of the SRT basic qualification course, the SRT-qualified SPO must participate in a site-specific training program designed to provide the minimum level of skills and knowledge needed to competently perform all the identified essential functions of the job and tasks associated with site-specific SRT job responsibilities. The site-specific essential functions and minimum levels of competency will be based on a site-specific JA or METL, task areas as specified by DOE, and any other site specific task areas that will ensure the SRT-qualified SPO's ability to perform all aspects of the assigned position under normal and emergency conditions without posing a direct threat to himself or to others.

(2) *SRT maintenance training.* After assignment to duties as a member of an SRT, an SRT-qualified SPO must, as a minimum, train semiannually in all of the areas determined necessary by a site-specific JA or METL. Failure to achieve a minimum level of competency will result in the SRT-qualified SPO being placed in a remedial training program or removal from SRT qualification status, as determined by contractor management. The remedial training program must be tailored to provide the SRT-qualified SPO with necessary training to afford a reasonable opportunity to meet the level of competency required by the JA or METL. Failure to demonstrate competency at the completion of the remedial program will result in loss of SRT-qualification status.

(3) *SRT knowledge, skills, and abilities.* The requirements for each SRT-qualified SPO to demonstrate proficiency in, and familiarity with, the responsibilities identified in the applicable JA or METL and proficiency in the individual and collective knowledge, skills, and abilities necessary to perform the job tasks must include, but are not limited to, those identified for SPOs and based on their applicable JA or METL.

(h) *Specialized requirements.* PF personnel who are assigned specialized PF responsibilities outside the scope of normal duties must successfully complete the appropriate basic and maintenance training, as required by DOE and other applicable governing regulating authorities (*e.g.,* Federal Aviation Administration). This training must enable the individual to achieve and maintain the minimum level of skills, knowledge and ability needed to competently perform the tasks associated with the specialized job responsibilities, as well as maintain mandated certification, when applicable. Such personnel may include, but are not limited to, flight crews, instructors, armorers, central alarm system operators, crisis negotiators, investigators, canine handlers, and law enforcement specialists. The assignment of such specialists and scope of such duties must be based on site-specific needs and approved by the local officially designated Federal security authority.

(i) *Supervisors*—(1) *Supervisor training requirements.* Prior to initial assignment to duty, each PF supervisor must successfully complete a supervisor training program designed to provide the minimum level of skills, knowledge and ability needed to competently perform all essential functions of the job and tasks associated with supervisory job responsibilities. Appropriate annual refresher training must be provided. The essential functions and minimum levels of competency will be based on a site-specific JA or METL and will include the essential functions and task areas identified for the level of PF personnel to be supervised. Armed supervisors of SPOs must be trained and qualified as SPOs. They must meet applicable medical and physical readiness qualification and certification standards for assigned response duties.

(2) *Supervisor knowledge, skills, and abilities.* Each PF supervisor must possess the skills necessary to effectively direct the actions of assigned personnel. Each supervisor must demonstrate proficiency in, and familiarity with, the responsibilities identified in the applicable JA or METL and proficiency in the skills and abilities necessary to perform those jobs.

(j) *PF training exercises.* Exercises of various types must be included in the training and performance testing process for the purposes of achieving and maintaining skills and assessing individual, leader and collective competency levels. The types and frequency of training exercises must be determined by the training needs analysis conducted as part of the training program, and approved by the local officially designated Federal security authority. These exercises must be planned and conducted to provide site-specific training to the PF in the prevention of the successful completion of potential adversarial acts as specified by DOE.

(k) *Firearms qualification standards.* (1) No person may be authorized to carry a firearm as an SPO until the responsible local ODFSA is assured that the individual who is to be armed with individually issued/primary weapons is qualified in accordance with firearms standards or that, in the case of post-specific crew-served and special weapons, a determination of proficiency and ability to operate the weapon safely has been made.

(2) As a minimum, each SPO must meet the applicable firearms qualification or proficiency standards every 6 months. Requalification or proficiency demonstration must occur no later than the sixth month from the previous qualification. The requalification or proficiency demonstration may be accomplished at any time prior to or during the requalification month. In the case of individually assigned/primary weapons, if the SPO does not re-qualify during the re-qualification month, individual's authority to be armed and to make arrests must be suspended following the unsuccessful qualification attempts as provided in paragraph (k)(11) of this section. For post-specific and crew-served weapons, if the SPO does not demonstrate proficiency during the requalification month, the individual's

eligibility for assignment to posts having those post-specific or crew-served weapons must be suspended until such time as proficiency can be demonstrated. If requalification occurs prior to the anniversary month, the month of requalification becomes the new anniversary month.

(3) PF personnel must maintain firearms proficiency on a continuing basis. Therefore, an SPO may be required to demonstrate an ability to meet the applicable firearms qualification or proficiency standard(s) during a Headquarters or field audit, survey, inspection, or other situation directed by the local officially designated Federal security authority. Failure to meet the standard will be treated as if the individual failed the first attempt during routine semiannual qualification or proficiency demonstration. In this event, the requirements of paragraphs (k)(11) through (k)(14) of this section apply.

(4) Each SPO must qualify with primary/individually-issued weapons required by duty assignment (to include: specialty weapons, long gun and/or handgun, if so armed). Qualification is the semi-annual act of achieving a set score while demonstrating the ability to load, operate, and discharge a firearm or weapon system accurately and safely (to include clearing the weapon at the conclusion of firing) according to a Departmentally-approved course of fire. At least one of the two semi-annual qualifications must be accomplished with the same type of firearm or weapon system and ammunition equivalent in trajectory and recoil as that authorized for duty use. All qualification courses must be constrained by time, identify the maximum amount of available ammunition, and include minimum scoring percentages required to qualify.

(5) For the purposes of this part, weapons system simulator means a device that closely simulates all major aspects of employing the corresponding actual firearm/weapons system, without firing live ammunition. The simulator should permit all weapons-handling and operational actions required by the actual weapon, and should allow the use of sight settings similar to the corresponding actual weapon with assigned duty loads. Additionally, when weapons or weapons system simulators are used for qualification testing of protective force officers, the operation of the simulated weapon must closely approximate all weapons handling and operational manipulation actions required by the actual weapon. The simulation system must precisely register on-target hits and misses with accuracy comparable to the actual weapon at the same shooting distances. The weight, balance, and sighting systems should replicate those of the corresponding actual weapon, and noise signatures and felt recoil should be simulated to the extent technically feasible. Additionally, when used for qualification testing of protective force officers, the weight and balance of the simulated weapon with assigned duty loads must be closely approximated.

(6) SPOs assigned to posts which require the operation of site-specific post-specific specialized or crew-served weapons must be trained and must demonstrate proficiency in the safe use of such weapons in a tactical environment. These proficiency courses must provide for the demonstration of skills required to support the site security plan. Ammunition equivalent in both trajectory and recoil to that used for duty must be used during an initial demonstration of proficiency. A weapons proficiency demonstration means a process based on a predetermined, objective set of criteria approved by the respective program office in consultation with the Office of Health, Safety and Security that results in a grade (*e.g.,* pass/fail). The process must ensure that an individual (or team, for crew-served weapons) demonstrates the ability to perform all weapons-handling and operational manipulations necessary to load, operate, and discharge a weapon system accurately and safely (to include clearing/returning to safe mode the weapons system at the conclusion of firing), without the necessity for scoring targets during the course of fire. Proficiency courses of fire must include tactically-relevant time constraints. Demonstrations of proficiency are allowed with the actual weapon and assigned duty load, with alternate loads (*e.g.,* frangible or dye-marking rounds), or with authorized weapons system simulators, as defined in this section. Proficiency courses of fire must be tactically relevant.

(7) Weapon system simulators may be used for training, familiarization, and semi-annual proficiency verifications (*e.g.,* engaging moving vehicles and/or aircraft). Demonstrations of proficiency must include all weapons-handling and operational manipulations necessary to load, operate, and discharge a weapon system accurately and safely (to include clearing the weapon at the conclusion of firing) according to a Departmentally-approved course of demonstration. Weapon demonstrations of proficiency are allowed with the same type of firearm or weapon system and ammunition equivalent in trajectory and recoil as that authorized for duty use, or with firearms simulators that have the features and capabilities as described in paragraph (k)(5) of this section.

(8) Each SPO must be given a safety presentation on the basic principles of weapons safety prior to any range activity. This does not require that a weapons safety presentation be given for each course of fire, but does require that prior to the start of range training or qualification for a given period (*e.g.,* initial qualification, semiannual qualification, training, familiarization, proficiency testing, or range practice) each SPO must be given a range safety presentation.

(9) Standardized Departmentally-approved firearm/weapon qualification courses must be used for qualification. Site-specific conditions and deployment of specialized firearms/weapons may justify requirements for developing and implementing supplementary special training and proficiency courses. Proficiency courses or demonstrations must be constrained by time limits. Where standardized Department firearms/weapons courses do not exist for a weapons system that is required to address site-specific concerns, both daylight and reduced lighting site-specific qualification or proficiency courses (as applicable) must be developed. After approval by the local officially designated Federal security authority, the developed courses will be submitted to the respective program office for review and approval.

(10) When qualification is prescribed, SPOs must be allowed two attempts to qualify with assigned firearms/weapons semiannually. A designated firearms instructor or other person in charge of the range will ensure the shooter understands that the attempt will be for qualification. Once this has been communicated by the firearms instructor or person in charge, the attempt will constitute an attempt to qualify or demonstrate proficiency. The SPO must qualify or demonstrate proficiency during one of these attempts.

(11) Upon suspension of an SPO's authority to carry firearms, the SPO must enter a standardized, remedial firearms/weapons training program developed by the respective site PF contractor firearms training staff. The remedial training program will be a combination of basic weapon manipulation skills, firearms safety, and an additional segment of time tailored to provide the SPO with the necessary individual training to afford a reasonable opportunity to meet the firearms/weapons qualification or proficiency standards.

(12) When qualification is required following the completion of the

remedial training course, any SPO who fails to qualify after two subsequent attempts must lose SPO status and the authority to carry firearms/weapons and to make arrests. When weapons-specific safety or proficiency cannot be demonstrated, the SPO must not be assigned to posts that require the operation of that weapon until such safety or proficiency standards can be met.

(13) Any SPO who requires remedial training on three consecutive semiannual qualification periods with the same type of firearm/weapon (caliber, make, and model, but not necessarily the exact same weapon) must be suspended from duties that require the issuance of that weapon. If the weapon is considered a primary duty weapon, *e.g.,* rifle or handgun, the contractor may, at its discretion, permanently remove that individual from SPO status based on recurring inability to maintain qualification status. Three consecutive recurrent remediations on specialty weapons shall result in permanent removal from duties that require those specific weapons. The contractor may consider reinstating an individual permanently removed from SPO status if the individual can demonstrate the ability to pass the current Department qualification course for that firearm with written validation from a certified firearms instructor. All such training and validation expenses are solely the responsibility of the SPO. If such an individual is reinstated, the contractor must provide all other training for returning protective force members according to the requirements of this part and as otherwise specified by DOE.

(14) An appropriate Department record must be maintained for each SPO who qualifies or who attempts to qualify or to demonstrate proficiency. Records will be retained for one year after separation of a PF member from SPO duties, unless a longer retention period is specified by other requirements. A supervisor or a training officer will be designated, in writing, as the individual authorized to certify the validity of the scores.

§ 1046.18 Access authorization.

PF personnel must have the access authorization for the highest level of classified matter to which they have access or SNM which they protect. The specific level of access authorization required for each duty assignment must be determined by the site security organization and approved by the local officially designated Federal security authority. At sites where access authorizations are not required, SPOs must have at least a background investigation based upon a national agency check with local agency and credit check (NACLC), with maximum duration between reinvestigations not to exceed 10 years. This background investigation must be favorably adjudicated by the applicable Departmental field element. Those SPOs who have access to Category I or Category II quantities of SNM with credible roll-up potential to Category I must have and maintain a DOE ''Q'' access authorization.

§ 1046.19 Medical and fitness for duty status reporting requirements.

(a) SPOs and SOs must report immediately to their supervisor that they have a known or suspected change in health status that might impair their capacity for duty. To protect their medical confidentiality, they are required only to identify that they need to see the Designated Physician. SOs and SPOs must provide to the Designated Physician detailed information on any known or suspected change in health status that might impair their capacity for duty or the safe and effective performance of assigned duties.

(b) SPOs and SOs must report to their supervisor and the Designated Physician for a determination of fitness for duty when prescription medication is started or a dosage is changed, to ensure that such medication or change in dosage does not alter the individual's ability to perform any of the essential functions of the job. SPOs and SOs must report to their supervisor and the Designated Physician for a determination of fitness for duty within 24 hours, and prior to assuming duty, after any medication capable of affecting the mind, emotions, and behavior is started, to ensure that such medication does not alter the individual's ability to perform any of the essential functions of the job. Where a written reasonable accommodation determination already has been made, any additional change to an SO's or SPO's health status affecting that accommodation must be reported to their supervisor and the Designated Physician for a determination of fitness for duty.

(c) Supervisory personnel must document and report to the Designated Physician any observed physical, behavioral, or health changes or deterioration in work performance in SPOs and SOs under their supervision.

(d)(1) PF management must inform the Designated Physician of all anticipated job transfers or recategorizations including:

(i) From SO to FPRS, BRS, ARS, or SRT Member;

(ii) From FPRS, to BRS, ARS or SRT Member;

(iii) From BRS to ARS to SRT Member;

(iv) From ARS to SRT Member;

(v) From SRT Member to ARS, BRS, FPRS or SO;

(vi) From ARS to BRS, FPRS, or SO;

(vii) From BRS to FPRS or SO;

(viii) From FPRS to SO; and

(ix) From PF to other assignments.

(2) For downward re-categorizations in paragraphs (d)(1)(v) through (ix) of this section, the anticipated transfer notification must include appropriate additional information such as the apparent inability of the employee to perform essential functions, meet physical readiness standards, or to serve without posing a direct threat to self or others.

(e) The Designated Physician must notify the PPMD to ensure appropriate medical review can be made regarding any recommended or required changes to the PF member's status.

§ 1046.20 Medical records maintenance requirements.

(a) The Designated Physician must maintain all medical information for each employee or applicant as a confidential medical record, with the exception of the psychological record. The psychological record is part of the medical record but must be stored separately, in a secure location in the custody of the evaluating psychologist. These records must be kept in accordance with DOE Privacy Act System of Records 33—Personnel Medical Records.

(b) Nothing in this part is intended to preclude access to these records according to the requirements of other parts of this or other titles. Medical records maintained under this section may not be released except as permitted or required by law.

(c) Medical records will be retained according to Paragraph 21.1, Department of Energy, Administrative Records Schedule 1: Personnel Records, September 2010, Revision 3 (*http://energy.gov/sites/prod/files/cioprod/documents/ADM_1%281%29.pdf*).

(d) When an individual has been examined by a Designated Physician, all available history and test results must be maintained by the Designated Physician under the supervision of the PPMD in the medical record, regardless of whether:

(1) The individual completes the examination;

(2) It is determined that the individual cannot engage in physical training or

testing and cannot perform the essential functions of the job; or

(3) It is determined that the individual poses a direct threat to self or others.

(e) The Designated Physician will provide written work restrictions to the affected SPO/SO and PF management. PF management must approve and implement site-specific plans to ensure confidentiality of PF medical information. This plan must permit access to only those with a need to know the information and must identify those individuals by organizational position or responsibility. The plan must adhere to all applicable laws and regulations, including but not limited to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Family and Medical Leave Act of 1993 (FMLA), and the ADA, as amended by the ADAAA.

§ 1046.21 Materials incorporated by reference.

(a) *General.* DOE incorporates by reference the following standards into part 1046. The material has been approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552a and 1 CFR part 51. Any subsequent amendment to a standard by the standard-setting organization will not affect the DOE regulations unless and until amended by DOE. Material will be incorporated as it exists on the date of the approval and a notice of any change to the material will be published in the **Federal Register**. All approved material will be available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* Also, this material will be available for inspection at U.S. Department of Energy, Office of Health, Safety and Security, 1000 Independence Ave. SW., Washington, DC 20585. Standards can be obtained from the sources below.

(b) *ANSI.* American National Standards Institute, 25 W. 43rd St., 4th Floor, New York, NY 10036, 212–642–4900, or go to *http://www.ansi.org.*

(1) ANSI/ASA S3.6–2010 (''ANSI S3.6''), American National Standard Specification for Audiometers, approved 2010; IBR approved for § 1046.13.

(2) [Reserved].

[FR Doc. 2012–5280 Filed 3–5–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0188; Directorate Identifier 2011–NM–120–AD]

RIN 2120–AA64

Airworthiness Directives; BAE SYSTEMS (Operations) Limited Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all BAE SYSTEMS (Operations) Limited Model 4101 airplanes. This proposed AD was prompted by reports of cracking found in the wing rear spar. This proposed AD would require a one-time detailed inspection for cracks, corrosion, and other defects of the rear face of the wing rear spar, and repair if necessary. We are proposing this AD to detect and correct cracking in the rear spar, which could propagate to a critical length, possibly affecting the structural integrity of the area and resulting in a fuel tank rupture, with consequent damage to the airplane and possible injury to its occupants.

DATES: We must receive comments on this proposed AD by April 20, 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 BAE SYSTEMS (Operations) Limited, Customer Information Department, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland, United Kingdom; telephone +44 1292 675207; fax +44 1292 675704; email *RApublications@baesystems.com;* Internet *http://www.baesystems.com/Businesses/RegionalAircraft/index.htm.* 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: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–1175; 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–2012–0188; Directorate Identifier 2011–NM–120–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

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2011–0096, dated May 25, 2011 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Four cracks were found on a wing rear spar by an operator during a fuel leak investigation. The cracks were located between ribs 6 and 7, immediately inboard of the inboard engine rib. The cracks initiated at adjacent fastener bores in the rear spar

upper boom and progressed downwards, diagonally, into the rear spar web.

Such cracking in the rear spar, if not detected and corrected, could propagate to a critical length, possibly affecting the structural integrity of the area and/or resulting in a fuel tank rupture, and consequent damage to the aeroplane and injury to its occupants.

For the reasons described above, this [EASA] AD requires a one-time [detailed] inspection [for cracks, corrosion, and other defects] of the rear face of the wing rear spar and the accomplishment of the associated corrective actions [i.e., repair], depending on findings.

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

Relevant Service Information

BAE SYSTEMS (Operations) Limited has issued Alert Service Bulletin J41–A57–029, dated May 6, 2011; and Subject 57–00–00, Wings General, of Chapter 57, Wings, of the Jetstream Series 4100 Structural Repair Manual, Volume 1, Revision 30, dated April 15, 2007. 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 3 products of U.S. registry. We also estimate that it would take about 25 work-hours per product to comply with the 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 $6,375, or $2,125 per product.

We have received no definitive data that would enable us to provide a cost estimates for the on-condition actions (repairing cracks, corrosion, and defects) specified in this AD.

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 that this AD:

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.

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:

BAE SYSTEMS (Operations) Limited: Docket No. FAA–2012–0188; Directorate Identifier 2011–NM–120–AD.

(a) Comments Due Date

We must receive comments by April 20, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to BAE SYSTEMS (Operations) Limited Model 4101 airplanes, certificated in any category, all models, and all serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 57: Wings.

(e) Reason

This AD was prompted by reports of cracking found in the wing rear spar. We are issuing this AD to detect and correct cracking in the rear spar, which could propagate to a critical length, possibly affecting the structural integrity of the area and resulting in a fuel tank rupture, with consequent damage to the airplane and possible injury to its occupants.

(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.

(g) Detailed Inspection and Repair

Within 300 flight hours after the effective date of this AD, or before further flight if a fuel leak is detected in the vicinity of a wing rear spar, whichever occurs first: Do a detailed inspection for cracks, corrosion, and other defects (defects include scratches, dents, holes, damage to fastener holes, or damage to surface protection and finish) of the rear face of the wing rear spars, in accordance with the Accomplishment Instructions of BAE SYSTEMS Alert Service Bulletin J41–A57–029, dated May 6, 2011.

(1) If any cracking, corrosion, or other defect is found to be within the criteria defined in Subject 57–00–00, Wings General, of Chapter 57, Wings, of the Jetstream Series 4100 Structural Repair Manual, Volume 1, Revision 30, dated April 15, 2007: Before further flight, repair the damage, in accordance with the repair instructions specified in Subject 57–00–00, Wings General, of Chapter 57, Wings, of the Jetstream Series 4100 Structural Repair Manual, Volume 1, Revision 30, dated April 15, 2007.

(2) If any cracking, corrosion, or other defect is found exceeding the criteria as specified in Subject 57–00–00, Wings General, of Chapter 57, Wings, of the Jetstream Series 4100 Structural Repair Manual, Volume 1, Revision 30, dated April 15, 2007: Before further flight, repair the condition, in accordance with a method approved by the Manager, International

Branch, ANM–116, Transport Airplane Directorate, FAA, or EASA (or its delegated agent).

(h) Reporting

Submit a report of the findings of the inspection required by paragraph (g) of this AD, including a report of no defects, to BAE SYSTEMS (Operations) Limited, Customer Information Department, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland, United Kingdom; telephone +44 1292 675207; fax+44 1292 675704; email *RApublications@baesystems.com;* Internet *http://www.baesystems.com/Businesses/RegionalAircraft/index.htm,* at the applicable time specified in paragraph (h)(1) or (h)(2) of this AD.

(1) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(2) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(i) 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: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–1175; 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.

(3) *Reporting Requirements:* A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(j) Related Information

Refer to MCAI EASA Airworthiness Directive 2011–0096, dated May 25, 2011, and the service information specified in paragraphs (k)(1) and (k)(2) of this AD; for related information.

(1) BAE SYSTEMS Alert Service Bulletin J41–A57–029, dated May 6, 2011.

(2) Subject 57–00–00, Wings General, of Chapter 57, Wings, of the Jetstream Series 4100 Structural Repair Manual, Volume 1, Revision 30, dated April 15, 2007.

Issued in Renton, Washington, on February 27, 2012.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–5379 Filed 3–5–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0189; Directorate Identifier 2011–NM–133–AD]

RIN 2120–AA64

Airworthiness Directives; BAE SYSTEMS (OPERATIONS) LIMITED Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain BAE SYSTEMS (OPERATIONS) LIMITED Model BAe 146 and Avro 146–RJ airplanes. This proposed AD was prompted by a report of a crack found on the left-hand sidewall well on the nose landing gear (NLG). This proposed AD would require performing a repetitive high frequency eddy current inspection of the stiffeners on the left-hand sidewall on the NLG gear bay for cracks, and repair or replace the sidewall if necessary. Replacing the sidewall with a certain sidewall part number constitutes a terminating action for the repetitive inspections. We are proposing this AD to detect and correct failure of the sidewall, which could result in consequent in-flight rapid decompression of the cabin and injury to the passengers.

DATES: We must receive comments on this proposed AD by April 20, 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 BAE SYSTEMS (OPERATIONS) LIMITED, Customer Information Department, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland, United Kingdom; telephone +44 1292 675207; fax +44 1292 675704; email *RApublications@baesystems.com;* Internet *http://www.baesystems.com/Businesses/RegionalAircraft/index.htm.* 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: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1175; 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–2012–0189; Directorate Identifier 2011–NM–133–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

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2011–0097, dated May 25, 2011 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> During accomplishment of EASA AD 2007–0305 on an Avro 146–RJ85, a corner crack was found on the left hand Nose Landing Gear (NLG) sidewall well. The crack was located on one of the sidewall stiffeners adjacent to the area being inspected. In this instance, the cracking was severe enough to warrant replacement of the sidewall. Analysis has shown that these types of cracks are likely to exist or develop in other aeroplanes of the same design.
>
> This condition, if not detected and corrected, could result in failure of the sidewall and consequent in-flight rapid decompression of the cabin and injury to its occupants.
>
> For the reasons described above, this [EASA] AD requires repetitive [high frequency eddy current] inspections of the stiffeners [for cracks] on the left hand NLG sidewall. This [EASA] AD also introduces an optional terminating action for the repetitive inspections.

The corrective actions include repairing or replacing the sidewall with a new sidewall. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

BAE SYSTEMS (OPERATIONS) LIMITED has issued Inspection Service Bulletin ISB.53–229, Revision 1, dated November 22, 2010. 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.

Differences Between This Proposed AD and the MCAI or Service Information

This proposed AD specifies not installing certain sidewalls after the installation of a new sidewall is done. This proposed AD does not allow installation of certain sidewalls as of the effective date of this proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 1 product of U.S. registry. We also estimate that it would take about 2 work-hours per product to comply with the 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 $170.

In addition, we estimate that any necessary follow-on actions would take about 2 work-hours and require parts costing $8,850, for a cost of $9,020 per product. We have no way of determining the number of products that may need these actions.

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.

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:

BAE SYSTEMS (OPERATIONS) LIMITED: Docket No. FAA–2012–0189; Directorate Identifier 2011–NM–133–AD.

(a) Comments Due Date

We must receive comments by April 20, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to BAE SYSTEMS (OPERATIONS) LIMITED Model BAe 146–100A, –200A, and –300A airplanes; and Model Avro 146–RJ70A, 146–RJ85A, and 146–RJ100A airplanes; certificated in any

category; all serial numbers; on which the left-hand sidewall of the nose landing gear (NLG) bay has one of the following part numbers installed: HC537L0002–000, –002, and –004, HC537H8021–000, –002, and –004, and HC537H8018–000.

(d) Subject

Air Transport Association (ATA) of America Code 53: Fuselage.

(e) Reason

This AD was prompted by a report of a crack found on the left-hand sidewall well on the NLG. We are issuing this AD to correct and detect failure of the sidewall, which could result in consequent in-flight rapid decompression of the cabin and injury to the passengers.

(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.

(g) Inspection

Before the accumulation of 12,000 total flight cycles or within 4,000 flight cycles after the effective date of this AD, whichever occurs later: Perform a high frequency eddy current inspection of the stiffeners on the left-hand sidewall on the NLG gear bay adjacent to the boss at the NLG retraction jack attachment pin hole, in accordance with the Accomplishment Instructions of BAE SYSTEMS (OPERATIONS) LIMITED Inspection Service Bulletin ISB.53–229, Revision 1, dated November 22, 2010. Repeat the inspection thereafter at intervals not to exceed 12,000 flight cycles, except as provided in paragraph (i) of this AD.

(h) Repair

If, during any inspection required by paragraph (g) of this AD, any crack is found in the sidewall stiffeners, before further flight repair the sidewall stiffeners, using a method approved by either the Manager, International Branch, ANM 116, Transport Airplane Directorate, FAA; or the EASA (or its delegated agent); or do the replacement specified in paragraph (i) of this AD.

(i) Optional Replacement

Replacement of the sidewall stiffeners, with sidewall P/N HC537L0002–006, on any airplane, in accordance with the Accomplishment Instructions of BAE SYSTEMS (OPERATIONS) LIMITED Inspection Service Bulletin ISB.53–229, Revision 1, dated November 22, 2010, terminates the repetitive inspections required by paragraph (g) of this AD.

(j) Parts Installation

As of the effective date of this AD: No person may install a sidewall stiffener with P/N HC537L0002–000, –002, or –004, HC537H8021–000, –002, or –004, or HC537H8018–000, on any airplane.

(k) Credit for Previous Actions

This paragraph provides credit for inspections and replacements, as specified in paragraphs (g) and (i) of this AD, if those actions were performed before the effective date of this AD using BAE SYSTEMS (OPERATIONS) LIMITED Inspection Service Bulletin ISB.53–229, dated July 8, 2010.

(l) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, 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: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1175; 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.

(m) Related Information

Refer to MCAI EASA Airworthiness Directive 2011–0097, dated May 25, 2011; and BAE SYSTEMS (OPERATIONS) LIMITED Inspection Service Bulletin ISB.53–229, Revision 1, dated November 22, 2010; for related information.

Issued in Renton, Washington, on February 27, 2012.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–5380 Filed 3–5–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 172

[Docket No. FDA–2012–F–0138]

Abbott Laboratories; Filing of Food Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of petition.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Abbott Laboratories has filed a petition proposing that the food additive regulations be amended to provide for the expanded safe use of vitamin D_3 as a nutrient supplement in food.

FOR FURTHER INFORMATION CONTACT: Judith Kidwell, Center for Food Safety and Applied Nutrition (HFS–265), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740–3835, 240–402–1071.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (section 409(b)(5) (21 U.S.C. 348(b)(5))), notice is given that a food additive petition (FAP 2A4788) has been filed by Abbott Laboratories, 3300 Stelzer Rd., Columbus, OH 43219. The petition proposes to amend § 172.380 (21 CFR 172.380) to provide for the safe use of vitamin D_3 as a nutrient supplement in meal replacement beverages and meal replacement bars that are not intended for special dietary use in reducing or maintaining body weight and for use in foods that are sole sources of nutrition for enteral tube feeding.

The Agency has determined under 21 CFR 25.32(k) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Dated: February 29, 2012.

Dennis M. Keefe,

Director, Office of Food Additive Safety, Center for Food Safety and Applied Nutrition.

[FR Doc. 2012–5314 Filed 3–5–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2012–0052]

RIN 1625–AA87

Security Zones; G8/North Atlantic Treaty Organization (NATO) Summit, Chicago, IL

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish four separate security zones on both the waters and waterfront area of Chicago Harbor and the Chicago River. These proposed temporary security zones are intended to restrict vessels, regardless of the mode of propulsion, and people from certain land and water

areas in Chicago Harbor and the Chicago River during the G8/NATO Summit and associated events, which will be held in Chicago from May 16, 2012, through May 24, 2012. These security zones are necessary to protect visiting government officials and dignitaries from the potential dangers, including terrorists threats, associated with a large scale, international political event.

DATES: Comments and related materials must be received by the Coast Guard on or before April 5, 2012.

ADDRESSES: You may submit comments identified by docket number USCG–2012–0052 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 temporary rule, call or email CWO Jon Grob, Prevention Department, Coast Guard Sector Lake Michigan, Milwaukee, WI at (414) 747–7188, email at *Jon.K.Grob@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–2012–0052), 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–2012–0052'' 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–2012–0052'' 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 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**.

Background and Purpose

Leaders from around the world will gather in Chicago this spring for two diplomatic summits hosted by President Obama. Specifically, the G8 and NATO will hold summits and certain associated events in Chicago from May 16, 2012, through May 24, 2012. G8 (Group of Eight) was founded in 1975. The G8 is a group of eight countries that has served in recent years as a forum for the leaders of the world's largest markets to discuss critical issues of the day ranging from the global economy to pressing security challenges. Meanwhile, NATO was founded in 1949 and includes the United States and twenty seven other countries. Today, NATO is the hub of an international global security network.

Considering the international, economical, and political objectives of G8 and NATO along with the high concentration of dignitaries and political figures, the G8/NATO Summit is expected to draw significant domestic and international media interest and also attract a large number of protesters. Consequently, the Captain of the Port, Sector Lake Michigan (COTP), has determined that the implementation of four separate security zones is necessary to mitigate the threat of violence and ensure the safety and security of those who attend, participate, and visit the G8/NATO Summit and any associated events.

Discussion of Proposed Rule

To alleviate the safety and security concerns presented by the international, economical, and political implications of G8 and NATO; the high concentration of dignitaries and political figures; the expected interest of domestic and international media; and the anticipated presence of protesters; the Captain of the Port, Sector Lake Michigan, has

determined that it is necessary to establish four separately enforceable security zones. These zones will allow for the closure of four specific areas on and around the waterfront along both Chicago Harbor and the Chicago River.

The four proposed temporary security zones will encompass:

(1) Security Zone A—This zone will encompass all U.S. navigable waters, facilities, and shoreline within the arc of a circle with a 2000-yard radius of the Burnham park hoist ramp with its center point located in the approximate position 41°51′37″ N, 087°36′44″ W. [DATUM: NAD 83].

(2) Security Zone B—This zone will encompass all U.S. navigable waters, facilities, and shoreline within the arc of a circle with a 2000-yard radius of the outermost tip of the Chicago lock with its center point located in the approximate position 41°53′19″ N, 087°36′17″ W. [DATUM: NAD 83].

(3) Security Zone C—This zone will encompass all U.S. navigable waters of the Chicago River between the Western Gate of the Chicago Controlling Works Lock which is located in approximate position 41°53′18″ N, 087°36′28″ W. [DATUM: NAD 83] and the juncture of the north and south branches of the Chicago River which is located in approximate position 41°53′11″ N, 087°38′15″ W. [DATUM: NAD 83]

(4) Security Zone D—This zone will encompass all U.S. navigable waters of the Chicago River between Mile Marker 322.0, which is in the vicinity of the Loomis Street coal storage terminal slip, and Mile Marker 326.4, which is in the vicinity of the Chicago Tribune Wharf. [DATUM: NAD 83]

These proposed security zones would be effective and enforced between 8 a.m. on May 16, 2012, and 8 a.m. on May 24, 2012.

In accordance with 33 CFR 165.33, no person or vessel, regardless of the mode of propulsion, may enter or remain in any one of the security zones established in this proposed rule without first obtaining permission from the Captain of the Port Sector Lake Michigan. The Captain of the Port Sector Lake Michigan, at his or her discretion, may permit persons and vessels to enter the security zones addressed in this proposed rule.

Regulatory Analyses

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

Regulatory Planning and Review

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS). We conclude that this proposed 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. Each security zone has been designed to allow as much free transit of vessels as possible while also preserving the security of the G8/NATO Summit. Thus, vessels may still transit portions of the affected waterways not implicated by the proposed security zones. Also, under certain conditions, vessels may still transit through a security zone when permitted by the Captain of the Port, Sector Lake Michigan. Moreover, the COTP retains the discretion to suspend enforcement of any or all of these proposed security zones when he deems necessary. On the whole, the Coast Guard expects insignificant adverse impact to mariners from the activation of these security zones.

Small Entities

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

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

This proposed rule would affect the following entities, some of which might be small entities: the owners and operators of vessels, regardless of the mode of propulsion, intending to transit or anchor in the security zones established in this proposed rule. These security zones would not have a significant economic impact on a substantial number of small entities for the same reasons discussed above in the Regulatory Planning and Review section.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed 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 this proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the Waterways Management Department, Coast Guard Marine Safety Unit Chicago, Willowbrook, IL at (630) 986–2155. The Coast Guard will not retaliate against small entities that question or object to this rule or any policy or action of the Coast Guard.

Collection of Information

This proposed 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 proposed temporary 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 temporary rule would not result in such an expenditure, we do discuss the effects of this proposed temporary rule elsewhere in this preamble.

Taking of Private Property

This proposed temporary rule will not affect the 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 temporary 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 temporary rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This proposed temporary 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 proposed temporary 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 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 temporary rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed temporary rule under Commandant Instruction M16475.lD and Department of Homeland Security Management Directive 5100.1, 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. This proposed temporary rule involves the establishing of security zones and therefore, is categorically excluded under paragraph 34(g) of the Instruction. A preliminary environmental analysis check list supporting this preliminary 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 temporary rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine security, 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.T09–0052 to read as follows:

§ 165.T09–0052 Security Zones; G8/North Atlantic Treaty Organization (NATO) Summit, Chicago, Illinois.

(a) *Locations.* The following areas are designated security zones:

(1) Security Zone A—Security Zone A encompasses all U.S. navigable waters, facilities, and shoreline within the arc of a circle with a 2000-yard radius of the Burnham park hoist ramp with its center point located in the approximate position 41°51′37″ N, 087°36′44″ W. [DATUM: NAD 83].

(2) Security Zone B—Security Zone B encompasses all U.S. navigable waters, facilities, and shoreline within the arc of a circle with a 2000-yard radius of the outermost tip of the Chicago lock with its center point located in the approximate position 41°53′19″ N, 087°36′17″ W. [DATUM: NAD 83].

(3) Security Zone C—Security Zone C encompasses all U.S. navigable waters of the Chicago River between the Western Gate of the Chicago Controlling Works Lock which is located in approximate position 41°53′18″ N, 087°36′28″ W. [DATUM: NAD 83] and the juncture of the north and south branches of the Chicago River which is located in approximate position 41°53′11″ N, 087°38′15″ W. [DATUM: NAD 83]

(4) Security Zone D—This zone will encompass all U.S. navigable waters of the Chicago River between Mile Marker 322.0, which is in the vicinity of the Loomis Street coal storage terminal slip, and Mile Marker 326.4, which is in the vicinity of the Chicago Tribune Wharf. [DATUM: NAD 83]

(b) *Enforcement period.* The security zones described in paragraph (a) of this section will be effective and enforced between 8 a.m. on May 16, 2012, and 8 a.m. on May 24, 2012.

(c) *Regulations.* (1) In accordance with § 165.33, entry into any area of these security zones is prohibited unless authorized by the Coast Guard Captain of the Port, Sector Lake Michigan, or his or her on-scene designated representative.

(2) 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.

(3) Vessel operators desiring to enter or operate within any of the security zones shall contact the Captain of the Port, Sector Lake Michigan, or his or her on-scene designated representative to obtain permission to do so. The Captain of the Port, Sector Lake Michigan, or his or her on-scene designated representative may be contacted via VHF Channel 16.

(4) Vessel operators given permission to enter or operate in any of the security zones shall comply with all directions given by the Captain of the Port, Sector

Lake Michigan, or his or her on-scene designated representative.

Dated: February 3, 2012.

M.W. Sibley,

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

[FR Doc. 2012–5330 Filed 3–5–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AO27

Exempting In-Home Video Telehealth From Copayments

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) is proposing to amend its regulation that governs VA services that are not subject to copayment requirements for inpatient hospital care or outpatient medical care. Specifically, the regulation would be amended to exempt in-home video telehealth care from having any required copayment. This would remove a barrier that may have previously discouraged veterans from choosing to use in-home video telehealth as a viable medical care option. In turn, VA hopes to make the home a preferred place of care, whenever medically appropriate and possible.

DATES: Written comments must be received on or before April 5, 2012.

ADDRESSES: Written comments may be submitted through *www.Regulations.gov;* by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave. NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to ''RIN 2900–AO27]— Exempting In-home Video Telehealth from Copayments.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment (this is not a toll-free number). In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Kristin J. Cunningham, Director Business Policy, Chief Business Office, Department of Veterans Affairs, 810 Vermont Ave. NW., Washington, DC 20420; (202) 461–1599. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Many of our nation's veterans must travel great distances in order to obtain health care at a VA hospital or medical center. To improve veterans' access to VA health care, VA established community-based outpatient clinics (CBOCs) located in local communities. VA has continued its efforts to improve veterans' access to VA medical care by establishing ''telehealth'' services. Telehealth allows VA to provide certain medical care without requiring the veteran to be physically present with the examining or treating medical professional. Telehealth helps ensure that veterans are able to get their care in a timely and convenient manner, by reducing burdens on the patient as well as appropriately reducing the utilization of VA resources without sacrificing the quality of care provided. The benefits of using this technology include increased access to specialist consultations, improved access to primary and ambulatory care, reduced waiting times, and decreased veteran travel.

VA provides various telehealth services, including clinical video telehealth and in-home video telehealth care. Clinical video telehealth, as the name implies, occurs between two clinical settings, such as two VA Medical Centers (VAMCs), a VAMC and a CBOC, or two CBOCs. Clinical video telehealth may also connect patient and provider between VAMCs and VA Centers of Specialized Care, such as those established for Spinal Cord Injury (SCI), Traumatic Brain Injury (TBI) and Multiple Sclerosis (MS). Clinical video telehealth uses real-time interactive video conferencing, sometimes with supportive peripheral devices, such as a camera to closely examine skin. This allows a specialist located in another facility to assess and treat a veteran by providing care remotely.

Like clinical video telehealth, in-home video telehealth care is used to connect a veteran to a VA health care professional using real-time videoconferencing, and other equipment as necessary, as a means to replicate aspects of face-to-face assessment and care delivery that do not require the health care professional to make an examination requiring physical contact. However, in-home video telehealth care is provided in a veteran's home, eliminating the need for the veteran to travel to a clinical setting. Using telehealth capabilities, a VA clinician can assess elements of a patient's care, such as wound management, psychiatric or psychotherapeutic care, exercise plans, and medication management. The clinician may also monitor patient self-care by reviewing vital signs and evaluating the patient's appearance on video.

Prior to this proposed rulemaking, veterans have been required to pay a copayment for in-home video telehealth care. We believe that VA has authority by statute to discontinue charging copayments for these services.

Section 1710(g)(1) of 38 U.S.C. states:

> The Secretary may not furnish medical services (except if such care constitutes hospice care) under subsection (a) of this section (including home health services under section 1717 of this title) to a veteran who is eligible for hospital care under this chapter by reason of subsection (a)(3) of this section unless the veteran agrees to pay to the United States in the case of each outpatient visit the applicable amount or amounts established by the Secretary by regulation.

VA has interpreted section 1710(g)(1) to mean that VA has the discretion to establish the applicable copayment amount in regulation, even if such amount is zero. One such implementing regulation is 38 CFR 17.108.

Generally, VA calculates the amount of a copayment based on the complexity of care provided and the resources needed to provide that care. In addition, VA may exempt certain care from the copayment requirement in an effort to make health care more accessible to veterans, or to encourage veterans to become more actively involved in their medical care, and thereby improve health care outcomes (which, in turn, lowers overall health care costs). VA proposes to make in-home video telehealth care exempt from copayments because it is not used to provide complex care and its use significantly reduces impact on VA resources compared to an in-person, outpatient visit. It also reduces any potential negative impact on the veteran's health that might be incurred if the veteran were required to travel to a VA hospital or medical center to obtain the care that would be provided via in-home video telehealth. VA also wants to encourage veterans to use the in-home video telehealth care option when their provider finds it appropriate because we believe that it would help ensure that veterans comply with outpatient treatment plans by regularly following up with physicians and medical professionals, taking medication in appropriate doses on a regular basis, and generally being more engaged with their VA health care providers.

As previously stated in this rulemaking, in-home video telehealth allows a VA clinician to assess the elements of a veteran's care, while the veteran remains at home. Conversely, clinical video telehealth assess the veteran's medical condition in a clinical setting using resources and technology that allows a medical specialist, who may be hundreds of miles away, to interact with the veteran and provide the level of care needed to treat the medical condition. VA would not exempt clinical video telehealth services from the copayment requirement because the type of care a veteran receives in clinical video telehealth requires not just the use of CBOC's technological resources, but also patient interaction between the attending physician that may be hundreds of miles away, and the medical staff in the CBOC. The attending medical staff in the CBOC follows the attending physician's instructions in the placement of the adapted equipment that is used in clinical video telehealth in order to assess the veteran's medical condition, to include the set up of the conference, use of the teleconference room, etc. All of these additional services provide a veteran a higher level of care than the level of care that the veteran receives through in-home video telehealth.

Paragraph (e) of § 17.108 contains a list of services that are not subject to copayment requirements for inpatient hospital care or outpatient medical care.

Based on the rationale set forth in this preamble, VA proposes to amend § 17.108(e) by adding a new paragraph (e)(16) to include in-home video telehealth care as exempt from copayment requirements.

Administrative Procedure Act

Concurrent with this proposed rule, we also are publishing a separate, substantively identical direct final rule in the ''Rules and Regulations'' section of this **Federal Register**. The simultaneous publication of these documents will speed notice and comment rulemaking under section 553 of the Administrative Procedure Act should we have to withdraw the direct final rule due to receipt of significant adverse comments.

For purposes of the direct final rulemaking, a significant adverse comment is one that explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or why it would be ineffective or unacceptable without change. If significant adverse comments are received, VA will publish a notice of receipt of significant adverse comments in the **Federal Register** withdrawing the direct final rule.

Under direct final rule procedures, unless significant adverse comments are received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, VA will publish a document in the **Federal Register** indicating that no adverse comments were received and confirming the date on which the final rule will become effective. VA will also publish a notice withdrawing this proposed rule.

In the event the direct final rule is withdrawn because of significant adverse comments, VA can proceed with the rulemaking by addressing the comments received and publishing a final rule. The comment period for the proposed rule runs concurrently with that of the direct final rule. Any comments received under the direct final rule will be treated as comments regarding the proposed rule. VA will consider such comments in developing a subsequent final rule. Likewise, significant adverse comments submitted to the proposed rule will be considered as comments regarding the direct final rule.

Effect of Rulemaking

The Code of Federal Regulations, as proposed to be revised by this proposed rulemaking, would represent the exclusive legal authority on this subject. No contrary rules or procedures would be authorized. All VA guidance would be read to conform with this rulemaking if possible or, if not possible, such guidance would be superseded by this rulemaking.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

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

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action,'' which requires review by the Office of Management and Budget (OMB), as ''any regulatory action 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 this Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

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

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program number and title for this proposed rule are as follows: 64.007 Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.014,

Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; and 64.022, Veterans Home Based Primary Care.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on February 28, 2012, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Health care, Health facilities, Mental health programs, Nursing homes, Veterans.

Dated: March 1, 2012.

Robert C. McFetridge,

Director, Office of Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons set forth in the preamble, we propose to amend 38 CFR part 17 as follows:

PART 17—MEDICAL

1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

2. Amend § 17.108 by adding paragraph (e)(16) to read as follows:

§ 17.108 Copayments for inpatient hospital care and outpatient medical care.

* * * * *

(e) * * *

(16) In-home video telehealth care.

* * * * *

[FR Doc. 2012–5355 Filed 3–5–12; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2012–0112, FRL–9643–5]

Partial Approval and Promulgation of Implementation Plans; Washington: Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to partially approve the State Implementation Plan (SIP) submittal from the Washington State Department of Ecology (Ecology) to demonstrate that the SIP meets the requirements of section 110(a)(1) and (2) of the Clean Air Act (CAA) for the National Ambient Air Quality Standards (NAAQS) promulgated for ozone on July 18, 1997. EPA is proposing to find that the current Washington SIP meets the following 110(a)(2) infrastructure elements for the 1997 8-hour ozone NAAQS: (A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M), except for portions related to the major source Prevention of Significant Deterioration (PSD) permitting program which is implemented under a Federal Implementation Plan.

DATES: Comments must be received on or before April 5, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R10–OAR–2012–0112, by any of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: R10-Public_Comments@epa.gov.*
- *Mail:* Jeff Hunt, EPA Region 10, Office of Air, Waste and Toxics (AWT–107), 1200 Sixth Avenue, Suite 900, Seattle, WA 98101.
- *Hand Delivery/Courier:* EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101. Attention: Jeff Hunt, Office of Air, Waste and Toxics, AWT–107. Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R10–OAR–2012–0112 EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *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 *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.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Office of Air, Waste and Toxics, EPA Region 10, 1200 Sixth Avenue, Seattle, WA 98101.

FOR FURTHER INFORMATION CONTACT: Jeff Hunt at telephone number: (206) 553–0256, email address: *hunt.jeff@epa.gov*, or the above EPA, Region 10 address.

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we'', ''us'' or ''our'' are used, we mean EPA. Information is organized as follows:

Table of Contents

I. What action is EPA proposing?
II. What is the background for the action that EPA is proposing?
III. What infrastructure elements are required under sections 110(a)(1) and (2)?
IV. What is the scope of action on infrastructure submittals?
V. What is EPA's analysis of Washington's submittal?
VI. Scope of Proposed Action
VII. Proposed Action
VIII. Washington Notice Provision
IX. Statutory and Executive Order Reviews

I. What action is EPA proposing?

EPA is proposing to partially approve the State Implementation Plan (SIP) submittal from the State of Washington to demonstrate that the SIP meets the requirements of section 110(a)(1) and (2) of the Clean Air Act (CAA) for the National Ambient Air Quality Standards (NAAQS) promulgated for ozone on July 18, 1997. EPA is proposing to find that the current Washington SIP, as codified at 40 CFR Part 52 Subpart WW meets

the following 110(a)(2) infrastructure elements for the 1997 8-hour ozone NAAQS: (A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M), except for those infrastructure requirements which relate to regulations for preventing significant deterioration (PSD) of air quality, as explained in this Notice. PSD permits are implemented in Washington under a Federal Implementation Plan as specified at 40 CFR 52.2497.

Section 110(a)(1) of the CAA requires that each state, after a new or revised NAAQS is promulgated, review their SIPs to ensure that they meet the requirements of the ''infrastructure'' elements of section 110(a)(2). The State of Washington submitted a certification to EPA dated January 24, 2012, certifying that Washington's SIP meets the infrastructure obligations for the 1997 8-hour ozone NAAQS. The certification included an analysis of Washington's SIP as it relates to each section of the infrastructure requirements with regard to the 1997 8-hour ozone NAAQS. This action does not address the requirements of 110(a)(2)(D)(i) for the 1997 8-hour ozone NAAQS which were previously addressed and approved by EPA on January 13, 2009 (74 FR 1501).

II. What is the background for the action that EPA is proposing?

On July 18, 1997, EPA promulgated a new NAAQS for ozone. EPA revised the ozone NAAQS to provide an 8-hour averaging period which replaced the previous 1-hour averaging period, and the level of the NAAQS was changed from 0.12 parts per million (ppm) to 0.08 ppm (62 FR 38856).

The CAA requires SIPs meeting the requirements of sections 110(a)(1) and (2) be submitted by states within 3 years after promulgation of a new or revised standard. Sections 110(a)(1) and (2) require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the standards, so-called ''infrastructure'' requirements. States were required to submit such SIPs for the 1997 8-hour ozone NAAQS to EPA no later than June 2000. However, intervening litigation over the 1997 8-hour ozone standard created uncertainty about how to proceed, and many states did not provide the required infrastructure SIP submissions for the newly promulgated standard.

To help states meet this statutory requirement for the 1997 8-hour ozone NAAQS, EPA issued guidance to address infrastructure SIP elements under section 110(a)(1) and (2).[1] The 2007 Guidance provides that, to the extent an existing SIP already meets the section 110(a)(2) requirements, states need only to certify that fact via a letter to EPA. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions the state's federally approved SIP already contains. In the case of the 1997 8-hour ozone NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous ozone standards.

III. What infrastructure elements are required under sections 110(a)(1) and (2)?

Section 110(a)(1) provides the procedural and timing requirements for SIP submissions after a new or revised NAAQS is promulgated. Section 110(a)(2) lists specific elements that states must meet for ''infrastructure'' SIP requirements related to a newly established or revised NAAQS. These requirements include SIP infrastructure elements such as modeling, monitoring, and emissions inventories that are designed to assure attainment and maintenance of the NAAQS. The requirements, with their corresponding CAA subsection, are listed below:

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.
- 110(a)(2)(D): Interstate transport.
- 110(a)(2)(E): Adequate resources.
- 110(a)(2)(F): Stationary source monitoring system.
- 110(a)(2)(G): Emergency power.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(I): Areas designated nonattainment and meet the applicable requirements of part D.
- 110(a)(2)(J): Consultation with government officials; public notification; and Prevention of Significant Deterioration (PSD) and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.
- 110(a)(2)(M): Consultation/participation by affected local entities.

EPA's 2007 Guidance clarified that two elements identified in section 110(a)(2) are not governed by the 3 year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within 3 years after promulgation of a new or revised NAAQS, but rather due at the time the nonattainment area plan requirements are due pursuant to CAA section 172. These requirements are: (i) Submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D Title I of the CAA, and (ii) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. As a result, this action does not address infrastructure elements related to section 110(a)(2)(C) with respect to nonattainment new source review (NSR) or 110(a)(2)(I). This action also does not address the requirements of 110(a)(2)(D)(i) for the 1997 8-hour ozone NAAQS which EPA previously found to be adequate on January 13, 2009 (74 FR 1501). Furthermore, EPA interprets the section 110(a)(2)(J) provision on visibility as not being triggered by a new NAAQS because the visibility requirements in part C are not changed by a new NAAQS.

EPA is proposing to disapprove Washington's SIP for those infrastructure elements discussed herein which relate to the major source PSD regulation. Washington's SIP does not currently include EPA-approved provisions for PSD regulation. Instead PSD regulations are implemented by means of a FIP in Washington which incorporates the requirements of 40 CFR 52.21. *See* 40 CFR 52.2497. To the extent that Washington's SIP does not include federally-approvable or approved PSD regulations, Washington's SIP must be disapproved for those infrastructure elements which relate to PSD regulation. However, because these major source PSD regulations are implemented in the state by means of the FIP, neither Washington nor EPA have additional SIP or FIP obligations arising out of this proposed disapproval.

[1] William T. Harnett, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards. ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards.'' Memorandum to EPA Air Division Directors, Regions I–X, October 2, 2007 (The ''2007 Guidance'').

IV. What is the scope of action on infrastructure submittals?

EPA is currently acting upon SIPs that address the infrastructure requirements of CAA section 110(a)(1) and (2) for ozone and $PM_{2.5}$ NAAQS for various states across the country. Commenters on EPA's recent proposals for some states raised concerns about EPA statements that it was not addressing certain substantive issues in the context of acting on those infrastructure SIP submissions.[2] The commenters specifically raised concerns involving provisions in existing SIPs and with EPA's statements in other proposals that it would address two issues separately and not as part of actions on the infrastructure SIP submissions: (i) Existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction at sources, that may be contrary to the CAA and EPA's policies addressing such excess emissions (''SSM''); and (ii) existing provisions related to ''director's variance'' or ''director's discretion'' that purport to permit revisions to SIP approved emissions limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA (''director's discretion''). EPA notes that there are two other substantive issues for which EPA likewise stated in other proposals that it would address the issues separately: (i) Existing provisions for minor source new source review programs that may be inconsistent with the requirements of the CAA and EPA's regulations that pertain to such programs (''minor source NSR''); and (ii) existing provisions for PSD programs that may be inconsistent with current requirements of EPA's ''Final NSR Improvement Rule,'' 67 FR 80,186 (December 31, 2002), as amended by 72 FR 32,526 (June 13, 2007) (''NSR Reform''). In light of the comments, EPA believes that its statements in various proposed actions on infrastructure SIPs with respect to these four individual issues should be explained in greater depth. It is important to emphasize that EPA is taking the same position with respect to these four substantive issues in this action on the infrastructure SIP for the 1997 8-hour ozone NAAQS submittal from Washington.[3]

EPA intended the statements in the other proposals concerning these four issues merely to be informational, and to provide general notice of the potential existence of provisions within the existing SIPs of some states that might require future corrective action. EPA did not want states, regulated entities, or members of the public to be under the misconception that the Agency's approval of the infrastructure SIP submission of a given state should be interpreted as a reapproval of certain types of provisions that might exist buried in the larger existing SIP for such state. Thus, for example, EPA explicitly noted that the Agency believes that some states may have existing SIP approved SSM provisions that are contrary to the CAA and EPA policy, but that ''in this rulemaking, EPA is not proposing to approve or disapprove any existing State provisions with regard to excess emissions during SSM of operations at facilities.'' EPA further explained, for informational purposes, that ''EPA plans to address such State regulations in the future.'' EPA made similar statements, for similar reasons, with respect to the director's discretion, minor source NSR, and NSR Reform issues. EPA's objective was to make clear that approval of an infrastructure SIP for these ozone and $PM_{2.5}$ NAAQS should not be construed as explicit or implicit reapproval of any existing provisions that relate to these four substantive issues. EPA is reiterating that position in this action on the 1997 8-hour ozone infrastructure SIP for Washington.

Unfortunately, the commenters and others evidently interpreted these statements to mean that EPA considered action upon the SSM provisions and the other three substantive issues to be integral parts of acting on an infrastructure SIP submission, and therefore that EPA was merely postponing taking final action on the issues in the context of the infrastructure SIPs. This was not EPA's intention. To the contrary, EPA only meant to convey its awareness of the potential for certain types of deficiencies in existing SIPs, and to prevent any misunderstanding that it was reapproving any such existing provisions. EPA's intention was to convey its position that the statute does not require that infrastructure SIPs address these specific substantive issues in existing SIPs and that these issues may be dealt with separately, outside the context of acting on the infrastructure SIP submission of a state. To be clear, EPA did not mean to imply that it was not taking a full final agency action on the infrastructure SIP submission with respect to any substantive issue that EPA considers to be a required part of acting on such submissions under section 110(k) or under section 110(c). Given the confusion evidently resulting from EPA's statements in those other proposals, however, we want to explain more fully the Agency's reasons for concluding that these four potential substantive issues in existing SIPs may be addressed separately from actions on infrastructure SIP submissions.

The requirement for the SIP submissions at issue arises out of CAA section 110(a)(1). That provision requires that states must make a SIP submission ''within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof)'' and that these SIPS are to provide for the ''implementation, maintenance, and enforcement'' of such NAAQS. Section 110(a)(2) includes a list of specific elements that ''[e]ach such plan'' submission must meet. EPA has historically referred to these particular submissions that states must make after the promulgation of a new or revised NAAQS as ''infrastructure SIPs.'' This specific term does not appear in the statute, but EPA uses the term to distinguish this particular type of SIP submission designed to address basic structural requirements of a SIP from other types of SIP submissions designed to address other different requirements, such as ''nonattainment SIP'' submissions required to address the nonattainment planning requirements of part D, ''regional haze SIP'' submissions required to address the visibility protection requirements of CAA section 169A, new source review permitting program submissions required to address the requirements of part D, and a host of other specific types of SIP submissions that address other specific matters.

Although section 110(a)(1) addresses the timing and general requirements for these infrastructure SIPs, and section 110(a)(2) provides more details concerning the required contents of these infrastructure SIPs, EPA believes that many of the specific statutory provisions are facially ambiguous. In particular, the list of required elements provided in section 110(a)(2) contains a

[2] See, Comments of Midwest Environmental Defense Center, dated May 31, 2011. Docket # EPA–R05–OAR–2007–1179 (adverse comments on proposals for three states in Region 5). EPA notes that these public comments on another proposal are not relevant to this rulemaking and do not have to be directly addressed in this rulemaking. EPA will respond to these comments in the appropriate rulemaking action to which they apply.

[3] As noted earlier, EPA is proposing to disapprove Washington's SIP for those elements of CAA Section 110(a)(2) infrastructure requirements that require adequate PSD regulations as part of the approved SIP because the PSD program is implemented in Washington by means of a FIP.

wide variety of disparate provisions, some of which pertain to required legal authority, some of which pertain to required substantive provisions, and some of which pertain to requirements for both authority and substantive provisions.[4] Some of the elements of section 110(a)(2) are relatively straightforward, but others clearly require interpretation by EPA through rulemaking, or recommendations through guidance, in order to give specific meaning for a particular NAAQS.[5]

Notwithstanding that section 110(a)(2) provides that ''each'' SIP submission must meet the list of requirements therein, EPA has long noted that this literal reading of the statute is internally inconsistent, insofar as section 110(a)(2)(I) pertains to nonattainment SIP requirements that could not be met on the schedule provided for these SIP submissions in section 110(a)(1).[6] This illustrates that EPA must determine which provisions of section 110(a)(2) may be applicable for a given infrastructure SIP submission. Similarly, EPA has previously decided that it could take action on different parts of the larger, general ''infrastructure SIP'' for a given NAAQS without concurrent action on all subsections, such as section 110(a)(2)(D)(i), because the Agency bifurcated the action on these latter ''interstate transport'' provisions within section 110(a)(2) and worked with states to address each of the four prongs of section 110(a)(2)(D)(i) with substantive administrative actions proceeding on different tracks with different schedules.[7] This illustrates that EPA may conclude that subdividing the applicable requirements of section 110(a)(2) into separate SIP actions may sometimes be appropriate for a given NAAQS where a specific substantive action is necessitated, beyond a mere submission addressing basic structural aspects of the state's SIP. Finally, EPA notes that not every element of section 110(a)(2) would be relevant, or as relevant, or relevant in the same way, for each new or revised NAAQS and the attendant infrastructure SIP submission for that NAAQS. For example, the monitoring requirements that might be necessary for purposes of section 110(a)(2)(B) for one NAAQS could be very different than what might be necessary for a different pollutant. Thus, the content of an infrastructure SIP submission to meet this element from a state might be very different for an entirely new NAAQS, versus a minor revision to an existing NAAQS.[8]

Similarly, EPA notes that other types of SIP submissions required under the statute also must meet the requirements of section 110(a)(2), and this also demonstrates the need to identify the applicable elements for other SIP submissions. For example, nonattainment SIPs required by part D likewise have to meet the relevant subsections of section 110(a)(2) such as section 110(a)(2)(A) or (E). By contrast, it is clear that nonattainment SIPs would not need to meet the portion of section 110(a)(2)(C) that pertains to part C, *i.e.,* the PSD requirements applicable in attainment areas. Nonattainment SIPs required by part D also would not need to address the requirements of section 110(a)(2)(G) with respect to emergency episodes, as such requirements would not be limited to nonattainment areas. As this example illustrates, each type of SIP submission may implicate some subsections of section 110(a)(2) and not others.

Given the potential for ambiguity of the statutory language of section 110(a)(1) and (2), EPA believes that it is appropriate for EPA to interpret that language in the context of acting on the infrastructure SIPs for a given NAAQS. Because of the inherent ambiguity of the list of requirements in section 110(a)(2), EPA has adopted an approach in which it reviews infrastructure SIPs against this list of elements ''as applicable.'' In other words, EPA assumes that Congress could not have intended that each and every SIP submission, regardless of the purpose of the submission or the NAAQS in question, would meet each of the requirements, or meet each of them in the same way. EPA elected to use guidance to make recommendations for infrastructure SIPs for these ozone and $PM_{2.5}$ NAAQS.

On October 2, 2007, EPA issued guidance making recommendations for the infrastructure SIP submissions for both the 1997 8-hour ozone NAAQS and the 1997 $PM_{2.5}$ NAAQS.[9] Within this guidance document, EPA described the duty of states to make these submissions to meet what the Agency characterized as the ''infrastructure'' elements for SIPs, which it further described as the ''basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the standards.''[10] As further identification of these basic structural SIP requirements, ''attachment A'' to the guidance document included a short description of the various elements of section 110(a)(2) and additional information about the types of issues that EPA considered germane in the context of such infrastructure SIPs. EPA emphasized that the description of the basic requirements listed on attachment A was not intended ''to constitute an interpretation of'' the requirements, and was merely a ''brief description of the required elements.''[11] EPA also stated its belief that with one exception, these requirements were ''relatively self explanatory, and past experience with SIPs for other NAAQS should enable States to meet these requirements with assistance from EPA Regions.''[12] For the one exception to that general assumption, however, *i.e.,* how states should proceed with respect to the requirements of section 110(a)(2)(G) for the 1997 $PM_{2.5}$ NAAQS, EPA gave much more specific recommendations. But for

[4] For example, section 110(a)(2)(E) provides that states must provide assurances that they have adequate legal authority under state and local law to carry out the SIP; section 110(a)(2)(C) provides that states must have a substantive program to address certain sources as required by part C of the CAA; section 110(a)(2)(G) provides that states must have both legal authority to address emergencies and substantive contingency plans in the event of such an emergency.

[5] For example, section 110(a)(2)(D)(i) requires EPA to be sure that each state's SIP contains adequate provisions to prevent significant contribution to nonattainment of the NAAQS in other states. This provision contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution. See, e.g., ''Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_X SIP Call; Final Rule,'' 70 FR 25,162 (May 12, 2005) (defining, among other things, the phrase ''contribute significantly to nonattainment'').

[6] See, *e.g., Id.,* 70 FR 25,162, at 63–65 (May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

[7] EPA issued separate guidance to states with respect to SIP submissions to meet section 110(a)(2)(D)(i) for the 1997 ozone and 1997 $PM_{2.5}$ NAAQS. See, ''Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards,'' from William T. Harnett, Director Air Quality Policy Division OAQPS, to Regional Air Division Director, Regions I–X, dated August 15, 2006.

[8] For example, implementation of the 1997 $PM_{2.5}$ NAAQS required the deployment of a system of new monitors to measure ambient levels of that new indicator species for the new NAAQS.

[9] See, ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards,'' from William T. Harnett, Director Air Quality Policy Division, to Air Division Directors, Regions I–X, dated October 2, 2007.

[10] *Id.,* at page 2.

[11] *Id.,* at attachment A, page 1.

[12] *Id.,* at page 4. In retrospect, the concerns raised by commenters with respect to EPA's approach to some substantive issues indicates that the statute is not so ''self explanatory,'' and indeed is sufficiently ambiguous that EPA needs to interpret it in order to explain why these substantive issues do not need to be addressed in the context of infrastructure SIPs and may be addressed at other times and by other means.

other infrastructure SIP submittals, and for certain elements of the submittals for the 1997 $PM_{2.5}$ NAAQS, EPA assumed that each State would work with its corresponding EPA regional office to refine the scope of a State's submittal based on an assessment of how the requirements of section 110(a)(2) should reasonably apply to the basic structure of the State's SIP for the NAAQS in question.

On September 25, 2009, EPA issued guidance to make recommendations to states with respect to the infrastructure SIPs for the 2006 $PM_{2.5}$ NAAQS.[13] In the 2009 Guidance, EPA addressed a number of additional issues that were not germane to the infrastructure SIPs for the 1997 8-hour ozone and 1997 $PM_{2.5}$ NAAQS, but were germane to these SIP submissions for the 2006 $PM_{2.5}$ NAAQS, *e.g.,* the requirements of section 110(a)(2)(D)(i) that EPA had bifurcated from the other infrastructure elements for those specific 1997 ozone and $PM_{2.5}$ NAAQS. Significantly, neither the 2007 Guidance nor the 2009 Guidance explicitly referred to the SSM, director's discretion, minor source NSR, or NSR Reform issues as among specific substantive issues EPA expected states to address in the context of the infrastructure SIPs, nor did EPA give any more specific recommendations with respect to how states might address such issues even if they elected to do so. The SSM and director's discretion issues implicate section 110(a)(2)(A), and the minor source NSR and NSR Reform issues implicate section 110(a)(2)(C). In the 2007 Guidance and the 2009 Guidance, however, EPA did not indicate to states that it intended to interpret these provisions as requiring a substantive submission to address these specific issues in existing SIP provisions in the context of the infrastructure SIPs for these NAAQS. Instead, EPA's 2007 Guidance merely indicated its belief that the states should make submissions in which they established that they have the basic SIP structure necessary to implement, maintain, and enforce the NAAQS. EPA believes that states can establish that they have the basic SIP structure, notwithstanding that there may be potential deficiencies within the existing SIP. Thus, EPA's proposals for other states mentioned these issues not because the Agency considers them issues that must be addressed in the context of an infrastructure SIP as required by section 110(a)(1) and (2), but rather because EPA wanted to be clear that it considers these potential existing SIP problems as separate from the pending infrastructure SIP actions. The same holds true for this action on the 1997 8-hour ozone infrastructure SIP for Washington.

EPA believes that this approach to the infrastructure SIP requirement is reasonable, because it would not be feasible to read section 110(a)(1) and (2) to require a top to bottom, stem to stern, review of each and every provision of an existing SIP merely for purposes of assuring that the state in question has the basic structural elements for a functioning SIP for a new or revised NAAQS. Because SIPs have grown by accretion over the decades as statutory and regulatory requirements under the CAA have evolved, they may include some outmoded provisions and historical artifacts that, while not fully up to date, nevertheless may not pose a significant problem for the purposes of ''implementation, maintenance, and enforcement'' of a new or revised NAAQS when EPA considers the overall effectiveness of the SIP. To the contrary, EPA believes that a better approach is for EPA to determine which specific SIP elements from section 110(a)(2) are applicable to an infrastructure SIP for a given NAAQS, and to focus attention on those elements that are most likely to need a specific SIP revision in light of the new or revised NAAQS. Thus, for example, EPA's 2007 Guidance specifically directed states to focus on the requirements of section 110(a)(2)(G) for the 1997 $PM_{2.5}$ NAAQS because of the absence of underlying EPA regulations for emergency episodes for this NAAQS and an anticipated absence of relevant provisions in existing SIPs.

Finally, EPA believes that its approach is a reasonable reading of section 110(a)(1) and (2) because the statute provides other avenues and mechanisms to address specific substantive deficiencies in existing SIPs. These other statutory tools allow the Agency to take appropriate tailored action, depending upon the nature and severity of the alleged SIP deficiency. Section 110(k)(5) authorizes EPA to issue a ''SIP call'' whenever the Agency determines that a state's SIP is substantially inadequate to attain or maintain the NAAQS, to mitigate interstate transport, or otherwise to comply with the CAA.[14] Section 110(k)(6) authorizes EPA to correct errors in past actions, such as past approvals of SIP submissions.[15] Significantly, EPA's determination that an action on the infrastructure SIP is not the appropriate time and place to address all potential existing SIP problems does not preclude the Agency's subsequent reliance on provisions in section 110(a)(2) as part of the basis for action at a later time. For example, although it may not be appropriate to require a state to eliminate all existing inappropriate director's discretion provisions in the course of acting on the infrastructure SIP, EPA believes that section 110(a)(2)(A) may be among the statutory bases that the Agency cites in the course of addressing the issue in a subsequent action.[16]

V. What is EPA's analysis of Washington's submittal?

The Washington SIP submittal lists specific provisions of the Revised Code of Washington (RCW) including Chapter 70.94 RCW Washington Clean Air Act; Chapter 43.21 RCW Department of Ecology; Chapter 34.05 RCW Administrative Procedure Act; Chapter 42.30 RCW Open Public Meetings Act; Chapter 42.17 RCW Public Disclosure Act; and the Washington Administrative Code (WAC) Chapters 173–400 through –492 as codified in the SIP at 40 CFR part 52 Subpart WW.

110(a)(2)(A): Emission Limits and Other Control Measures

Section 110(a)(2) requires SIPs to include enforceable emission limits and other control measures, means or techniques, schedules for compliance and other related matters. EPA notes that the specific nonattainment area plan requirements of Section 110(a)(2)(I) are subject to the timing requirement of

[13] See, ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS),'' from William T. Harnett, Director Air Quality Policy Division, to Regional Air Division Directors, Regions I–X, dated September 25, 2009 (the ''2009 Guidance'').

[14] EPA has recently issued a SIP call to rectify a specific SIP deficiency related to the SSM issue. See, ''Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision,'' 74 FR 21,639 (April 18, 2011).

[15] EPA has recently utilized this authority to correct errors in past actions on SIP submissions related to PSD programs. See, ''Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule,'' 75 FR 82,536 (Dec. 30, 2010). EPA has previously used its authority under CAA 110(k)(6) to remove numerous other SIP provisions that the Agency determined it had approved in error. See, *e.g.,* 61 FR 38,664 (July 25, 1996) and 62 FR 34,641 (June 27, 1997) (corrections to American Samoa, Arizona, California, Hawaii, and Nevada SIPs); 69 FR 67,062 (November 16, 2004) (corrections to California SIP); and 74 FR 57,051 (November 3, 2009) (corrections to Arizona and Nevada SIPs).

[16] EPA has recently disapproved a SIP submission from Colorado on the grounds that it would have included a director's discretion provision inconsistent with CAA requirements, including section 110(a)(2)(A). See, e.g., 75 FR 42,342 at 42,344 (July 21,2010)(proposed disapproval of director's discretion provisions); 76 FR 4,540 (Jan. 26, 2011)(final disapproval of such provisions).

Section 172, not the timing requirement of Section 110(a)(1).

Washington's submittal: The Washington SIP submittal lists the emissions limitation regulations of WAC Chapters 173–400 through -492 as codified in 40 CFR 52.2470. These regulations are (in parenthesis: state adopted date; EPA approval date; and FR citation):

- WAC 173–400 General Regulations for Air Pollution Sources (3/22/91; 6/2/95; 60 FR 28726)
- WAC 173–405 Kraft Pulping Mills (3/22/91; 1/15/93; 58 FR 4578)
- WAC 173–410 Sulfite Pulping Mills (3/22/91; 1/15/93; 58 FR 4578)
- WAC 173–415 Primary Aluminum Plants (3/22/91; 1/15/93; 58 FR 4578)
- WAC 173–425 Open Burning (10/18/90; 1/15/93; 58 FR 4578)
- WAC 173–433 Solid Fuel Burning Device Standards (various dates from 12/16/87 to 10/18/90; 1/15/93; 58 FR 4578)
- WAC 173–434 Solid Waste Incinerator Facilities (various dates from 12/16/87 to 1/22/04; 1/15/93; 58 FR 4578)
- WAC 173–490 Emission Standards and Controls for Sources Emitting Volatile Organic Compounds (3/22/91; 9/10/93; 58 FR 37426)

As part of the federally approved SIP codified in 40 CFR Part 52 Subpart WW, Washington State has an air quality permitting program for minor sources. As discussed previously, major sources are subject to regulation under the PSD permitting program implemented by means of a FIP which incorporates the PSD program specified at 40 CFR 52.21 (See 40 CFR 52.2497).

Under the Washington Clean Air Act general authority to adopt enforceable emission standards and limitations and other measures necessary for the attainment and maintenance of NAAQS is contained in RCW 70.94.331, Powers and Duties of Department. The following sections of the statute address various components of the state's emissions control measures and permitting program:

- RCW 70.94.152 Notice May be Required of Construction of Proposed New Contaminant Source—Submission of Plans—Approval, Disapproval—Emission Control—''De Minimis New Sources'' Defined
- RCW 70.94.153 Existing Stationary Source—Replacement or Substantial Alteration of Emission Control Technology
- RCW 70.94.161 Operating Permits for Air Contaminant Sources—Generally—Fees, Report to Legislature
- RCW 70.94.162 Annual Fees from Operating Permit Program
- RCW 70.94.380 Emission Control Requirements
- RCW 70.94.395 Air Contaminant Sources—Regulation by Department; Authorities May be More Stringent—Hearing—Standards
- RCW 70.94.430 Penalties
- RCW 70.94.431 Civil Penalties—Excusable Excess Emissions
- RCW 70.94.850 Emission Credits Banking Program—Amount of Credit

EPA analysis: EPA finds that Washington's rules as codified in 40 CFR 52.2470, Subpart WW define and reference emissions limits and significant emissions rates for air pollutants including NO_X and VOCs, which are precursors to ozone. Washington has no areas designated nonattainment for the 1997 8-hour ozone NAAQS.

Some of the rules listed above were approved into the SIP under part D because certain areas in Washington were historically nonattainment under the 1-hour ozone standard and required maintenance plans to ensure on-going compliance with the 1997 8-hour ozone standard. As a result, Washington regulates ozone and its precursors through its SIP-approved minor source permitting program and ozone maintenance plans. EPA does not consider SIP requirements triggered by the nonattainment area mandates in part D of Title I of the CAA to be governed by the submission deadline of section 110(a)(1), and EPA is not proposing to find the SIP to be adequate for purposes of CAA Part D requirements in this action. Nevertheless, Washington has referenced some SIP provisions originally submitted in response to part D in its submittal documenting its compliance with the infrastructure requirements of section 110(a)(1) and (2). Washington has over time updated the elements of its SIP addressing the ozone NAAQS, and the provisions reviewed here are a weave of SIP revisions submitted in response to the infrastructure requirements of section 110(a)(2) and the nonattainment requirements of part D.

For the purposes of this action, EPA is reviewing any rules originally submitted in response to part D solely for the purposes of determining whether they support a finding that the state has met the basic infrastructure requirements under section 110(a)(2). EPA is proposing to approve Washington's SIP as meeting the requirements of section 110(a)(2)(A) for the 1997 8-hour ozone NAAQS.

In this action, EPA is not proposing to approve or disapprove any existing state provisions with regard to excess emissions during startup, shutdown, or malfunction (SSM) of operations at a facility. EPA believes that a number of states may have SSM provisions that are contrary to the Clean Air Act and existing EPA guidance [17] and the Agency plans to address such state regulations in the future. In the meantime, EPA encourages any state having a deficient SSM provision to take steps to correct it as soon as possible.

In this action, EPA is not proposing to approve or disapprove any existing state rules relating to director's discretion or variance provisions. EPA believes that a number of states may have such provisions that are contrary to the Clean Air Act and existing EPA guidance (52 FR 45109), November 24, 1987, and the Agency plans to take action in the future to address such state regulations. In the meantime, EPA encourages any state having a director's discretion or variance provision that is contrary to the Clean Air Act and EPA guidance to take steps to correct the deficiency as soon as possible.

110(a)(2)(B): Ambient Air Quality Monitoring/Data System

Section 110(a)(2)(B) requires SIPs to include provisions to provide for establishment and operation of ambient air quality monitors, collecting and analyzing ambient air quality data, and making these data available to EPA upon request.

Washington's submittal: Washington references RCW 70.94.331(5) which requires Ecology to provide for or conduct surveillance program that: monitors the quality of the ambient atmosphere, monitors the concentrations and movements of air contaminants, and determines the quantity of emissions to the atmosphere. The regulations implementing this provision are contained in WAC 173–400–105 Records, Monitoring and Reporting as codified in the SIP at 40 CFR 52.2470, Subpart WW.

EPA analysis: In accordance with EPA's air quality monitoring requirements of 40 CFR part 58 states are required to submit annual network reviews to determine if the network achieved its required air monitoring objectives and if it should be modified (e.g., termination, relocation or establishment of monitoring stations) to meet those objectives. Washington's most recent annual network review was

[17] Steven Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation. ''State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown.'' Memorandum to EPA Air Division Directors, August 11, 1999.

approved by EPA on December 7, 2011, and is available to the public on the Ecology Web site at *http://www.ecy.wa.gov/biblio/1102017.html.* This plan includes, among other things, the locations for the ozone monitoring network. In addition, Washington sends real time air monitoring information for ozone, particulate matter, and carbon monoxide to EPA's AIRNow Web page at *http://www.airnow.gov* and also provides the information on the Ecology Web site at *https://fortress.wa.gov/ecy/enviwa/Default.ltr.aspx.* Based on the foregoing, EPA proposes to approve the Washington's SIP as meeting the requirements of CAA Section 110(a)(2)(B) for the 1997 8-hour ozone NAAQS.

110(a)(2)(C): Program for Enforcement of Control Measures

Section 110(a)(2)(C) requires states to include a program providing for enforcement of all SIP measures and the regulation of construction of new or modified stationary sources, including a program to meet PSD and nonattainment NSR requirements.

Washington's submittal: Washington State cites the following regulatory provisions contained in the SIP which provide for the enforcement of the measures described in subparagraph (A). As discussed previously, Washington State has an EPA-approved air quality permitting program for minor sources. For major sources, EPA has a FIP in place to implement the PSD program.

- WAC 173–400–230 Regulatory Actions (state adopted date 3/20/93; EPA approval date 6/2/95; 60 FR 28726)
- WAC 173–400–240 Criminal Penalties (state adopted date 3/22/91; EPA approval date 6/2/95; 60 FR 28726)

Ecology's enforcement powers are derived from the statutory provisions in Chapter 70.94 RCW:

- RCW 70.94.141 Air Pollution Control Authority—Powers and Duties of Activated Authority
- RCW 70.94.200 Investigation of Conditions by Control Officer or Department—Entering Private, Public Property
- RCW 70.94.211 Enforcement Actions by Air Authority—Notice to Violators
- RCW 70.94.332 Enforcement Actions by Department—Notice to Violators
- RCW 70.94.425 Restraining Orders—Injunctions
- RCW 70.94.430 Penalties
- RCW 70.94.431 Civil Penalties—Excusable Excess Emissions
- RCW 70.94.435 Additional Means for Enforcement of Chapter

EPA analysis: To generally meet the requirements of section 110(a)(2)(C), the state is required to have a minor NSR permitting program adequate to implement the 1997 8-hour ozone NAAQS. For major sources a FIP is in place to implement the PSD program. Because the SIP does not contain approved PSD permitting provisions, EPA is proposing to disapprove that aspect of the SIP. However, as explained previously, EPA need not take any additional action related to the section 110(a)(2) provisions that are contingent upon adequate PSD permitting provisions in the SIP because these requirements are currently addressed by a FIP. Also, as discussed above, in this action EPA is not evaluating nonattainment related provisions, such as the nonattainment NSR program required by part D of the CAA, nor does Washington have nonattainment areas for the 1997 8-hour ozone NAAQS.

EPA believes Washington code provides Ecology with the authority to enforce the air quality laws, regulations, permits, and orders promulgated pursuant to WAC Chapters 173–400 through –492 as codified in the SIP at 40 CFR 52.2470, Subpart WW. Ecology staffs and maintains an enforcement program to ensure compliance with SIP requirements. The Ecology director may issue a restraining order for polluting activities that constitute or will constitute a violation under the SIP approved provisions of WAC 173–400–230(4). Enforcement cases may be referred to the state Attorney General's Office for civil or criminal enforcement. Therefore, EPA is proposing to approve the Washington SIP as meeting the requirements of 110(a)(2)(C) related to enforcement for the 1997 8-hour ozone NAAQS.

In this action, EPA is not proposing to approve or disapprove the state's existing minor NSR program itself to the extent that it is inconsistent with EPA's regulations governing this program, such as the SSM and director's discretion provisions discussed with respect to 110(a)(2)(A). EPA believes that a number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and EPA believes it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

110(a)(2)(D): Interstate Transport

Section 110(a)(2)(D) requires SIPs to include provisions prohibiting any source or other type of emissions activity in one state from contributing significantly to nonattainment, or interfering with maintenance of the NAAQS in another state, or from interfering with measures required to prevent significant deterioration of air quality or to protect visibility in another state. As noted above, this action does not address the requirements of 110(a)(2)(D(i) for the 1997 8-hour ozone NAAQS which were previously approved by EPA on January 13, 2009 (74 FR 1501).

Interstate and International Transport Provisions

Section 110(a)(2)(D)(ii) requires SIPs to include provisions ensuring compliance with the applicable requirements of sections 126 and 115 (relating to interstate and international pollution abatement). Specifically, section 126(a) requires new or modified major sources to notify neighboring states of potential impacts from the source.

EPA analysis: The notification requirements of CAA section 126(a) pertain only to major proposed new or modified sources. As previously discussed, the major source PSD program in Washington is implemented under a FIP and is therefore not part of this action. The state has no pending obligations under section 115 or 126(b) of the Act. Because the PSD permitting program is implemented pursuant to a FIP, EPA is proposing to disapprove the Washington SIP because it does not meet the requirements of CAA section 110(a)(2)(D)(ii) for the 1997 8-hour ozone NAAQS. However, these requirements are adequately satisfied by the FIP and thus no additional action by Washington or EPA is needed to satisfy this infrastructure requirement for the 1997 8-hour ozone NAAQS.

110(a)(2)(E): Adequate Resources

Section 110(a)(2)(E) requires states to provide (i) necessary assurances that the state will have adequate personnel, funding, and authority under state law to carry out the SIP (and is not prohibited by any provision of Federal or state law from carrying out the SIP or portion thereof), (ii) requires that the state comply with the requirements respecting state boards under section

128 and (iii) necessary assurances that, where the state has relied on a local or regional government, agency, or instrumentality for the implementation of any SIP provision, the state has responsibility for ensuring adequate implementation of such SIP provision.

Washington's submittal: Ecology cites the following:

Chapter 43.21A RCW provides authority for the director to employ personnel necessary for administration of this chapter. Chapters 43.21A and 70.94 RCW provide for Ecology's rule-making authority. Ecology's Air Quality Program is funded through the following funding sources: the state General Fund, section 105 of the CAA grant program, Air Operating Permit Account (permit fees from large industrial sources), and Air Pollution Control Account (permit fees for burning and annual fees for small industrial air pollution sources).

The SIP-approved provisions of WACs 173–400–220 Requirements for Board Members and 173–400–260 Conflict of Interest (state adopted date 3/22/91; EPA approval date 6/2/95; 60 FR 28726) provide that no state board or body which approves operating permits or enforcement orders, either in the first instance or upon appeal, shall be constituted of less than a majority of members who represent the public interest and who do not derive a significant portion of their income from persons subject to operating permits. State law also provides that any potential conflicts of interest by members of such board or body or the head of any executive agency with similar powers be adequately disclosed. See RCW 34.05.425 Administrative Procedure Act; RCW 42.17 Public Disclosure Act; RCW 70.94.100 Composition of Local Air Authorities' Board; Conflict of Interest Requirements.

Ecology works with other organizations and agencies and may enter into agreements allowing for implementation of the air pollution controls by another agency. However, RCW 70.94.370 states that no provision of this chapter or any recommendation of the state board or of any local or regional air pollution program is a limitation on the power of a state agency in the enforcement, or administration of any provision of law which it is specifically permitted or required to enforce or administer.

EPA analysis: Regarding adequate personnel, funding and authority, EPA believes the Washington SIP meets the requirements of this element. Washington receives sections 103 and 105 grant funds from EPA and provides state matching funds necessary to carry out SIP requirements. Regarding the state board requirements under section 128, EPA approved WAC 173–400–220 Requirements for Board Members and WAC 173–400–260 Conflict of Interest as meeting the section 128 requirements on June 2, 1995 (60 FR 28726). Finally, regarding state responsibility and oversight of local and regional entities, RCW 70.94.370 provides Ecology with adequate authority to carry out SIP obligations with respect to the 1997 8-hour ozone NAAQS. Therefore EPA is proposing to approve the Washington SIP as meeting the requirements of CAA Section 110(a)(2)(E) for the 1997 8-hour ozone NAAQS.

110(a)(2)(F): Stationary Source Monitoring System

Section 110(a)(2)(F) requires (i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources, (ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and (iii) correlation of such reports by the state agency with any emission limitations or standards established pursuant to the CAA, which reports shall be available at reasonable times for public inspection.

Washington's submittal: Washington's SIP submittal refers to the following SIP approved regulatory provisions:

- WAC 173–400–105 Records, Monitoring, and Reporting (state adopted date 9/20/93; EPA approval date 6/2/95; 60 FR 28726)
- WAC 173–400–110 New Source Review (NSR) (state adopted date 3/22/91; EPA approval date 6/2/95; 60 FR 28726)
- WAC 173–400–112 Requirements for New Sources in Nonattainment Areas (state adopted date 3/22/91; EPA approval date 6/2/95; 60 FR 28726)
- WAC 173–400–113 Requirements for New Sources in Attainment or Unclassifiable Areas (state adopted date 3/22/91; EPA approval date 6/2/95; 60 FR 28726)

EPA analysis: The provisions cited by the Washington SIP submittal provide for monitoring, recordkeeping and reporting requirements for sources. As note previously, Washington State has an EPA-approved air quality permitting program for minor sources. A FIP implements the PSD program requirements for major sources. EPA proposes to approve the Washington SIP as meeting the requirements of CAA Section 110(a)(2)(F) for the 1997 8-hour ozone NAAQS, with the exception of those aspects of the infrastructure requirements which relate to PSD permitting. EPA proposes disapprove that aspect of the SIP because the PSD provisions continue to be implemented by a FIP. Accordingly, no additional action is needed by Washington or EPA in response to this proposed disapproval.

110(a)(2)(G): Emergency Episodes

Section 110(a)(2)(G) requires states to provide for authority to address activities causing imminent and substantial endangerment to public health, including contingency plans to implement the emergency episode provisions in their SIPs.

Washington's submittal: The Washington submittal cites the emergency episode regulations of WAC 173–435 approved into the SIP by EPA on January 15, 1993 (58 FR 4578). The significant harm level for ozone under the SIP approved WAC 173–435 is identical to the level contained in the current Federal regulations at 40 CFR 51.151.

EPA analysis: As noted in EPA's October 2, 2007 guidance, the significant harm level for the 8-hour ozone NAAQS shall remain unchanged at 0.60 ppm ozone, 2 hour average, as indicated in 40 CFR 51.151. EPA believes that the existing ozone-related provisions of 40 CFR 51 Subpart H remain appropriate. Washington's regulations discussed above, which have previously been approved by EPA into the SIP on January 15, 1993 (58 FR 4578) continue to be consistent with the requirements of 40 CFR 51.151. Accordingly, EPA proposes to find that the Washington SIP is adequate for purposes of CAA section 110(a)(2)(G) for the 1997 8-hour ozone NAAQS.

110(a)(2)(H): Future SIP Revisions

Section 110(a)(2)(H) requires that SIPs provide for revision of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and (ii), except as provided in paragraph 110(a)(3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the SIP is substantially inadequate to attain the NAAQS which it implements or to otherwise comply with any additional requirements under the CAA.

Washington's submittal: Washington's SIP submittal refers to RCW 70.94 which gives Ecology the authority to promulgate rules and regulations to

maintain and protect Washington's air quality and to comply with the federal requirements, including revisions of NAAQS, SIPs, and responding to EPA's findings.

EPA analysis: RCW 70.94.510 specifically requires Ecology to cooperate with the federal government in order to insure the coordination of the provisions of the federal and state clean air acts. EPA proposes to approve the Washington SIP as meeting the requirements of section 110(a)(2)(H) for the 1997 8-hour ozone NAAQS.

110(a)(2)(I): Nonattainment Area Plan Revision Under Part D

EPA analysis: There are two elements identified in section 110(a)(2) not governed by the 3 year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within 3 years after promulgation of a new or revised NAAQS, but rather due at the time of the nonattainment area plan requirements pursuant to section 172. These requirements are: (i) Submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D Title I of the CAA, and (ii) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. As a result, this action does not address infrastructure elements related to section 110(a)(2)(C) with respect to nonattainment NSR or section 110(a)(2)(I).

110(a)(2)(J): Consultation With Government Officials

Section 110(a)(2)(J) requires states to provide a process for consultation with local governments and Federal Land Managers carrying out NAAQS implementation requirements pursuant to Section 121 relating to consultation. Section 110(a)(2)(J) further requires states to notify the public if NAAQS are exceeded in an area and to enhance public awareness of measures that can be taken to prevent exceedances. Lastly, section 110(a)(2)(J) requires states to meet applicable requirements of part C related to prevention of significant deterioration and visibility protection.

Washington's submittal: Washington's SIP submittal refers to a number of laws and regulations relating to consultation and public notification:

- WAC 173–400–171 Public Involvement (state effective date 9/20/93; EPA approval date 6/2/95; 60 FR 28726).
- WAC 173–435–050 Emergency Episode Plan (state effective date 1/3/89; EPA approval date 1/15/93; 58 FR 4578).
- RCW 70.94.141 Washington Clean Air Act, Air Pollution Control Authority—Powers and Duties of Activated Authority.
- RCW 70.94.240 Washington Clean Air Act, Air Pollution Control Advisory Council.
- RCW 34.05 Administrative Procedure Act.
- RCW 42.30 Open Public Meetings Act.

EPA analysis: Under the SIP approved provisions of WAC 173–400–171 Public Involvement, Ecology routinely coordinates with local governments, states, federal land managers, and other stakeholders on air quality issues and provides notice to appropriate agencies related to permitting actions. Washington regularly participates in regional planning processes including the Western Regional Air Partnership which is a voluntary partnership of states, tribes, federal land managers, local air agencies, and the U.S. EPA whose purpose is to understand current and evolving regional air quality issues in the West. Therefore EPA proposes to approve the Washington SIP as meeting the requirements of CAA Section 110(a)(2)(J) for consultation with government officials.

Washington sends real time air monitoring information for ozone, particulate matter, and carbon monoxide to EPA's AIRNow Web page at *http://www.airnow.gov* and also provides the information on Ecology's Web site at *https://fortress.wa.gov/ecy/enviwa/Default.ltr.aspx*. Therefore, EPA is proposing to approve the Washington SIP as meeting the requirements of CAA Section 110(a)(2)(J) for public notification.

Turning to the requirement in section 110(a)(2)(J) that the SIP meet the applicable requirements of part C of title I of the CAA, EPA has evaluated this requirement with respect to PSD permitting. As previously discussed, the major source PSD permitting program in Washington is implemented by means of a FIP. Therefore, EPA proposes to find that Washington's SIP must be disapproved with respect to the requirements of 110(a)(2)(J) because PSD provisions are not part of Washington's SIP. However, because the PSD provisions are adequately addressed by the FIP that is in place, no further action is needed by Washington or EPA in response to this proposed disapproval.

With regard to the applicable requirements for visibility protection, EPA recognizes that states are subject to visibility and regional haze program requirements under part C of the CAA. In the event of the establishment of a new NAAQS, however, the visibility and regional haze program requirements under part C do not change. Thus we find that there is no new visibility obligation triggered under section 110(a)(2)(J) when a new NAAQS becomes effective.

110(a)(2)(K): Air Quality and Modeling/Data

Section 110(a)(2)(K) requires that SIPs provide for (i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and (ii) the submission, upon request, of data related to such air quality modeling to the Administrator.

Washington's submittal: Washington's SIP submittal refers to the SIP-approved minor source NSR permitting provisions in WAC 173–400–110, –112, and –113 (State adopted date 3/22/91; EPA approval date 6/2/95; 60 FR 28726), which models pollutant concentrations in the ambient air based on EPA's guidance and latest methodologies and techniques specified in 40 CFR 51, Appendix W (Guideline on Air Quality Models). Ecology also cites the Washington Clean Air Act (specifically RCW 70.94.011 Declaration of Public Policies and Purpose and RCW 70.94.510 Policy to Cooperate with Federal Government) which directs Ecology to cooperate with the federal government in order to coordinate and implement federal and state clean air acts, which would include the submission of data related to air quality modeling to the Administrator.

EPA analysis: Washington models estimates of ambient concentrations based on 40 CFR part 51 Appendix W (Guidelines on Air Quality Models). Any change or substitution from models specified in 40 CFR part 51, Appendix W is subject to notice and opportunity for public comment. While Washington has no nonattainment areas for the 1997 8-hour ozone NAAQS, modeling was used to support maintenance plans and redesignation to attainment requests for the historical nonattainment areas of Puget Sound and Vancouver approved by EPA on September 26, 1996 (61 FR 50438) and May 19, 1997 (62 FR 27204), respectively. Modeling data has been provided to EPA in this context. Based on the foregoing, EPA proposes to approve Washington's SIP as meeting the requirements of CAA Section 110(a)(2)(K) for the 1997 8-hour ozone NAAQS.

110(a)(2)(L): Permitting Fees

Section 110(a)(2)(L) requires SIPs to require each major stationary source to pay permitting fees to cover the cost of reviewing, approving, implementing, and enforcing a permit, until such time as the SIP fee requirement is superseded by EPA's approval of the state's Title V operating permit program.

Washington's submittal: Washington's SIP submittal refers to RCW 70.94.162, Annual Fees from Operating Permit Program Source to Cover Cost of Program, which provides Ecology authority to establish a schedule of fees for permits based upon the costs of filing and investigating applications, issuing or denying permits, carrying out Title V requirements, and determining compliance. Washington's submittal also refers to WAC 173–455, Air Quality Fee Regulation, which requires payment of permit fees based on a specified table of sources and fee schedule.

EPA analysis: On August 13, 2001 (66 FR 42439), EPA fully approved Washington's Title V program. As part of the approval process, Washington's Title V program included a demonstration the state will collect a fee from Title V sources above the presumptive minimum in accordance with 40 CFR 70.9(b)(2)(i). Therefore, EPA proposes to find that Washington has satisfied the requirements of CAA Section 110(a)(2)(L) for the 1997 8-hour ozone NAAQS.

110(a)(2)(M): Consultation/Participation by Affected Local Entities

Section 110(a)(2)(M) requires states to provide for consultation and participation in SIP development by local political subdivisions affected by the SIP.

Washington's submittal: Washington's SIP submittal refers to the following laws and regulations:

- WAC 173–400–171 Public Involvement (state effective date 9/20/93; EPA approval date 6/2/95; 60 FR 28726).
- RCW 34.05 Administrative Procedure Act.
- RCW 42.30 Open Public Meetings Act.
- RCW 70.94.240 Washington Clean Air Act, Air Pollution Control Advisory Council.

EPA analysis: As discussed in the narrative relating to 110(a)(2)(J), Ecology routinely coordinates with local governments and other stakeholders on air quality issues. The public involvement regulations cited in Washington's submittal were previously approved into Washington's federally-approved SIP on June 2, 1995 (60 FR 28726). Therefore, EPA proposes to find that Washington's SIP meets the requirements of CAA Section 110(a)(2)(M) for the 1997 8-hour ozone NAAQS.

VI. Scope of Proposed Action

This proposed SIP approval does not extend to sources or activities located in ''Indian Country'' as defined in 18 U.S.C. 1151.[18] Consistent with previous Federal program approvals or delegations, EPA will continue to implement the Act in Indian Country because Washington did not adequately demonstrate authority over sources and activities located within the exterior boundaries of Indian reservations and other areas of Indian Country. The one exception is within the exterior boundaries of the Puyallup Indian Reservation, also known as the 1873 Survey Area. Under the Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. 1773, Congress explicitly provided state and local agencies in Washington authority over activities on non-trust lands within the 1873 Survey Area. Therefore, EPA's proposed SIP approval applies to sources and activities on nontrust lands within the 1873 Survey Area.

VII. Proposed Action

EPA is proposing to approve the following section 110(a)(2) infrastructure elements for Washington for the 1997 ozone NAAQS: (A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), (M), except for those portions of (C), (D)(ii), and (J) which relate to PSD and are addressed by the FIP codified at 40 CFR 52.2497. Therefore, EPA proposes to disapprove the SIP as inadequate for these PSD-related requirements, but no additional action is required by the state or EPA pursuant to this proposed disapproval because the requirements are adequately addressed by the FIP. EPA is also taking no action on infrastructure elements (D)(i) and (I) for the 1997 ozone NAAQS. This action is being taken under section 110 of the CAA.

[18] ''Indian country'' is defined under 18 U.S.C. 1151 as: (1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (2) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (3) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Under this definition, EPA treats as reservations trust lands validly set aside for the use of a Tribe even if the trust lands have not been formally designated as a reservation.

VIII. Washington Notice Provision

Washington's Regulatory Reform Act of 1995, codified at Chapter 43.05 Revised Code of Washington (RCW), precludes ''regulatory agencies'', as defined in RCW 43.05.010, from assessing civil penalties under certain circumstances. EPA has determined that Chapter 43.05 of the RCW, often referred to as ''House Bill 1010,'' conflicts with the requirements of CAA section 110(a)(2)(A) and (C) and 40 CFR 51.230(b) and (e). Based on this determination, Ecology has determined that Chapter 43.05 RCW does not apply to the requirements of Chapter 173–422 WAC. See 66 FR 35115, 35120 (July 3, 2001). The restriction on the issuance of civil penalties in Chapter 43.05 RCW does not apply to local air pollution control authorities in Washington because local air pollution control authorities are not ''regulatory agencies'' within the meaning of that statute. See 66 FR 35115, 35120 (July 3, 2001).

In addition, EPA is relying on the State's interpretation of another technical assistance law, RCW 43.21A.085 and .087, to conclude that the law does not impinge on the State's authority to administer Federal Clean Air Act programs. The Washington Attorney Generals' Office has concluded that RCW 43.21A.085 and .087 do not conflict with Federal authorization requirements because these provisions implement a discretionary program. EPA understands from the State's interpretation that technical assistance visits conducted by the State will not be conducted under the authority of RCW 43.21A.085 and .087. See 66 FR 16, 20 (January 2, 2001); 59 FR 42552, 42555 (August 18, 1994).

IX. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves the state's law as meeting Federal requirements and does not impose additional requirements beyond those imposed by the state's law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

• Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

• Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

• Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in Washington [19] and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, and Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

[19] The one exception is within the exterior boundaries of the Puyallup Indian Reservation, also known as the 1873 Survey Area. Under the Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. 1773, Congress explicitly provided State and local agencies in Washington authority over activities on non-trust lands within the 1873 Survey Area.

Dated: February 23, 2012.

Dennis J. McLearran,

Regional Administrator, Region 10.

[FR Doc. 2012–5393 Filed 3–5–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R06–RCRA–2011–0478; FRL–9642–5]

Texas: Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The State of Texas has applied to EPA for Final authorization of the changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA proposes to grant Final authorization to the State of Texas. In the ''Rules and Regulations'' section of this **Federal Register**, EPA is authorizing the changes by an immediate final rule. EPA did not make a proposal prior to the immediate final rule because we believe this action is not controversial and do not expect comments that oppose it. We have explained the reasons for this authorization in the preamble to the immediate final rule. Unless we get written comments which oppose this authorization during the comment period, the immediate final rule will become effective on the date it establishes, and we will not take further action on this proposal. If we receive comments that oppose this action, we will withdraw the immediate final rule and it will not take effect. We will then respond to public comments in a later final rule based on this proposal. You may not have another opportunity for comment. If you want to comment on this action, you must do so at this time.

DATES: Send your written comments by April 5, 2012.

ADDRESSES: Send written comments to Alima Patterson, Region 6, Regional Authorization Coordinator, (6PD–O), Multimedia Planning and Permitting Division, at the address shown below. You can examine copies of the materials submitted by the State of Texas during normal business hours at the following locations: EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, phone number (214) 665–8533; or Texas Commission on Environmental Quality, (TCEQ) 12100 Park S. Circle, Austin TX 78753–3087, (512) 239–6079. Comments may also be submitted electronically or through hand delivery/courier; please follow the detailed instructions in the **ADDRESSES** section of the immediate final rule which is located in the Rules section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Alima Patterson (214) 665–8533.

SUPPLEMENTARY INFORMATION: For additional information, please see the immediate final rule published in the ''Rules and Regulations''section of this **Federal Register**.

Dated: February 17, 2012

Al Armendariz,

Regional Administrator, Region 6.

[FR Doc. 2012–5378 Filed 3–5–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R1–ES–2011–N251; FXES11130100000C4–123–FF01E00000]

Endangered and Threatened Wildlife and Plants; 5-Year Status Reviews of 46 Species in Idaho, Oregon, Washington, Nevada, Montana, Hawaii, Guam, and the Northern Mariana Islands

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of initiation of reviews; request for information.

SUMMARY: We, the U.S. Fish and Wildlife Service, are initiating 5-year reviews for 46 species in Idaho, Oregon, Washington, Nevada, Montana, Hawaii, Guam, and the Northern Mariana Islands under the Endangered Species Act of 1973, as amended (Act). We request any new information on these species that may have a bearing on their classification as endangered or threatened. Based on the results of our 5-year reviews we will determine whether these species are properly classified under the Act.

DATES: To ensure consideration in our reviews, we are requesting submission of new information no later than May 7, 2012. However, we will continue to accept new information about any listed species at any time.

ADDRESSES: For the 44 species in Hawaii, Guam, and the Northern Mariana Islands (see Table 1 below), submit information to: Field Supervisor, Attention: 5-Year Review, U.S. Fish and Wildlife Service, Pacific Islands Fish

and Wildlife Office, 300 Ala Moana Blvd., Room 3–122, Box 50088, Honolulu, HI 96850. Information can also be submitted by email to: *pifwo-5yr-review@fws.gov.*

For the Snake River physa snail and bull trout, submit information to: Branch Chief, Classification and Recovery, Attention: 5-Year Review, U.S. Fish and Wildlife Service, Idaho Fish and Wildlife Office, 1387 S. Vinnell Way, Room 368, Boise, ID 83709. Information can also be submitted by email to: *fws1srbocomment@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Jess Newton, U.S. Fish and Wildlife Service, Pacific Islands Fish and Wildlife Office (see **ADDRESSES**), 808–792–9400 (for species in Hawaii, Guam, and the Northern Mariana Islands); or Susan Burch, U.S. Fish and Wildlife Service, Idaho Fish and Wildlife Office, 208–378–5243 (for Snake River physa snail and bull trout). Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at (800) 877–8337 for TTY assistance.

SUPPLEMENTARY INFORMATION:

I. Why do we conduct 5-year reviews?

Under the Act (16 U.S.C. 1531 *et seq.*), we maintain Lists of Endangered and Threatened Wildlife and Plants (which we collectively refer to as the List) in the Code of Federal Regulations (CFR) at 50 CFR 17.11 (for animals) and 17.12 (for plants). Section 4(c)(2)(A) of the Act requires us to review each listed species' status at least once every 5 years. Then, under section 4(c)(2)(B), we determine whether to remove any species from the List (delist), to reclassify it from endangered to threatened, to reclassify it from threatened to endangered, or to conclude that the current listing is appropriate. Any change in Federal classification requires a separate rulemaking process.

We use the following definitions, from 50 CFR 424.02, in our analysis of classification status:

(A) *Species* includes any species or subspecies of fish, wildlife, or plant, and any distinct population segment of any species of vertebrate, that interbreeds when mature;

(B) *Endangered species* means any species that is in danger of extinction throughout all or a significant portion of its range; and

(C) *Threatened species* means any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

Our regulations at 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing those species under active review.

II. What species are under review?

This notice announces our active review of the 46 species listed in Table 1.

TABLE 1—SPECIES FOR WHICH WE ARE INITIATING A STATUS REVIEW TO DETERMINE IF THEY ARE APPROPRIATELY LISTED UNDER THE U.S. ENDANGERED SPECIES ACT

Common name	Scientific name	Status	Where listed	Final listing rule
Animals				
Akepa, Maui	*Loxops coccineus ochraceus*	Endangered	U.S.A. (HI)	35 FR 16047; 10/13/1970.
Creeper, Molokai	*Paroreomyza flammea*	Endangered	U.S.A. (HI)	35 FR 16047; 10/13/1970.
Crow, Mariana (=aga)	*Corvus kubaryi*	Endangered	Western Pacific Ocean—U.S.A. (Guam, Rota).	49 FR 33885; 8/27/1984.
Duck, Laysan	*Anas laysanensis*	Endangered	U.S.A. (HI)	32 FR 4001; 3/11/1967.
Finch, Laysan	*Telespyza cantans*	Endangered	U.S.A. (HI)	32 FR 4001; 3/11/1967.
Fruit bat, Mariana	*Pteropus mariannus mariannus*	Threatened	Western Pacific Ocean—U.S.A. (GU, MP).	70 FR 1190; 1/06/2005.
Honeycreeper, crested	*Palmeria dolei*	Endangered	U.S.A. (HI)	32 FR 4001; 3/11/1967.
Kingfisher, Guam Micronesian.	*Halcyon cinnamomina cinnamomina*	Endangered	Western Pacific Ocean—U.S.A. (Guam).	49 FR 33885; 8/27/1984.
Parrotbill, Maui	*Pseudonestor xanthophrys*	Endangered	U.S.A. (HI)	32 FR 4001; 3/11/1967.
Po'ouli	*Melamprosops phaeosoma*	Endangered	U.S.A. (HI)	40 FR 44151; 9/25/1975.
Rail, Guam	*Rallus owstoni*	Endangered, Non-Essential Experimental Population.	Western Pacific Ocean—U.S.A. (Guam, Rota).	49 FR 33881; 8/27/1984.
Snail, Snake River physa.	*Physa natricina*	Endangered	U.S.A. (ID)	57 FR 59244; 12/14/1992.
Thrush, Molokai	*Myadestes lanaiensis rutha*	Endangered	U.S.A. (HI)	35 FR 16047; 10/13/1970.
Trout, bull	*Salvelinus confluentus*	Threatened	U.S.A., coterminous (lower 48 states); occurs in ID, OR, WA, NV, and MT.	64 FR 58910; 11/01/1999.
White-eye, bridled	*Zosterops conspicillatus conspicillatus.*	Endangered	Western Pacific Ocean—U.S.A. (Guam).	49 FR 33885; 8/27/1984.
Plants				
No common name	*Abutilon eremitopetalum*	Endangered	U.S.A. (HI)	56 FR 47694; 9/20/1991.

TABLE 1—SPECIES FOR WHICH WE ARE INITIATING A STATUS REVIEW TO DETERMINE IF THEY ARE APPROPRIATELY LISTED UNDER THE U.S. ENDANGERED SPECIES ACT—Continued

Common name	Scientific name	Status	Where listed	Final listing rule
Liliwai	*Acaena exigua*	Endangered	U.S.A. (HI)	57 FR 20787; 5/15/1992.
Pua ‘ala	*Brighamia rockii*	Endangered	U.S.A. (HI)	57 FR 46339; 10/8/1992.
Kamanomano	*Cenchrus agrimonioides*	Endangered	U.S.A. (HI)	61 FR 53123; 10/10/1996.
Haha	*Cyanea dunbarii*	Endangered	U.S.A. (HI)	61 FR 53137; 10/10/1996.
Haha	*Cyanea hamatiflora* ssp. *hamatiflora*	Endangered	U.S.A. (HI)	64 FR 48323; 9/3/1999.
Haha	*Cyanea lobata*	Endangered	U.S.A. (HI)	57 FR 20787; 5/15/1992.
Haha	*Cyanea macrostegia ssp. gibsonii*	Endangered	U.S.A. (HI)	56 FR 47694; 9/20/1991.
Haha	*Cyanea mceldowneyi*	Endangered	U.S.A. (HI)	57 FR 20787; 5/15/1992.
Haha	*Cyanea procera*	Endangered	U.S.A. (HI)	57 FR 46339; 10/8/1992.
No common name	*Diplazium molokaiense*	Endangered	U.S.A. (HI)	59 FR 49031; 9/26/1994.
Na‘ena‘e	*Dubautia plantaginea ssp. humilis*	Endangered	U.S.A. (HI)	64 FR 48323; 9/3/1999.
Gardenia (=Na‘u), Hawaiian.	*Gardenia brighamii*	Endangered	U.S.A. (HI)	50 FR 33731; 8/21/1985.
Kopa	*Hedyotis schlechtendahliana* var. *remyi.*	Endangered	U.S.A. (HI)	64 FR 48323; 9/3/1999.
Wawae‘iole	*Huperzia mannii*	Endangered	U.S.A. (HI)	57 FR 20787; 5/15/1992.
Kohe malama malama o kanaloa.	*Kanaloa kahoolawensis*	Endangered	U.S.A. (HI)	64 FR 48323; 9/3/1999.
Koki‘o, Cooke’s	*Kokia cookei*	Endangered	U.S.A. (HI)	44 FR 62471; 10/30/1979.
Kamakahala	*Labordia triflora*	Endangered	U.S.A. (HI)	64 FR 48323; 9/3/1999.
Nehe	*Lipochaeta kamolensis*	Endangered	U.S.A. (HI)	57 FR 20787; 5/15/1992.
No common name	*Lysimachia maxima*	Endangered	U.S.A. (HI)	61 FR 53137; 10/10/1996.
Alani	*Melicope adscendens*	Endangered	U.S.A. (HI)	59 FR 62352; 12/5/1994.
Alani	*Melicope knudsenii*	Endangered	U.S.A. (HI)	59 FR 9327; 2/25/1994.
Alani	*Melicope mucronulata*	Endangered	U.S.A. (HI)	57 FR 20787; 5/15/1992.
No common name	*Phyllostegia hispida*	Endangered	U.S.A. (HI)	73 FR 9078; 2/19/2008.
No common name	*Platanthera holochila*	Endangered	U.S.A. (HI)	61 FR 53123; 10/10/1996.
Lo‘ulu	*Pritchardia munroi*	Endangered	U.S.A. (HI)	57 FR 46339; 10/8/1992.
No common name	*Pteris lidgatei*	Endangered	U.S.A. (HI)	59 FR 49031; 9/26/1994.
Remya, Maui	*Remya mauiensis*	Endangered	U.S.A. (HI)	56 FR 1453; 1/14/1991.
Naupaka, dwarf	*Scaevola coriacea*	Endangered	U.S.A. (HI)	51 FR 17974; 5/16/1986.
No common name	*Silene alexandri*	Endangered	U.S.A. (HI)	57 FR 46339; 10/8/1992.
No common name	*Stenogyne bifida*	Endangered	U.S.A. (HI)	57 FR 46339; 10/8/1992.

III. What information do we consider in the review?

A 5-year review considers all new information available at the time of the review. In conducting these reviews, we consider the best scientific and commercial data that has become available since the listing determination or most recent status review, such as:

(A) Species biology including, but not limited to, population trends, distribution, abundance, demographics, and genetics;

(B) Habitat conditions including, but not limited to, amount, distribution, and suitability;

(C) Conservation measures that have been implemented that benefit the species;

(D) Threat status and trends (see five factors under heading ‘‘How Do We Determine Whether a Species is Endangered or Threatened?’’); and

(E) Other new information, data, or corrections including, but not limited to, taxonomic or nomenclatural changes, identification of erroneous information contained in the List, and improved analytical methods.

IV. How do we determine whether a species is endangered or threatened?

Section 4(a)(1) of the Act requires that we determine whether a species is

endangered or threatened based on one or more of the five following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

Under section 4(b)(1) of the Act, we must base our assessment of these factors solely on the best scientific and commercial data available.

V. What could happen as a result of this review?

For each species under review, if we find new information that indicates a change in classification may be warranted, we may propose, through formal rulemaking, to:

(A) Reclassify the species from threatened to endangered (uplist);

(B) Reclassify the species from endangered to threatened (downlist); or

(C) Remove the species from the List (delist).

If we determine that a change in classification is not warranted, then no formal rulemaking is required; the species remains on the List under its current status.

VI. Request for New Information

To ensure that a 5-year review is complete and based on the best available scientific and commercial information, we request new information from all sources. See ''What Information Do We Consider in Our Review?'' for specific criteria. If you submit information, please support it with documentation such as maps, bibliographic references, methods used to gather and analyze the data, and/or copies of any pertinent publications, reports, or letters by knowledgeable sources.

If you wish to provide information for any species listed above, please submit your comments and materials to the appropriate contact in either the Idaho or Pacific Islands Fish and Wildlife Office (see **ADDRESSES** section).

VII. 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.

Comments and materials received will be available for public inspection, by appointment, during normal business hours at the offices where the comments are submitted.

VIII. Completed and Active Reviews

A list of all completed and currently active 5-year reviews addressing species for which the Pacific Region of the Service has lead responsibility is available at: *http://www.fws.gov/pacific/ecoservices/endangered/recovery/5year.html.*

IX. Authority

This document is published under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: January 18, 2012.

Richard R. Hannan,

Acting Regional Director, Region 1 Fish and Wildlife Service.

[FR Doc. 2012–5335 Filed 3–5–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R5–ES–2012–N038; FXES11130500000D2–123–FF05E00000]

Endangered and Threatened Wildlife and Plants; Initiation of a 5-Year Review of Nine Northeastern Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of initiation of reviews; request for information.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are initiating 5-year reviews under the Endangered Species Act (Act), as amended, for nine northeastern species. We will review the following species, all listed as endangered under the Act: Maryland darter, Virginia fringed mountain snail, Virginia big-eared bat, Hay's Spring amphipod, Lee County Cave isopod, and Shenandoah salamander. We will also review the following threatened species: Knieskern's beaked-rush, small whorled pogonia, and Virginia sneezeweed. We conduct these reviews to ensure that our classification of each species on the lists of endangered and threatened wildlife and plants is accurate. A 5-year review assesses the best scientific and commercial data available at the time of the review. We are requesting submission of any such information that has become available since the previous 5-year review for each species. Based on review results, we will determine whether we should change the listing status of any of these species.

DATES: To ensure consideration, please send your written information by May 7, 2012. However, we will continue to accept new information about any listed species at any time.

ADDRESSES: For where and how to send information, see ''VIII. Contacts'' near the end of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Mary Parkin, by U.S. mail at U.S. Fish and Wildlife Service, Northeast Regional Office, 300 Westgate Center Drive, Hadley, MA 01035; by telephone at 617–417–3331; or by electronic mail at *mary_parkin@fws.gov.*

SUPPLEMENTARY INFORMATION:

I. Why do we conduct 5-year reviews?

Under the Act (16 U.S.C. 1531 *et seq.*), we maintain lists of endangered and threatened wildlife and plants (which we refer to collectively as the list) at 50 CFR 17.11 (for animals) and 17.12 (for plants). Section 4(c)(2)(A) of the ESA requires us to review the status of each listed species at least once every 5 years. Then, under section 4(c)(2)(B), we determine whether to remove the species from the list (delist), reclassify it from endangered to threatened, or reclassify it from threatened to endangered. Any change in Federal classification requires a separate rulemaking process.

In classifying a species, we use the following definitions from 50 CFR 424.02:

(A) *Species* includes any species or subspecies of fish, wildlife, or plant, or any distinct population segment of any species or vertebrate, that interbreeds when mature;

(B) *Endangered species* means any species that is in danger of extinction throughout all or a significant portion of its range; and

(C) *Threatened species* means any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

We must support delisting a species by the best scientific and commercial data available, and we only consider delisting if data substantiate that the species is neither endangered nor threatened for one or more of the following reason (50 CFR 424.11 (d)):

(A) The species is extinct;

(B) The species is recovered; or

(C) The original data available when the species was listed, or the

interpretation of such data, were in error.

The regulations in 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing those species currently under active review.

II. What species are under review?

We are initiating 5-year status reviews of the species in the following table.

Species Under 5-Year Review

Common name	Scientific name	Status	Where listed	Final listing rule publication date and citation
Animals				
Maryland darter	*Etheostoma sellare*	Endangered	U.S.A.; MD	March 11, 1967; 32 FR 4001.
Virginia fringed mountain snail.	*Polygyriscus virginianus*	Endangered	U.S.A.; VA	July 3, 1978; 43 FR 28932.
Virginia big-eared bat	*Corynorhinus (=Plecotus) townsendii virginianus.*	Endangered	U.S.A.; KY, NC, VA, WV.	November 30, 1979; 44 FR 69206.
Hay's Spring amphipod.	*Stygobromus hayi*	Endangered	U.S.A.; District of Columbia, MD.	February 5, 1982; 47 FR 5425.
Lee County Cave isopod.	*Lirceus usdagalun*	Endangered	U.S.A.; VA	November 20, 1992; 57 FR 54722.
Shenandoah salamander.	*Plethodon shenandoah*	Endangered	U.S.A.; VA	August 18, 1989; 54 FR 34464.
Plants				
Knieskern's beaked-rush.	*Rhynchospora knieskernii*	Threatened	U.S.A.; DE, NJ	July 18, 1991; 56 FR 32978.
Small whorled pogonia.	*Isotria medeoloides*	Threatened	U.S.A.; CT , DE, GA, IL, ME, MA, MI, MO, NH, NJ, NY, NC, OH, PA, RI, SC, TN, VA, WV.	September 9, 1982; 47 FR 39827.
Virginia sneezeweed	*Helenium virginicum*	Threatened	U.S.A.; MO, VA	November 3, 1998; 63 FR 59239.

III. What do we consider in our review?

We consider all new information available at the time we conduct a 5-year review. We consider the best scientific and commercial data that have become available since the current listing determination or most recent status review, such as:

(A) Species biology, including but not limited to, population trends, distribution, abundance, demographics, and genetics;

(B) Habitat conditions, including but not limited to, amount, distribution, and suitability;

(C) Conservation measures that have been implemented that benefit the species;

(D) Threat status and trends (see five factors under heading, ''How Do We Determine Whether a Species is Endangered or Threatened?''); and

(E) Other new information, data, or corrections, including but not limited to, taxonomic or nomenclatural changes, identification of erroneous information contained in the List, and improved analytical methods.

We specifically request data from any systematic surveys, as well as any studies or analysis of data that may show any of the following:

(A) Population size or trends;

(B) Species biology or ecology;

(C) The effects of current land management on population distribution and abundance;

(D) Current habitat conditions;

(E) Recent conservation measures that have been implemented to benefit the species;

(F) Current distribution of populations;

(G) Evaluation of threats faced by the species in relation to the five listing factors (as defined below and in section 4(a)(1) of the Act); or

(H) The species' status as judged against the definition of endangered or threatened.

IV. How do we determine whether a species is endangered or threatened?

Section 4(a)(1) of the Act requires that we determine whether a species is endangered or threatened based on one or more of the five following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or man-made factors affecting its continued existence.

Under section 4(b)(1) of the Act, we must base our assessment of these factors solely on the best scientific and commercial data available.

V. What Could Happen as a Result of Our Review?

For each species under review, if we find new information indicating that a change in classification may be warranted, we may propose a rule that could do one of the following:

(A) Reclassify the species from threatened to endangered (uplist);

(B) Reclassify the species from endangered to threatened (downlist); or

(C) Remove the species from the List (delist).

If we determine that a change in classification is not warranted, then the species will remain on the list under its current status.

VI. Request for New Information

To ensure that a 5-year review is complete and based on the best available scientific and commercial information, we request new information from all sources. See ''What Information Do We Consider in Our Review?'' for specific criteria. If you submit information, support it with documentation such as maps, bibliographic references, methods used to gather and analyze the data, and/or copies of any pertinent publications, reports, or letters by knowledgeable sources.

Submit your information and materials to the appropriate U.S. Fish and Wildlife Office listed under ''VIII., Contacts.''

VII. Public Availability of Information Submitted

Before including your address, phone number, electronic mail address, or other personal identifying information in your submission, you should be aware that you entire submission—including your personal identifying information—may be made publicly available at any time. Although you can request that personal information be withheld from public review, we cannot guarantee that we will be able to do so. Materials received will be available for public inspection, by appointment, during normal business hours at the offices where the information is submitted.

VIII. Contacts

Species	Contact person, phone, e-mail	Contact address
Maryland darter	Andy Moser, (410) 573–4537; e-mail *andy_moser@fws.gov*.	U.S. Fish and Wildlife Service, Chesapeake Bay Field Office, 177 Admiral Cochrane Drive, Annapolis, MD 21401.
Virginia fringed mountain snail	Michael Drummond, (804) 693–6694; e-mail *mike_drummond@fws.gov*.	U.S. Fish and Wildlife Service, Virginia Field Office, 6669 Short Lane, Gloucester, VA 23061.
Virginia big-eared bat	Barbara Douglas, (304) 636–6586; e-mail *barbara_douglas@fws.gov*.	U.S. Fish and Wildlife Service, West Virginia Field Office, 694 Beverly Pike, Elkins, WV 26241.
Hay's Spring amphipod	Andy Moser, (410) 573–4537; e-mail *andy_moser@fws.gov*.	U.S. Fish and Wildlife Service, Chesapeake Bay Field Office, 177 Admiral Cochrane Drive, Annapolis, MD 21401.
Lee County Cave isopod	Shane Hanlon, (276) 623–1233; e-mail *shane_hanlon@fws.gov*.	U.S. Fish and Wildlife Service, Southwest Virginia Field Office, 330 Cummings Street, Abingdon, VA 24210.
Shenandoah salamander	Cindy Schulz, (804) 693–6694; e-mail *cindy_schulz@fws.gov*.	U.S. Fish and Wildlife Service, Virginia Field Office, 6669 Short Lane, Gloucester, VA 23061.
Knieskern's beaked-rush	Annette Scherer, (609) 383–3938; e-mail *annette_scherer@fws.gov*.	U.S. Fish and Wildlife Service, New Jersey Field Office, 927 North Main Street, Bldg D, Pleasantville, NJ 08232.
Small whorled pogonia	Susi von Oettingen, (603) 223–2541; e-mail *susi_vonOettingen@fws.gov*.	U.S. Fish and Wildlife Service, New England Field Office, 70 Commercial Street, Ste. 300, Concord, NH 03301.
Virginia sneezeweed	Cindy Schulz, (804) 693–6694; e-mail *cindy_schulz@fws.gov*.	U.S. Fish and Wildlife Service, Virginia Field Office, 6669 Short Lane, Gloucester, VA 23061.

IX. Authority

We publish this document under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: January 25, 2012.

Wendi Weber,

Regional Director, Northeast Region, U.S. Fish and Wildlife Service.

[FR Doc. 2012–5212 Filed 3–5–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

RIN 0648–BB18

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Management Area; Amendment 97

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

ACTION: Notification of availability of fishery management plan amendment; request for comments.

SUMMARY: The North Pacific Fishery Management Council submitted Amendment 97 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) to NMFS for review. If approved, Amendment 97 would allow owners of vessels participating in the Amendment 80 Program, known as Amendment 80 vessels, to replace their vessels for any reason at any time. Amendment 97 includes provisions that would limit the length of a replacement vessel, extend Gulf of Alaska groundfish harvest limits known as ''sideboards'' to replacement vessels, require replacement vessels to meet certain safety standards established by the Coast Guard, and prevent replaced vessels from being used in Federal groundfish fisheries off Alaska other than certain Bering Sea and Aleutian Islands groundfish fisheries. This action is necessary to promote safety-at-sea by allowing Amendment 80 vessels owners to replace aging vessels with newer, larger, and safer vessels and by requiring replacement vessels to meet certain Coast Guard vessel safety standards, and is intended to provide Amendment 80 vessel owners with the opportunity to increase their retention and utilization of groundfish catch through the ability to expand their vessel's range of processing capabilities. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act, the FMP, and other applicable laws.

DATES: Comments on the amendment must be received on or before May 7, 2012.

ADDRESSES: Send comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by NOAA–NMFS–2011–0147, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal at *http://*

www.regulations.gov. To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2011–0147 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on that line.

• *Fax:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Fax comments to (907) 586–7557.

• *Mail:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802.

• *Hand delivery to the Federal Building:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Deliver comments to 709 West 9th Street, Room 420A, Juneau, AK.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All Personal Identifying Information (for example, name, address) voluntarily submitted by the commenter will be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

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

Electronic copies of the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) prepared for this action may be obtained from *http://www.regulations.gov* or from the Alaska Region Web site at *http://alaskafisheries.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Seanbob Kelly, 907–586–7228.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires that each regional fishery management council submit any fishery management plan amendment it prepares to NMFS for review and approval, disapproval, or partial approval by the Secretary of Commerce (Secretary). The Magnuson-Stevens Act also requires that NMFS, upon receiving a fishery management plan amendment, immediately publish a notice in the **Federal Register** announcing that the amendment is available for public review and comment. This notice announces that proposed Amendment 97 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) is available for public review and comment.

The groundfish fisheries in the exclusive economic zone (EEZ) of the BSAI are managed under the FMP. The FMP was prepared by the North Pacific Fishery Management Council (Council) under the Magnuson-Stevens Act. The EA/RIR/IRFA prepared for this action contains a complete description of the alternatives and a comparative analysis of the potential impacts of the alternatives (see **ADDRESSES** for availability). All of the directly regulated entities would be expected to benefit from this action relative to the status quo because the proposed amendment would enable vessel owners to replace aging vessels with newer, larger, safer, and more efficient vessels.

Amendment 97 would amend FMP provisions related to vessel replacement in the Amendment 80 Program. In June 2006, the Council adopted Amendment 80 to the FMP, which was implemented with a final rule published in 2007 and was fully effective starting with the 2008 fishing year (72 FR 52668, September 14, 2007). Among other measures, Amendment 80 authorized the allocation of specified groundfish species to harvesting cooperatives and established a catch share program for trawl catcher/processors that are not authorized to conduct directed fishing for pollock under the American Fisheries Act of 1998 (AFA) (Pub. L. 105–227, Title II of Division C), or non-AFA trawl catcher/processors. Non-AFA trawl catcher/processors are also referred to as Amendment 80 vessels or the Amendment 80 sector. Amendment 80 was intended to meet a number of policy objectives that included improving retention and utilization of fishery resources by the Amendment 80 sector, reducing potential bycatch reduction costs, encouraging fishing practices with lower discard rates, and promoting opportunities for the sector to increase the value of harvested species.

Regulations implementing Amendment 80 limit participation in the Amendment 80 sector to non-AFA trawl catcher/processors that qualified under the definition of the non-AFA trawl catcher processor subsector as defined by section 219(a)(7) of the BSAI Catcher Processor Capacity Reduction Program (CRP), contained within the Department of Commerce and Related Agencies Appropriations Act, 2005 (Pub. L. 108–447). The regulations list the 28 non-AFA trawl catcher/processors that meet the criteria laid out in section 219(a)(7) of the CRP. In developing the regulations for Amendment 80, NMFS determined that the language of the CRP prohibited vessels that did not meet the criteria from participating in the Amendment 80 sector. Therefore, only listed vessels were permitted to fish in the Amendment 80 sector and non-qualifying vessels could not be used as replacement vessels. Arctic Sole Seafoods, Inc., the owner of an original qualifying Amendment 80 vessel that was lost, submitted comments on the proposed rule specifically addressing the restriction of participation in the Amendment 80 sector to the listed vessels and the lack of a replacement vessel provision in the regulations. NMFS maintained that Congress had established the eligibility requirements for participation in the Amendment 80 sector through the CRP and the non-AFA trawl catcher/processor subsector, and that section 219(a)(7) limited participation to the vessels that met the qualifying criteria. NMFS further explained that it could not provide replacement language in the regulations because Congress did not authorize such action. After publication of the final rule, Arctic Sole Seafoods, Inc. challenged NMFS's statutory interpretation of section 219(a)(7), contending that the lack of replacement vessel language was arbitrary and capricious.

On May 19, 2008, the U.S. District Court for the Western District of Washington (Court) issued a decision invalidating those regulatory provisions that limit the vessels used in the Amendment 80 Program to only those vessels meeting the qualification criteria in section 219(a)(7) of the CRP. In *Arctic Sole Seafoods, Inc.* v. *Gutierrez,* 622 F.Supp.2d 1050 (W.D. Wash. 2008), the Court found the statutory language of the CRP ambiguous as to whether replacement of qualifying vessels with non-qualifying vessels was permissible, and found the agency's interpretation of the statute to be arbitrary and capricious. The Court concluded that

the inability to replace qualifying vessels with non-qualifying vessels would ultimately result in the elimination of the sector through vessel attrition, and that Congress had not intended such an outcome in the CRP. The Court ordered that ''[t]o the extent that [regulations] restrict access to the BSAI non-pollock groundfish fishery to qualifying vessels without allowing a qualified owner to replace a lost qualifying vessel with a single substitute vessel, the regulations must be set aside. * * *''

After receiving the Court's decision, NMFS developed an interim policy for vessel replacement in the Amendment 80 sector consistent with the Court's decision. In October 2008, NMFS provided the Council with an overview of the Court Order, the necessary amendments to the FMP to implement the Court Order, possible alternatives the Council could consider with regard to vessel replacement, and a discussion of other aspects of the Amendment 80 Program that may be affected by vessel replacement, such as the application of Gulf of Alaska (GOA) sideboards to replacement vessels and the assignment of quota share (QS) permits to replacement vessels.

The Council and NMFS recognized the need to clarify the conditions under which an Amendment 80 vessel may be replaced and that any vessel replacement provisions must be consistent with the Court Order, the Capacity Reduction Program, and the Magnuson-Stevens Act. Over the course of several meetings, the Council considered an analysis prepared for the action and public comments regarding the action. At its June 2010 meeting, the Council selected its preferred alternative for vessel replacement and recommended that it be submitted for Secretarial review as Amendment 97 to the FMP.

If approved, Amendment 97 would allow the owner of an Amendment 80 vessel to replace that vessel for any reason and at any time. The Council determined that Amendment 97 is necessary to provide for the replacement of Amendment 80 vessels in a manner that promotes the objectives of Amendment 80, the CRP, and the Magnuson-Stevens Act, to promote safety-at-sea by providing Amendment 80 vessel owners the opportunity to replace aging vessels with newer, larger, more efficient vessels and requiring replacement vessels to meet certain Coast Guard safety standards, and to facilitate the sector's ability to increase its processing capabilities to improve the sector's retention and utilization of groundfish catch.

Amendment 97 would make several modifications to the FMP applicable to replacement vessels and replaced vessels. For replacement vessels, Amendment 97 would authorize Amendment 80 vessel owners to replace an Amendment 80 vessel for any reason and at any time. Amendment 97 would require that up to one replacement vessel be used at any given time and would restrict the length of Amendment 80 replacement vessels to no longer than 295 ft (89.0 m) length overall. The Council considered several length limits, including no length limit, before recommending that NMFS implement a 295 ft (89.9 m) maximum length overall (MLOA) limit for all Amendment 80 replacement vessels. The Council recognized that larger vessels can include facilities able to store large quantities of fish and are able to make value added products like surimi, fillets, and fishmeal in onboard fishmeal plants. The Council also determined that the proposed 295 ft (89.9 m) MLOA would provide equal advantages to each participant in the Amendment 80 sector while improving the ability of the Council and NMFS to analyze and predict the maximum fishery impacts of the Amendment 80 fleet in future actions. If approved, Amendment 97 is intended to demonstrate to the United States Maritime Administration (MARAD) that the Council recommended and NMFS approved conservation and management measures allowing vessels that exceed the limits set forth in 46 U.S.C. 12113 to participate in certain North Pacific fisheries under the Council's jurisdiction and therefore are eligible to receive a certificate of documentation consistent with 46 U.S.C. 12113 and MARAD regulations at 46 CFR 356.47.

Under Amendment 97, vessel owners that choose to remove an Amendment 80 vessel would have the option of either assigning their Amendment 80 QS permit to a replacement vessel or permanently assigning their Amendment 80 QS permit to the License Limitation Program (LLP) license derived from the originally qualifying Amendment 80 vessel. Under this second option, the holder of an Amendment 80 LLP/QS license could then assign the license to a vessel authorized to participate in the Amendment 80 sector. Amendment 97 would prohibit the use of a replacement vessel in an Amendment 80 fishery unless an Amendment 80 QS permit or an Amendment 80 LLP/QS license has been assigned to that vessel. Additionally, Amendment 97 would permit a person holding an Amendment 80 QS permit associated with a vessel that is permanently ineligible to re-enter United States fisheries to replace the vessel associated with the QS permit.

With an exception for the F/V GOLDEN FLEECE, Amendment 97 would extend to a replacement vessel all Gulf of Alaska (GOA) sideboard measures that are applicable to the originally qualifying Amendment 80 vessel being replaced. Additionally, Amendment 97 would extend to a replacement vessel authorization to conduct directed fishing for GOA flatfish species if the originally qualifying Amendment 80 vessel being replaced was authorized to conduct directed fishing for GOA flatfish species. This action would ensure that any vessel that replaces an Amendment 80 vessel eligible to conduct directed fishing for flatfish in the GOA will continue to be allowed to conduct directed fishing in the GOA flatfish fishery. The Council did not recommend any measures to address the potential expansion of the harvest by Amendment 80 replacement vessels in GOA flatfish fisheries because the Council determined that halibut prohibited species catch limits applicable to Amendment 80 replacement vessels adequately constrain harvest and because the annual harvest limits for many GOA flatfish species have not been fully harvested. Depending on the length overall of any replacement vessel for the F/V GOLDEN FLEECE, Amendment 97 would either extend the current sideboard measures applicable to the F/V GOLDEN FLEECE or would impose the sideboard measures applicable to other Amendment 80 vessels. These provisions would continue to recognize the special standing that this vessel has received under Amendment 80 and its implementing regulations.

Amendment 97 would require all Amendment 80 replacement vessels to meet contemporary vessel construction standards in order to improve safety-at-sea for these vessels. Under Amendment 97, vessel owners applying to NMFS to replace their vessel would have to submit documentation demonstrating that their replacement vessel meets U.S. Coast Guard requirements applicable to catcher/processor vessels operating in the Amendment 80 sector or, if unable to meet these requirements, is enrolled in the U.S. Coast Guard Alternative Compliance and Safety Agreement (ACSA) program. Amendment 97 would allow Amendment 80 vessels currently participating in the Amendment 80 program to replace other Amendment 80 vessels. However, in order to be used as an Amendment 80 replacement vessel,

the currently participating Amendment 80 vessel would have to demonstrate compliance with the U.S. Coast Guard requirements or participate in the ACSA program.

Amendment 97 would restrict the use of replaced vessels that are not used as Amendment 80 replacement vessels. For replaced vessels that are not assigned to an Amendment 80 fishery, e.g., that are not used as Amendment 80 replacement vessels, Amendment 97 would establish a catch limit of zero metric tons for all BSAI and GOA groundfish fisheries. A catch limit of zero metric tons for all BSAI and GOA groundfish fisheries would effectively prohibit the vessel from being used to fish in any BSAI or GOA groundfish fishery. This provision would prevent the use of replaced vessels that have substantial fishing capacity from entering into other BSAI or GOA fisheries. The Council was concerned about the highly destabilizing effect of increased fishing capacity and the resulting rapid pace of harvest if replaced vessels entered other BSAI and GOA fisheries.

Finally, Amendment 97 would amend the FMP to provide a brief summary of Amendment 93 to the FMP. This summary was inadvertently omitted from Amendment 93. To correct this omission, Amendment 97 would insert a brief summary of Amendment 93 in Appendix A to the FMP.

Public comments are being solicited on proposed Amendment 97 to the FMP through the end of the comment period (see **DATES**). NMFS intends to publish in the **Federal Register** and seek public comment on a proposed rule that would implement Amendment 97, following NMFS' evaluation of the proposed rule under the Magnuson-Stevens Act. Public comments on the proposed rule must be received by the end of the comment period on Amendment 97 to be considered in the approval/disapproval decision on Amendment 97. All comments received by the end of the comment period on Amendment 97, whether specifically directed to the FMP amendment or the proposed rule, will be considered in the FMP amendment approval/disapproval decision.

Comments received after that date will not be considered in the approval/disapproval decision on the amendment. To be considered, comments must be received, not just postmarked or otherwise transmitted, by the last day of the comment period.

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

Dated: March 1, 2012.

Steven Thur,

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

[FR Doc. 2012–5430 Filed 3–5–12; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 77, No. 44
Tuesday, March 6, 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

Submission for OMB Review; Comment Request

February 29, 2012.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques and other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC, *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Forest Service

Title: McKenzie River and Trail Visitor Surveys, Flathead Wild and Scenic River Visitor Survey.

OMB Control Number: 0596–NEW.

Summary of Collection: The Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA) (Pub. L. 93–378) guides planning and inventory activities on the National Forests. It requires the agency to inventory resources in the National Forests, including recreation opportunities, and to periodically review and update these assessments. The Forest Service Willamette National Forest and Flathead National Forest, in co-operation with National Park Service Glacier National Park, are proposing to conduct an information collection in 2012, from forest visitors using the Flathead and McKenzie and Wild and Scenic Rivers and McKenzie River National Recreational Trail. The McKenzie visitor survey will (1) support implementation of the existing Willamette National Forest Land and Resource Management Plan (USFS 1990) and Upper McKenzie River Management Plan (''UMRMP,'' USFS 1992), (2) assess changes in visitor experience that have occurred since a previous river study in 1996, and (3) inform management practices to protect and enhance the outstandingly remarkable values identified for the McKenzie River, as required by the Wild and Scenic Rivers Act. The Flathead visitor survey, which is being conducted in partnership with Glacier National Park, will (1) support the development of a Comprehensive River Management Plan (CRMP) and, in particular, will assist managers in determining a user capacity for the river, both of which are statutory requirements of the Wild and Scenic River Act and (2) help determine the allocation of service days for outfitters and guides and develop thresholds and standards for important, measurable attributes.

Need and Use of the Information: The information will be used in conjunction with other information about natural resource conditions by Flathead and Willamette National Forest and Glacier National Park managers in taking actions to provide optimum recreation experiences for visitors, while still protecting the natural resource. Information from this study will help managers determine how well river and trail values are being protected and what actions may be needed to ensure the outstandingly remarkable values for which the rivers were designated is protected and enhanced. The surveys will be administered on-site. Collecting thoughts from the public on how these areas should be managed and consideration of their interest and priorities is a critical component to developing a fair and balanced management plan and strategy. Without the public's involvement, a plan has the risk of being biased and ineffective. Without the information from this survey, managers would not have representative information about public perceptions and preferences.

Description of Respondents: Individuals or households.

Number of Respondents: 3,000.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 394.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–5325 Filed 3–5–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

February 29, 2012.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection

techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal Plant and Health Inspection Service

Title: Emergency Management Response System (EMRS).

OMB Control Number: 0579–0071.

Summary of Collection: The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture broad authority to detect, control, or eradicate pests or diseases of livestock or poultry. The Secretary may also prohibit or restrict import or export of any animal or related material if necessary to prevent the spread of any livestock or poultry pest or disease. Through the Foreign Animal Disease Surveillance Program, the Animal and Plant Health Inspection Service (APHIS) compiles essential epidemiological and diagnostic data that are used to define foreign animal diseases (FAD) and their risk factors. The data is compiled through the Veterinary Services Emergency Management Response System, a web-based database for reporting investigations of suspected FAD occurrences.

Need and Use of the Information: APHIS collects information such as the purpose of the diagnostician's visit to the site, the name and address of the owner/manager, the type of operation being investigated, the number of and type of animals on the premises, whether any animals have been moved to or from the premises and when this movement occurred, number of sick or dead animals, the results of physical examinations of the affected animals, the results of postmortem examinations, and the number and kinds of samples taken, and the name of the suspected disease. APHIS uses the collected information to effectively prevent FAD occurrences and protect the health of the United States.

Without the information, APHIS has no way to detect and monitor foreign animal disease outbreaks in the United States.

Description of Respondents: Business or other for-profit State, Local or Tribal Government.

Number of Respondents: 471.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 1,884.

Animal and Plant Health Inspection Service

Title: Importation of Fruits and Vegetables.

OMB Control Number: 0579–0264.

Summary of Collection: Under the Plant Protection Act (7 U.S.C. 7701–7772), the Secretary of Agriculture is authorized to regulate the importation of plants, plant products, and other articles to prevent the introduction of injurious plant pests. Regulations contained in Title 7 of the Code of Federal Regulations, Part 319 (Subpart-Fruit and Vegetables), Sections 319.56 *et seq.* implement the intent of this Act by prohibiting or restricting the importation of certain fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of fruit flies and other injurious plant pests that are new to the United States or not widely distributed within the United States. These regulations are enforced by the Plant Protection and Quarantine, a program with USDA's Animal and Plant Health Inspection Service (APHIS).

Need and Use of the Information: The use of certain information collection activities including phytosanitary certificates, fruit fly monitoring records, and cooperative agreements will be used to allow the entry of certain fruits and vegetables into the United States. Without the information all shipment would need to be inspected very thoroughly, thereby requiring considerably more time and would slow the clearance of international shipments.

Description of Respondents: Business or other for-profit; Federal Government.

Number of Respondents: 15.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 123.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–5326 Filed 3–5–12; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2011–0129]

Biotechnology Regulatory Services; Changes Regarding the Solicitation of Public Comment for Petitions for Determinations of Nonregulated Status for Genetically Engineered Organisms

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service (APHIS) is implementing changes to the way it solicits public comment when considering petitions for determinations of nonregulated status for genetically engineered organisms to allow for early public involvement in the process. Under the updated process, APHIS will publish two separate notices in the **Federal Register** for petitions for which APHIS prepares an environmental assessment. The first notice will announce the availability of the petition, and the second notice will announce the availability of APHIS' decisionmaking documents. This change will provide two opportunities for public involvement in the decisionmaking process.

FOR FURTHER INFORMATION CONTACT: Dr. T. Clint Nesbitt, Chief of Staff, Biotechnology Regulatory Services, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 851–3917, email: *Thomas.C.Nesbitt@aphis.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under the authority of the plant pest provisions of the Plant Protection Act (7 U.S.C. 7701 *et seq.*), the regulations in 7 CFR part 340, ''Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests,'' regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic

engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered (GE) organisms and products are considered ''regulated articles.''

The regulations in § 340.6(a) provide that any person may submit a petition to the Animal and Plant Health Inspection Service (APHIS) seeking a determination that an article should not be regulated under 7 CFR part 340. Paragraph (d) provides that, for petitions that meet the submission procedures, format, required data, and information requirements in paragraphs (b) and (c), APHIS will publish a notice in the **Federal Register** to inform the public that APHIS will accept written comments regarding the petition for a period of 60 days from the date of the notice.

As part of the USDA Customer Service Plan,[1] which seeks to improve the Agency's customer service processes, APHIS analyzed the current petition process using Lean Six Sigma business process techniques. Based on this analysis, APHIS is implementing changes to improve our process for evaluating and responding to petitions for determinations of nonregulated status. Changes include earlier publication of the notice announcing the petition's availability in the **Federal Register**, which will allow early public involvement in the process, and changes to the way we currently solicit and use public comment.[2]

Current Comment Process for Petitions for Determinations of Nonregulated Status

Once APHIS deems a petition to be complete (i.e., the petition meets all the submission procedures, format, required data, and information requirements in § 340.6(b) and (c)), APHIS, in most instances, prepares a plant pest risk assessment (PPRA) and a draft environmental assessment (EA). APHIS prepares a PPRA to assess the plant pest risk of the article and an EA, in accordance with the National Environmental Policy Act (NEPA), to provide the Agency with a review and analysis of any potential environmental impacts associated with the petition request. After the completion of these documents, APHIS typically publishes a notice in the **Federal Register** announcing the availability of the petition, PPRA, and draft EA for public comment.

After the comment period closes, APHIS reviews all written comments received during the comment period and any other relevant information. After reviewing and evaluating the comments on the petition, draft EA, PPRA, and other data, APHIS prepares a final EA, PPRA, and NEPA decision document, which can be either a Finding of No Significant Impact (FONSI) or notice of intent (NOI) to prepare an environmental impact statement (EIS).[3]

If APHIS determines, based on the PPRA, that the regulated article is unlikely to pose a plant pest risk and a FONSI is reached, APHIS subsequently furnishes a response to the petitioner approving the petition. APHIS also publishes a notice in the **Federal Register** announcing the regulatory status of the GE organism and the availability of APHIS' final EA, PPRA, FONSI, and regulatory determination. Copies of these documents are made available as indicated in the **Federal Register** notice.

Changes to the Comment Process for Petitions for Determinations of Nonregulated Status

Under our updated process, APHIS intends to decide whether a petition is complete within 3 months of its receipt. If APHIS deems that a petition is not complete, APHIS will so inform the petitioner. For petitions APHIS deems complete, APHIS will follow the process for public involvement described below.

EA Comment Process for Petitions for Determinations of Nonregulated Status

For complete petitions, APHIS will make the petition available for public comment before preparing our EA and PPRA.[4] APHIS will, therefore, publish two separate notices in the **Federal Register**—a notice announcing the availability of the petition, with an opportunity for public comment, followed by a notice announcing the availability of APHIS' EA and PPRA and an opportunity for public involvement on those documents. This will provide two separate and specific opportunities for public involvement in the decisionmaking process.

First Opportunity for Public Involvement

The first opportunity for public involvement will be a public comment period on the petition itself, once it is deemed complete by APHIS. APHIS will publish a notice in the **Federal Register** to inform the public that APHIS will accept written comments regarding a petition for a determination of nonregulated status for a period of 60 days from the date of the notice. The comment period will provide the public with an opportunity to raise any issues regarding the petition and will be used by APHIS as a scoping opportunity to identify potential issues and impacts that APHIS would then determine should be considered in our evaluation of the petition.

Second Opportunity for Public Involvement

The second opportunity for public involvement will come with the publication of a notice of availability for APHIS' EA and PPRA in the **Federal Register**. This second notice will follow one of two approaches for public participation based on whether or not APHIS decides the petition for a determination of nonregulated status is for a GE organism that raises substantive new issues.

Approach 1

This approach for public participation will be used when APHIS decides, based on our review of the petition and our evaluation and analysis of comments received from the public during the 60-day comment period on the petition, that the petition involves a GE organism that raises no substantive new issues. This would include instances, for example, where APHIS decides that the petition involves gene modifications that do not raise substantive new biological, cultural, or ecological issues due to the nature of the modification or APHIS' familiarity with the recipient organism.

Under this approach, APHIS will publish a notice in the **Federal Register** announcing APHIS' preliminary regulatory determination and the availability of APHIS' EA, FONSI, and PPRA for a 30-day public review. Upon completion of the 30-day review period, APHIS will review and evaluate any information received. If APHIS determines that no substantive information has been received that

[1] For more information on the USDA Customer Service Plan, go to *http://www.usda.gov/open/Blog.nsf/dx/USDA-CSPlan.pdf/$file/USDA-CSPlan.pdf.*

[2] For information regarding APHIS' analysis and other internal process changes APHIS is making to our petition process, go to *http://www.aphis.usda.gov/biotechnology/pet_proc_imp.shtml.*

[3] If an EIS is determined to be necessary, APHIS completes the NEPA EIS process in accordance with Council on Environmental Quality regulations (40 CFR part 1500–1508) and APHIS' NEPA implementing regulations (7 CFR part 372) and prepares a record of decision prior to either approving or denying the petition.

[4] This notice describes our process for handling most petitions for determinations of nonregulated status. APHIS may decide that an EIS is necessary, either when we deem the petition to be complete or at any time during the EA process, in which case APHIS would complete the NEPA EIS process in accordance with Council on Environmental Quality regulations and APHIS' NEPA implementing regulations.

would warrant APHIS altering its preliminary regulatory determination or FONSI, substantially changing the proposed action identified in the EA, or substantially changing the analysis of impacts in the EA, our preliminary regulatory determination will become final and effective upon notification of the public through an announcement on our Web site. APHIS will also furnish a response to the petitioner regarding our final regulatory determination. No further **Federal Register** notice will be published announcing the final regulatory determination.

Should APHIS determine that we have received substantive new information within 30 days of publication of the **Federal Register** notice that would warrant APHIS altering our preliminary regulatory determination or FONSI, substantially changing the proposed action identified in the EA, or substantially changing the analysis of impacts in the EA, our preliminary determination will not become effective. In this case, APHIS intends to notify the public through an announcement on our Web site of our intent to conduct additional analysis. APHIS will also inform the petitioner of our intent.

Based on the information APHIS received and our further analysis, the Agency will prepare an amended EA, a new FONSI, and/or a revised PPRA, as necessary. APHIS will then publish a notice in the **Federal Register** announcing the availability of these documents for public review and APHIS' preliminary regulatory determination. After reviewing and evaluating any additional information received within 30 days of publication of this **Federal Register** notice, our preliminary regulatory determination will become final and effective upon notification of the public through an announcement on our Web site. APHIS will also furnish a response to the petitioner regarding our final regulatory determination. No further **Federal Register** notice will be published announcing the final regulatory determination.

Approach 2

A second approach for public participation will be used when APHIS determines that the petition for a determination of nonregulated status is for a GE organism that raises substantive new issues. This could include petitions involving a recipient organism that has not previously been determined by APHIS to have nonregulated status or when APHIS determines that gene modifications raise substantive biological, cultural, or ecological issues not previously analyzed by APHIS. Substantive issues would be identified by APHIS based on our review of the petition and our evaluation and analysis of comments received from the public during the 60-day comment period on the petition.

Under this approach, APHIS will solicit written comments on a draft EA and PPRA for 30 days through the publication of a **Federal Register** notice. The draft EA and PPRA will be made available as indicated in the **Federal Register** notice. Upon completion of the 30-day comment period, APHIS will review and evaluate all written comments received during the comment period and any other relevant information. After reviewing and evaluating the comments on the draft EA and PPRA and other information, APHIS will revise the PPRA as necessary and prepare a final EA. Based on the final EA, APHIS will prepare a NEPA decision document—either a FONSI or NOI to prepare an EIS. If a FONSI is reached, APHIS will furnish a response to the petitioner, either approving or denying the petition. APHIS will publish a notice in the **Federal Register** announcing the regulatory status of the GE organism and the availability of APHIS' final EA, PPRA, FONSI, and our regulatory determination.

These changes to the public participation process are effective March 6, 2012. All petitions for determinations of nonregulated status for GE organisms received by APHIS on or after this date will be handled using the new process for handling petitions described in this notice. For petitions received before this date and currently under consideration by APHIS, our ability to transition to the new process will depend upon the current status of the petition. For those petitions where APHIS has not completed a draft EA and PPRA, APHIS will follow the new process, i.e., the complete petition will be published for a 60-day comment period followed by later public involvement regarding the EA and PPRA. For those petitions where APHIS has completed or is nearing completion of a draft EA and PPRA, APHIS will follow our previous process, i.e., the petition, draft EA, and PPRA will be made available in a single **Federal Register** notice for a 60-day comment period. APHIS will notify petitioners which process their petition will follow and will make this information available at *http://www.aphis.usda.gov/biotechnology/pet_proc_imp.shtml.*

These public participation process changes are consistent with (1) 7 CFR part 340, (2) the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321 *et seq.*), (3) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (4) USDA regulations implementing NEPA (7 CFR part 1b), and (5) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 29th day of February 2012.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2012–5364 Filed 3–5–12; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0005]

Notice of Availability of a Pest Risk Analysis for the Importation of Litchi, Longan, and Rambutan From the Philippines Into the Continental United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability and request for comments.

SUMMARY: We are advising the public that we have prepared a pest risk analysis that evaluates the risks associated with the importation into the continental United States of fresh litchi, longan, and rambutan fruit from the Philippines. Based on that analysis, we believe that the application of one or more designated phytosanitary measures will be sufficient to mitigate the risks of introducing or disseminating plant pests or noxious weeds via the importation of fresh fruit of litchi, longan, and rambutan from the Philippines. We are making the pest risk analysis available to the public for review and comment.

DATES: We will consider all comments that we receive on or before May 7, 2012.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2012-0005-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2012–0005, Regulatory Analysis and Development, PPD, APHIS, Station

3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0005* or in our reading room, which is located in Room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

FOR FURTHER INFORMATION CONTACT: Ms. Claudia Ferguson, Regulatory Policy Coordinator, Regulations, Permits, and Manuals, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 851–2352.

SUPPLEMENTARY INFORMATION:

Background

Under the regulations in ''Subpart—Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–54, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent plant pests from being introduced into and spread within the United States.

Section 319.56–4 contains a performance-based process for approving the importation of commodities that, based on the findings of a pest risk analysis, can be safely imported subject to one or more of the designated phytosanitary measures listed in paragraph (b) of that section.

APHIS received a request from the Government of the Philippines to allow the importation of fresh fruit of litchi (*Litchi chinensis*), longan (*Dimocarpus longan*), and rambutan (*Nephelium lappaceum*) from the Philippines into the continental United States. Currently, fresh fruits of litchi, longan, and rambutan are not authorized for entry from the Philippines. We have completed a pest risk analysis for the purpose of evaluating the pest risks associated with the importation of fresh fruit of litchi, longan, and rambutan into the continental United States. The analysis consists of a pest list identifying pests of quarantine significance that are present in the Philippines and could follow the pathway of importation into the United States and a risk management document identifying phytosanitary measures that could be applied to the commodities to mitigate the pest risk.

We have concluded that fresh fruit of litchi, longan, and rambutan can be safely imported into the continental United States from the Philippines using one or more of the five designated phytosanitary measures listed in § 319.56–4(b). The requirements for shipments of fresh fruit of litchi, longan, and rambutan from the Philippines would be as follows:

- The fresh fruit of litchi, longan, and rambutan may be imported into the continental United States in commercial consignments only;
- The fresh fruit of litchi, longan, and rambutan must be irradiated in accordance with 7 CFR part 305 with a minimum absorbed dose of 400 Gy;
- If the irradiation treatment is applied outside the United States, each consignment of fresh fruit of litchi, longan, and rambutan must be jointly inspected by APHIS and the national plant protection organization (NPPO) of the Philippines and accompanied by a phytosanitary certificate attesting that the fruit received the required irradiation treatment. In the case of fresh rambutan fruit, the phytosanitary certificate must also include an additional declaration stating that the consignment was inspected and found free of the powdery mildew *Oidium nephelii;*
- If irradiation is applied upon arrival in the United States, each consignment of fresh fruit of litchi, longan, and rambutan must be inspected by the NPPO of the Philippines prior to departure. In the case of fresh rambutan fruit, the phytosanitary certificate must also include an additional declaration stating that the consignment was inspected and found free of the powdery mildew *Oidium nephelii;* and
- The fresh fruit of litchi, longan, and rambutan are subject to inspection upon arrival at the U.S. port of entry.

Therefore, in accordance with § 319.56–4(c), we are announcing the availability of our pest risk analysis for public review and comment. The pest risk analysis may be viewed on the Regulations.gov Web site or in our reading room (see **ADDRESSES** above for a link to Regulations.gov and information on the location and hours of the reading room). You may request paper copies of the pest risk analysis by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. Please refer to the subject of the pest risk analysis you wish to review when requesting copies.

After reviewing any comments we receive, we will announce our decision regarding the import status of fresh fruit of litchi, longan, and rambutan from the Philippines in a subsequent notice. If the overall conclusions of the analysis and the Administrator's determination of risk remain unchanged following our consideration of the comments, then we will authorize the importation of fresh fruit of litchi, longan, and rambutan from the Phillipines into the continental United States subject to the requirements specified in the risk management document.

Authority: 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 29th day of February 2012.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2012–5365 Filed 3–5–12; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Request for Applications: The Community Forest and Open Space Conservation Program

AGENCY: Forest Service.

ACTION: Notice; Correction.

SUMMARY: The Department of Agriculture (USDA), Forest Service, State and Private Forestry, Cooperative Forestry staff, published a document in the **Federal Register** of February 15, 2011, concerning requests for applications for the Community Forest and Open Space Conservation Program (Community Forest Program or CFP). The document contained incorrect funding information in section 2 (Award).

ADDRESSES: All local governments' and qualified nonprofit organizations' applications must be submitted to the State Forester of the State where the property is located. All Indian tribal applications must be submitted to the equivalent official of the Indian tribe. The Forest Service encourages applicants to contact and work with their State Forester or equivalent official of the Indian tribe when developing their proposal. The State Forester's contact information may be found at *http://www.fs.fed.us/spf/coop/programs/loa/cfp.shtml*.

All applicants must also send an email to *communityforest@fs.fed.us* to confirm an application has been submitted for funding consideration.

FOR FURTHER INFORMATION CONTACT: For questions regarding the grant application or administrative regulations, contact Kathryn Conant, Program Manager, 202–401–4072,

kconant@fs.fed.us or Maya Solomon, Program Coordinator, 202–205–1376, *mayasolomon@fs.fed.us*.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 twenty-four hours a day, every day of the year, including holidays.

Correction

In the **Federal Register** of February 15, 2012, in FR DOC #2012–3528 on page 8802 in the first column, correct the ''*2. Award Information*'' to read:

2. Award Information

Total CFP funding anticipated for awards made under this program is $3.15 million. Individual grant applications may not exceed $400,000. Awarding of grants under this program is contingent upon the availability of appropriated funds.

No legal liability on the part of the Government shall be incurred until appropriated funds are available and committed by the grant officer for this program to the applicant in writing. The initial grant period shall be for two years, and acquisition of lands should occur within that timeframe. The grant may be extended by the Forest Service when necessary to accommodate unforeseen circumstances in the land acquisition process. Awardees must submit written annual financial performance reports and semi–annual project performance reports shall be required and submitted to the appropriate grant officer.

Dated: February 21, 2012.

James Hubbard,

Deputy Chief, State & Private Forestry.

[FR Doc. 2012–5401 Filed 3–5–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

National Urban and Community Forestry Advisory Council

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The National Urban and Community Forestry Advisory Council will meet via conference call on March 20, 2012. The conference call will be initiated in Washington, DC at the U.S. Department of Agriculture (USDA), Forest Service, Yates Building. The purpose of this meeting is to discuss and finalize the Council's 2011 annual accomplishment report, recommendations for the Secretary of Agriculture, the 2012 plan of work, and hear public input related to urban and community forestry.

DATES: The meeting will be held on March 20, 2012, from 12 noon to 1:30 p.m. or until Council business is completed.

ADDRESSES: The meeting will be initiated from the Yates Building, 201 14th Street, SW., Washington, DC 20250; Phone: 202–205–7829.

Written comments concerning this meeting should be addressed to Nancy Stremple, Executive Staff to the National Urban and Community Forestry Advisory Council, 201 14th Street SW., Yates Building (1 Central) MS–1151, Washington, DC 20250–1151. Comments may also be sent via email to *nstremple@fs.fed.us,* or via facsimile to 202–690–5792.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. Visitors are encouraged to call ahead to facilitate entry into the Forest Service building.

FOR FURTHER INFORMATION CONTACT: Nancy Stremple, Executive Staff to the National Urban and Community Forestry Advisory Council, 201 14th Street. SW., Yates Building (1 Central) MS–1151, Washington, DC 20250–1151, phone 202–205–1054.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Those interested in attending should contact Nancy Stremple to be placed on the meeting attendance list or to receive call-in information. Council discussion is limited to Forest Service staff and Council members; however, persons who wish to bring urban and community forestry matters to the attention of the Council may file written statements with the Council staff (201 14th Street SW., Yates Building (1 Central) MS–1151, Washington, DC 20250–1151, email: *nstremple@fs.fed.us*) before or after the meeting. Public input sessions will be provided at the meeting.

Dated: February 28, 2012.

Robin L. Thompson,

Associate Deputy Chief, State and Private Forestry.

[FR Doc. 2012–5402 Filed 3–5–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

National Agricultural Library

Notice of Intent To Request an Extension of a Currently Approved Information Collection

AGENCY: National Agricultural Library, Agricultural Research Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13) and Office of Management and Budget (OMB) regulations at 5 CFR Part 1320 (60 FR 44978, August 29, 1995), this notice announces the Agricultural Research Service (ARS) intention to request an extension of a currently approved information collection, Information Collection for Document Delivery Services at the National Agricultural Library (NAL), that expires August 31, 2012.

DATES: Comments must be submitted on or before May 10, 2012.

ADDRESSES: Address all comments concerning this notice to Wayne Thompson, USDA, ARS, NAL, Collection Services Branch, 10301 Baltimore Ave., Room 305E, Beltsville, Maryland 20705–2351.

FOR FURTHER INFORMATION CONTACT: Wayne Thompson, Access Services Librarian, telephone: 301–504–6503; fax: 301–504–7593; email: *access@ars.usda.gov*.

SUPPLEMENTARY INFORMATION:

Title: Information Collection for Document Delivery Services.

OMB Number: 0518–0027.

Expiration Date of Approval: August 31, 2012.

Type of Request: To extend a currently approved information collection.

Abstract: In its role as both a preeminent agricultural research library and a National Library of the United States, NAL (part of the Department of Agriculture, Agricultural Research Service) provides loans and photocopies of materials from its collections to libraries and other institutions and organizations. NAL follows applicable copyright laws and interlibrary loan guidelines, standards, codes, and practices when providing loans and photocopies and charges a fee, if applicable, for this service. To request a loan or photocopy, institutions must provide a written request to NAL using either NAL's Web-based online request system or an interlibrary loan request system such as the Online Computer Library Center (OCLC) or the National

Library of Medicine's Docline. Information provided in these requests include the name, address, and telephone number of the party requesting the material, and depending on the method of delivery of the material to the party, may include either a fax number, email address, or Ariel IP address. The requestor must also provide a statement acknowledging copyright compliance, bibliographic information for the material they are requesting, and the maximum dollar amount they are willing to pay for the material. The collected information is used to deliver the material to the requesting party, bill for and track payment of applicable fees, monitor the return to NAL of loaned material, identify and locate the requested material in NAL collections, and determine whether the requesting party consents to the fees charged by NAL.

Estimate of Burden: Average 1.00 minute per response.

Description of Respondents: Respondents to the collection of information are those libraries, institutions, or organizations that request interlibrary loans or copies of material in the NAL collections. Each respondent must furnish the information for each loan or copying request.

Estimated Number of Respondents: 1,350.

Frequency of Responses: Average 9 per respondent.

Estimated Total Annual Burden on Respondents: 203 hours.

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 will have a practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, such as through the use of appropriate automated, electronic, mechanical, or other technological collection techniques. Comments may be sent to the address in the preamble. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: February 10, 2012.

Edward Knipling,

Administrator, Agricultural Research Service.

[FR Doc. 2012–5432 Filed 3–5–12; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Withdrawal of Notice of Intent To Prepare an Environmental Impact Statement for the Upper Deckers Creek Watershed, Preston County, WV

AGENCY: Natural Resources Conservation Service.

ACTION: Withdrawal of Notice of Intent to prepare an EIS.

SUMMARY: In the Monday, November 21, 2011, **Federal Register**, Vol. 76. No. 224, the Natural Resources Conservation Service (NRCS) announced its intension to prepare an Environmental Impact Statement (EIS) for the rehabilitation of the Upper Deckers Creek Site 1, in Preston County, West Virginia. Preparation of an EIS is no longer planned at this time.

The purpose of the project is to bring the dam up to current dam safety standards. NRCS policy requires that an EIS be prepared for watershed project activities that include stream channel realignment, increases in channel capacity, or projects that require congressional action or that have the potential to significantly affect the quality of the human environment. Upon review, it now appears that none of these conditions apply to the Upper Deckers Creek Site 1 dam rehabilitation project. Therefore, NRCS is withdrawing its Notice of Intent to prepare an EIS.

FOR FURTHER INFORMATION CONTACT: Kevin Wickey, State Conservationist, Natural Resources Conservation Service, 1550 Earl Core Road, Suite 200, Morgantown, West Virginia 26505. Telephone: (304) 284–7545.

SUPPLEMENTARY INFORMATION: The project involves the rehabilitation of the Upper Deckers Creek Site 1 dam and impoundment to meet current design criteria and performance standards. The Site 1 dam, located about 1.5 miles northwest of Arthurdale, WV, was constructed in 1969 as a single purpose flood control structure. Alternatives under consideration include the addition of rural raw water supply as a project purpose and increasing the reservoir volume, evaluating other raw water supply sources, raising the top of the dam elevation, flattening upstream and downstream face of the dam to improve slope stability, installing an internal drainage system in the dam, constructing a new auxiliary spillway, and constructing a new principal spillway riser structure. In addition to these structural alternatives, a no-action and a decommissioning alternative will be evaluated.

A draft Plan-Environmental Assessment will be prepared and circulated for review by agencies and the public. The Natural Resources Conservation Service invites participation and consultation of agencies and individuals that have special expertise, legal jurisdiction, or interest in the preparation of the draft environmental assessment. Comments received, including the names and addresses of those who comment, will be considered part of the public record for this proposal. As a result of the process, if it is determined that the project may have significant impacts, the EIS process will be reinitiated and a NOI published. Further information on the proposed action may be obtained from Kevin Wickey, State Conservationist, at the above address or telephone (304–284–7545).

Dated: February 24, 2012.

Kevin Wickey,

State Conservationist.

(This activity is listed in the Catalog of Federal Domestic Assistance under No. 10.904—Watershed Protection and Flood Prevention—and is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials.)

[FR Doc. 2012–5429 Filed 3–5–12; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 48–2011]

Foreign-Trade Zone 109 — Watertown, NY; Amendment to Application; North American Tapes, LLC (Textile Athletic Tape), Watertown, NY

A request has been submitted to the Foreign-Trade Zones Board (the Board) by the Jefferson County Industrial Development Authority (JCIDA), grantee of FTZ 109, to amend its application requesting authority on behalf of North American Tapes (NAT), to manufacture athletic tape under FTZ procedures within FTZ 109. The application was docketed under docket number 48–2011 on July 15, 2011 (76 FR 43259, 7–20–2011).

The NAT facility (25 employees) is located within FTZ 109 at 22430 Fisher

Road in the Jefferson County Industrial Park (Site 1). The facility is used to produce pressure-sensitive adhesive athletic tape with textile fabric backing material for the U.S. market and export.

JCIDA has now amended the application to provide updated and corrected information regarding the domestic availability and technical specifications of the textile fabric that would be used as an input to NAT's manufacturing process.

Public comment on the amended application is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the following address: Office of the Executive Secretary, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230–0002. The closing period for receipt of comments is April 5, 2012. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to April 20, 2012.

A copy of the amended application will be available for public inspection at the Office of the Foreign-Trade Zones Board's Executive Secretary at the address listed above and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz.* For further information, contact Pierre Duy at or (202) 482–1378.

Dated: February 29, 2012.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–5418 Filed 3–5–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–851]

Certain Preserved Mushrooms From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, and Rescission in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce

DATES: *Effective Date:* March 6, 2012.

SUMMARY: The Department of Commerce (''the Department'') is currently conducting an administrative review of the antidumping duty order on certain preserved mushrooms from the People's Republic of China (''PRC'') covering the period February 1, 2010, through January 31, 2011. We preliminarily determine that sales made by Blue Field (Sichuan) Food Industrial Co., Ltd. (Blue Field), and Dujiangyan Xingda Foodstuffs Co., Ltd. (Xingda) were made below normal value (''NV''). We invite interested parties to comment on these preliminary results. In addition, we are also rescinding this administrative review with respect to China National Cereals, Oils & Foodstuffs Import & Export Corp. (China National), China Processed Food Import & Export Co. (China Processed), Fujian Pinghe Baofeng Canned Foods (Fujian Pinghe), Fujian Yuxing Fruits and Vegetables Foodstufs Development Co., Ltd. (Fujian Yuxing), Fujian Zishan Group Co., Ltd. (Fujian Zishan), Guangxi Eastwing Trading Co., Ltd. (Guangxi Eastwing), Guangxi Hengyong Industrial & Commercial Dev. Ltd. (Guangxi Hengyong), Guangxi Jisheng Foods, Inc. (Jisheng), Linyi City Kangfu Foodstuff Drinkable Co.Ltd. (Linyi City), Longhai Guangfa Food Co., Ltd.(Longhai Guangfa), Primera Harvest (Xingfan) Co., Ltd. (Primera Harvest), Shandong Fengyu Edible Fungus Corporation Ltd. (Shangdong Fengyu), Sun Wave Trading Co., Ltd. (Sun Wave Trading), Xiamen Greenland Import & Export Co., Ltd. (Xiamen Greenland), Xiamen Gulong Import & Export Co., Ltd. (Xiamen Gulong), Xiamen Jiahua Import & Export Trading Co., Ltd. (Xiamen Jiahua), Xiamen International Trade & Industrial Co., Ltd. (XITIC), Xiamen Longhuai Import & Export Co., Ltd. (Xiamen Longhuai), Zhangzhou Ganchang Foods Co., Ltd. (Zhangzhou Ganchang), Zhangzhou Hongda Import & Export Trading Co., Ltd. (Zhangzhou Hongda), and Zhangzhou Tongfa Foods Industry Co., Ltd. (Zhangzhou Tongfa).

FOR FURTHER INFORMATION CONTACT: Michael J. Heaney, or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4475 or (202) 482–0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

On February 19, 1999, the Department published in the **Federal Register** the antidumping duty order on certain preserved mushrooms (''mushrooms'') from the PRC.[1] On February 1, 2011, the Department published in the **Federal Register** its notice of opportunity to request an administrative review of the antidumping duty order on mushrooms from the PRC.[2] On February 25, 2011, Ayecue (Liaocheng) Foodstuff Co.,Ltd. (Ayecue) filed a request for review. On February 28, 2011, Blue Field also filed a review request. Finally, on February 28, 2011, Petitioner, Monterey Mushrooms, Inc., requested reviews for the following exporters: (1) Ayecue, (2) Blue Field, (3) China National, (4) China Processed, (5) Dujiangyan Xingda Foodstuffs Co., Ltd. (Xingda), (6) Fujian Golden Banyan Foodstuffs Co., Ltd. (Golden Banyan), (7) Fujian Pinghe, (8) Fujian Yuxing, (9) Fujian Zishan, (10) Guangxi Eastwing, (11) Guangxi Hengyong, (12) Jisheng, (13) Linyi City, (14) Longhai Guangfa, (15) Primera Harvest, (16) Shandong Fengyu, (17) Shandong Jiufa, (18) Sun Wave Trading, (19) Xiamen Greenland, (20) Xiamen Gulong, (21) XITIC, (22) Xiamen Jiahua, (23) XITIC, (24) Xiamen Longhuai, (25) Zhangzhou Ganchang, Ltd. (Zhangzhou Ganchang), (26) Zhangzhou Golden Banyan Foodstuffs Industrial Co., Ltd. (Zhangzgou Golden), (27) Zhangzhou Hongda, (28) Zhangzhou Tongfa Foods Industry Co., Ltd., (Zhangzhou Tongfa) and (29) Zhejiang Iceman Food Co., Ltd (Zhejiang Iceman). On March 31 2011, the Department published in the **Federal Register** a notice of initiation of the antidumping duty administrative review of mushrooms from the PRC for the period February 1, 2010, through January 31, 2011, with respect to the 28 companies named in the review requests specified above.[3]

On April 8, 2011, we received a separate rate certification from Ayecue. On April 28, 2010, we received a separate rate certification from Jisheng.

On May 27, 2011, Shandong Jiufa submitted a separate rate certificaton. On May 31, 2011, Golden Banyan filed a separate rate certification.

On June 27, 2011 the petitioner filed a letter withdrawing its request for Linyi City and for Zhangzhou Ganchang. Finally, on June 29, 2011, the petitioner filed a letter withdrawing its request for review of XITIC. As the review request was timely withdrawn for one of the exporters previously selected for examination (*i.e.,* XITIC), the Department selected an additional exporter for individual examination in this administrative review according to the methodology specified below.

[1] *See Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Preserved Mushrooms From the People's Republic of China,* 64 FR 8308 (February 19, 1999) (''the Order'').

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 76 FR 5559 (February 1, 2011).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part, and Deferral of Administrative Review,* 76 FR 17825 (March 31, 2011) (''*Initiation Notice*'').

Respondent Selection

Section 777A(c)(1) of the Tariff Act of 1930, as amended (''the Act''), directs the Department to calculate individual dumping margins for each known exporter or producer of the subject merchandise. However, section 777A(c)(2) of the Act gives the Department discretion to limit its examination to a reasonable number of exporters or producers if it is not practicable to examine all exporters or producers involved in the review.

On April 4, 2011, the Department released U.S. Customs and Border Protection (''CBP'') data for entries of the subject merchandise during the period of review (''POR'') under administrative protective order (''APO'') to all interested parties having an APO, inviting comments regarding the CBP data and respondent selection. The Department received comments from Ayecue on April 8, 2011, and XITIC, Shandong Jiufia, and Blue Field on April 13, 2011.

Based on the large number of potential exporters or producers involved in this administrative review and, after considering our resources, we determined that it was not practicable to individually examine all 28 companies. Accordingly, on May 18, 2011, we issued our first respondent selection memorandum indicating that, pursuant to section 777A(c)(2)(B) of the Act, we could reasonably examine only the two largest producers/exporters of subject merchandise by volume. Therefore, we selected Blue Field and XITIC as mandatory respondents.[4] As noted, previously, on June 29, 2011, the petitioner filed a letter withdrawing its request for review of XITIC. Accordingly, on July 22, 2011, we issued a second respondent selection memorandum in which we selected Xingda, the second largest exporter of the remaining respondents for which the Department had a continuing request for review, as the second respondent in this review.[5]

We issued our antidumping questionnaire to Blue Field and Xingda on June 1, 2011, and July 25, 2011, respectively. On October 26, 2011, we issued supplemental questionnaires to Blue Field and Xingda. Blue Field and Xingda filed their responses to our request for supplemental information on November 10, 2011.

Verification

From January 9 through January 13, we conducted a verification of Blue Field. We used standard verification procedures, including examination of relevant accounting and production records, as well as source documentation provided by the respondents.[6]

Surrogate Country and Surrogate Value Data

Partial Rescission

Section 351.213(d)(1) of the Department's regulations provide that the Department will rescind an administrative review if the party that requested the review withdraws its request for review within 90 days of the date of publication of the notice of initiation of the requested review, or withdraws it at a later date if the Department determines it is reasonable to extend the time limit for withdrawing the request. The Department initiated this administrative review on March 31, 2011. *See Initiation Notice,* 76 FR 17825.

Petitioner withdrew its request for review for 18 exporters on May 6, 2011. Additionally, on June 27, 2011 petitioner withdrew its request for review of Linyi City and for Zhangzhou Ganchang. Finally, on June 29, 2011, the petitioner filed a letter withdrawing its request for review of XITIC. Because the party that requested this review has timely withdrawn the request for review, we are rescinding this review with respect to the following companies: (1) China National, (2) China Processed, (3) Fujian Pinghe, (4) Fujian Yuxing, (5) Fujian Zishan, (6) Guangxi Eastwing, (7) Guangxi Hengyong, (8) Jisheng, (9) Linyi City, (10) Longhai Guangfa, (11) Primera Harvest, (12) Shandong Fengyu, (13) Sun Wave Trading, (14) Xiamen Greenland, (15) Xiamen Gulong, (16) Xiamen Jiahua, (17) XITIC, (18) Xiamen Longhuai, (19) Zhangzhou Ganchang, (20) Zhangzhou Hongda, and (21) Zhangzhou Tongfa.

Scope of the Order

The products covered by this order are certain preserved mushrooms, whether imported whole, sliced, diced, or as stems and pieces. The certain preserved mushrooms covered under this order are the species *Agaricus bisporus* and *Agaricus bitorquis.* ''Certain Preserved Mushrooms'' refers to mushrooms that have been prepared or preserved by cleaning, blanching, and sometimes slicing or cutting. These mushrooms are then packed and heated in containers including, but not limited to, cans or glass jars in a suitable liquid medium, including, but not limited to, water, brine, butter or butter sauce. Certain preserved mushrooms may be imported whole, sliced, diced, or as stems and pieces. Included within the scope of this order are ''brined'' mushrooms, which are presalted and packed in a heavy salt solution to provisionally preserve them for further processing.[7]

Excluded from the scope of this order are the following: (1) All other species of mushroom, including straw mushrooms; (2) all fresh and chilled mushrooms, including ''refrigerated'' or ''quick blanched mushrooms;'' (3) dried mushrooms; (4) frozen mushrooms; and (5) ''marinated,'' ''acidified,'' or ''pickled'' mushrooms, which are prepared or preserved by means of vinegar or acetic acid, but may contain oil or other additives.

The merchandise subject to this order is classifiable under subheadings: 2003.10.0127, 2003.10.0131, 2003.10.0137, 2003.10.0143, 2003.10.0147, 2003.10.0153, and 0711.51.0000 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and Customs purposes, the written description of the scope of this order is dispositive.

Non-Market Economy Country Status

In every case conducted by the Department involving the PRC, we have treated the PRC as a non-market economy (''NME'') country.[8] In

[4] *See* Memorandum to Richard Weible, Director, AD/CVD Operations, Office 7, from Michael J. Heaney, Analyst, AD/CVD Operations, Office 7, Subject: ''Administrative Review of the Antidumping Duty Order on Certain Preserved Mushrooms from the People's Republic of China: Respondent Selection Memorandum,'' dated May 18, 2011.

[5] *See* Memorandum to Richard Weible, Director, AD/CVD Operations, Office 7, from Michael J. Heaney, Analyst, AD/CVD Operations, Office 7, Subject: ''Administrative Review of the Antidumping Duty Order on Certain Preserved Mushrooms from the People's Republic of China: Respondent Selection Memorandum,'' dated July 22, 2011.

[6] *See* ''Verification of the Sales and Factors Response of Blue Field in the Antidumping Review of Certain Preserved Mushrooms'' (''Blue Filed Verification Report''), dated February 14, 2012.

[7] On June 19, 2000, the Department affirmed that ''marinated,'' ''acidified,'' or ''pickled'' mushrooms containing less than 0.5 percent acetic acid are within the scope of the antidumping duty order. *See* Recommendation Memorandum—Final Ruling of Request by Tak Fat, *et al.* for ''Exclusion of Certain Marinated, Acidified Mushrooms from the Scope of the Antidumping Duty Order on Certain Preserved Mushrooms from the People's Republic of China'', dated June 19, 2000. On February 9, 2005, the United States Court of Appeals for the Federal Circuit upheld this decision. *See Tak Fat* v. *United States,* 396 F.3d 1378 (Fed. Cir. 2005).

[8] *See, e.g., Pure Magnesium from the People's Republic of China: Final Results of Antidumping*

Continued

accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the Department.[9]

Separate Rates Determination

It is the Department's policy to assign all exporters of the merchandise subject to review in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to exports. To establish whether a company is sufficiently independent to be entitled to a separate, company-specific rate, the Department analyzes each exporting entity in an NME country under the test established in *Final Determination of Sales at Less than Fair Value: Sparklers from the People's Republic of China,* 56 FR 20588 (May 6, 1991) (''*Sparklers*''), and amplified by *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China,* 59 FR 22585 (May 2, 1994) (''*Silicon Carbide*'').

In the *Initiation Notice,* the Department stated that all firms that wish to qualify for separate-rate status must complete, as appropriate, either a separate-rate application or certification. *See Initiation Notice,* 76 FR at 17826. To establish separate-rate eligibility, the Department requires entities for which a review was requested that were assigned a separate rate in the most recent segment of the proceeding in which they participated to certify that they continue to meet the criteria for obtaining a separate rate. In this administrative review, Ayecue, Fujian Golden Banyan Foodstuffs, and Shandong Juifa (''the separate-rate applicants'') each submitted a separate-rate certification indicating they continued to meet the criteria for obtaining a separate rate. Additionally, Blue Field and Xingda both submitted a separate-rate certification and answered all the separate-rate questions in our questionnaires. As such, we have determined that Blue Field, Xingda, and the separate-rate applicants each provided company-specific information and each stated that it met the criteria for the assignment of a separate rate.

The Department's separate-rate test to determine whether the exporter is independent from government control does not consider, in general, macroeconomic/border-type controls (*e.g.,* export licenses, quotas, and minimum export prices), particularly if these controls are imposed to prevent dumping. The test focuses, rather, on controls over the investment, pricing, and output decision-making process at the individual firm level.[10]

Absence of De Jure Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) An absence of restrictive stipulations associated with the individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of companies. *See Sparklers,* 56 FR at 20589.

In this administrative review, Blue Field and Xingda demonstrated, and the separate-rate applicants certified, that consistent with the most recent segment of this proceeding in which the entities participated and were granted a separate rate, there is an absence of *de jure* government control of their respective exports.[11] Each of the separate-rate applicants certified to its separate-rate status. Additionally, Blue Field, Xingda, and the separate-rate applicants stated that their companies had no relationship with any level of the PRC government with respect to ownership, internal management, and business operations. In this segment, we have no new information on the record that would cause us to reconsider our previous determinations of the absence of *de jure* government control with regard to these companies. Thus, we find that evidence on the record supports a preliminary finding of an absence of *de jure* government control with regard to the export activities of Blue Field, XITIC, and the separate-rate applicants.

Absence of De Facto Control

As stated in previous cases, there is some evidence that certain enactments of the PRC central government have not been implemented uniformly among different sectors and/or jurisdictions in the PRC. *See Silicon Carbide,* 59 FR at 22586–87; *Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from the People's Republic of China,* 63 FR 72255 (December 31, 1998). Therefore, the Department has determined that an analysis of *de facto* control is critical in determining whether the respondents are, in fact, subject to a degree of government control which would preclude the Department from assigning separate rates.

The Department typically considers the following four factors in evaluating whether a respondent is subject to *de facto* government control over its export functions: (1) Whether the export prices are set by, or subject to the approval of, a government agency; (2) whether the respondent retains the proceeds from its export sales and makes independent decisions regarding the disposition of profits or financing of losses; (3) whether the respondent has the authority to negotiate and sign contracts and other agreements; (4) whether the respondent has autonomy from the government regarding the selection of management. *See Silicon Carbide,* 59 FR at 22587; *Sparklers,* 56 FR at 20589; *Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China,* 60 FR 22544, 22545 (May 8, 1995).

The evidence provided by Blue Field, Xingda, and the separate-rate applicants supports a preliminary finding of absence of *de facto* government control based on the following facts: (1) The companies set their own export prices independent of the government and without the approval of a government

Duty Administrative Review, 73 FR 76336 (December 16, 2008); and *Frontseating Service Valves from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances,* 74 FR 10886 (March 12, 2009).

[9] *See, e.g., Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/2005 New Shipper Review,* 71 FR 66304 (November 14, 2006).

[10] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From Ukraine,* 62 FR 61754, 61758 (November 19, 1997); *Tapered Roller Bearings and Parts Thereof, finished and Unfinished, From the People's Republic of China; Final Results of Antidumping Administrative Review,* 62 FR 61276, 61279 (November 17, 1997).

[11] The most recently completed segment of this proceeding in which Fujian Golden Banyan Foodstuffs Industrial Co., Ltd. participated and was granted separate rate status was *Certain Preserved Mushrooms from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review,* 73 FR 75083 (December 10, 2008). The most recently completed segment of this proceeding in which Ayecue participated and was granted separate rate status was *Certain Preserved Mushrooms from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review,* 73 FR 21904 (April 23, 2008). The most recently completed segment of this proceeding in which Blue Field participated and was granted separate rate status was *Certain Preserved Mushrooms from the People's Republic of China: Notice of Final Results of the Eighth New Shipper Review,* 70 FR 60789 (October 19, 2005). The most recently completed segment of this proceeding in which Shandong Jiufa participated and was granted separate rate status was *Notice of Amended Final Results of Antidumping duty Administrative Review: Certain Preserved Mushrooms from the People's Republic of China,* 70 FR 60280 (October 17, 2005). The most recently completed segment of this proceeding in which Xingda participated and was granted separate rate status was *Certain Preserved Mushrooms from the People's Republic of China: Final Results of the Antidumping Duty New Shipper Review,* 73 FR 45402 (August 5, 2008).

authority; (2) there is no restriction on any of the companies' use of export revenue, nor the disposition of profits or financing of losses; (3) the companies have authority to negotiate and sign contracts and other agreements; (4) the companies have autonomy from the government in making decisions regarding the selection of management.[12]

Additionally, in this administrative review we have no new information on the record that would cause us to reconsider our previous determinations of the absence of *de facto* government control with regard to these companies. Therefore, the Department preliminarily finds that Blue Field, Xingda and the separate-rate applicants have established that they qualify for separate rates under the criteria established by *Silicon Carbide* and *Sparklers.*

The PRC-Wide Entity

In addition to the separate-rate applications discussed above, there was one company, Golden Banyan, for which we initiated a review in this proceeding and which did not previously have a separate rate. Because this company did not file a separate rate application to demonstrate eligibility for a separate rate in this administrative review or certify that it had no shipments, we preliminarily determine that this company will remain part of the PRC-wide entity. *See Initiation Notice,* 75 FR at 15680.

Surrogate Country

When the Department is investigating imports from an NME country, section 773(c)(1) of the Act directs it to base NV, in most circumstances, on the NME producer's FOPs, valued in a surrogate market economy country or countries considered to be appropriate by the Department. In accordance with section 773(c)(4) of the Act, in valuing the FOPs, the Department shall utilize, to the extent possible, the prices or costs of FOPs in one or more market economy countries that are: (1) At a level of economic development comparable to that of the NME country; and (2) significant producers of comparable merchandise.[13] From the countries that are both economically comparable and significant producers, the Department will select a primary surrogate country based upon whether the data for valuing FOPs are both available and reliable.[14]

Economic Comparability

As explained in our surrogate country list, the Department considers Colombia, Indonesia, the Philippines, South Africa, Thailand, and Ukraine all comparable to the PRC in economic development.[15] Therefore, we consider all six counties on the *Surrogate Country List* as having satisfied the comparable economic development prong of the surrogate selection criteria.[16] Furthermore, in *Steel Wheels,*[17] the Department stated:

> {U}nless we find that all of the countries determined to be equally economically comparable are not significant producers of comparable merchandise, do not provide a reliable source of publicly available surrogate data or are unsuitable for use for other reasons, we will rely on data from one of these countries.

Because the Department finds that one of these countries from the Surrogate Country List meets the selection criteria, as explained below, the Department will not consider India as the primary surrogate country.

Significant Producers of Identical or Comparable Merchandise

Based on publicly available information placed on the record by interested parties (*e.g.,* production data), the Department determines that Colombia, Ukraine, and the Philippines to be significant producers of identical or comparable merchandise. Because Colombia has publicly available and reliable data for all but two of the factors of production, the Department has determined to use Colombia as the primary surrogate country. Colombia is at a comparable level of economic development pursuant to section 773(c)(4)(A) of the Act, and is a significant producer of the subject merchandise pursuant to section 773(c)(4)(B) of the Act. *See* Petitioner's January 6, 2012, submission at Exhibit 1.[18] Accordingly because Colombia meets all of the criteria for selection as a surrogate country, the Department has selected Colombia as the primary source for valuing surrogate values. With the exception of mushroom spawn and land rent discussed *below,* the Department used Colombia as the source of surrogate values in this proceeding.

For mushroom spawn and land rent, the Department was unable to find surrogate value information from Colombia. For mushroom spawn, the Department used mushroom data derived from Ukraine because, among the six countries on the *Surrogate Country List,* Ukraine represented by HTS category the most specific and reliable source of data for the input among the six countries listed on the *Surrogate Country List.* For land rent, the Department used data derived from the Philippines, since these data were publicly available, specific to the production input in question, and Philippine land rent was the only available source of data among the six countries comprising our *Surrogate Country List.*

In accordance with 19 CFR 351.301(c)(3)(ii), for the final results of this administrative review, interested parties may submit publicly available information to value FOPs within 20 days after the date of publication of these preliminary results.

U.S. Price

In accordance with section 772(a) of the Act, we based Blue Field's and Xingda's U.S. prices on export prices (''EP'') because their first sales to unaffiliated purchasers were made before the date of importation and the use of constructed export price (''CEP'') was not otherwise warranted by the facts on the record. As appropriate, we deducted foreign inland freight and foreign brokerage and handling from the starting price (or gross unit price), in accordance with section 772(c)(2) of the Act. Where these services were provided by NME vendors, we based the deduction on surrogate values.

Both respondents used foreign inland freight via truck and train. As previously stated, where applicable, we made deductions for these expenses from the U.S. price. We valued truck and train freight using a per-unit, POR-wide, average rate calculated from the

[12] *See, e.g.,* Blue Field's June 21, 2011, Section A response at A–1 through A–8; Xingda's September 6, 2011, Section A response at A–1 through A–8, Ayecue April 18, 2011, separate rate certification at 3–5; Golden Banyan May 27, 2011, separate rate certification at 4–7, and Shandong Juifa separate rates certification at 4–7.

[13] *See* Import Administration Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process (March 1, 2004) (''Policy Bulletin''), available on the Department's Web site at *http://ia.ita.doc.gov/policy/index.html.*

[14] *Id.*

[15] *See* Memoandum from Carole Showers, Office of Policy to Richard Weible, Office Director, Office 7, AD/CVD Operations RE: Request for a List of Surrogate Countries for an Administrative Review of the Antidumping Duty Order on Certain Preserved Mushrroms (Mushrooms) from the People's Republic of China (China) dated October 12, 2011 (''Surrogate Country List'').

[16] *See* section 773(c)(4)(A) of the Act.

[17] *See Certain Steel Wheels From the People's Republic of China: Notice of Preliminary Deterrmination of Sales at Less Than Fair Value, Partial Affirmative Preliminary Determination of Critical Circumstances, and Postponent of Final Determination,* 76 FR 67703, 67708 (November 2, 2011) (''Steel Wheels'').

[18] *See* Memorandum to the File through Robert James, Program Manager Office 7 from Michael J. Heaney International Trade Analyst: Antidumping Duty Administrative Review of Certain Preserved Mushrroms from the People's Republic of China, dated February 28, 2012 (''Factors Valuation Memorandum'').

World Bank's *Doing Business in Colombia* study. *See Surrogate Values Memorandum* at page 11. We valued foreign brokerage and handling using the publicly summarized brokerage and handling expense reported in the World Bank's *Doing Business in Colombia* study. *See* Petitioner's January 6 Submission, at Exhibit 42; Surrogate Values Memorandum at page 11.

Because the record indicates that the material terms of Blue Field's and Xingda's U.S. sales were established on the date of invoice, pursuant to 19 CFR 351.401(i), we determine that invoice date is the appropriate date to use as the date of sale for these two respondents. *See* Blue Field July 6, 2011, Section C response at C–8; Xingda September 19, 2011, Section C response at C–8.

Normal Value

1. Methodology

Section 773(c)(1)(B) of the Act provides that the Department shall determine the NV using an FOP methodology if the merchandise under review is exported from an NME and the information does not permit the calculation of NV using home-market prices, third-country prices, or constructed value under section 773(a) of the Act. The Department bases NV on FOPs because the presence of government controls on various aspects of NMEs renders price comparisons and the calculation of production costs invalid under the Department's normal methodologies.[19] Under section 773(c)(3) of the Act, FOPs include, but are not limited to: (1) Hours of labor required; (2) quantities of raw materials employed; (3) amounts of energy and other utilities consumed; and (4) representative capital costs, including depreciation. The Department based NV on FOPs reported by the respondents for materials, energy, labor, and packing.

Thus, in accordance with section 773(c) of the Act, we calculated NV by adding the values of the FOPs, overhead, selling, general and administrative (''SG&A'') expenses, profit, and packing costs.

2. Selection of Surrogate Values

In selecting the ''best available information for surrogate values,'' consistent with the Department's preference, we considered whether the potential surrogate value data on the record were: Publicly available; product-specific; representative of broad market average prices; contemporaneous with the POR; and free of taxes and import duties.[20] Where only surrogate values that were not contemporaneous with the POR were available on the record of this administrative review, we inflated the surrogate values using, where appropriate, the Colombian WPI as published in *International Financial Statistics* by the International Monetary Fund. *See* Surrogate Values Memorandum at Exhibit 2.

In accordance with these guidelines, we calculated surrogate values, except as noted below, from import statistics of the primary selected surrogate country, Colombia, from Global Trade Atlas (''GTA''), as published by Global Trade Information Services. Our use of GTA import data is in accordance with past practice and satisfies all of our criteria for surrogate values noted above.[21]

After identifying appropriate surrogate values, we calculated NV by multiplying the reported per-unit factor-consumption rates by the surrogate values. As appropriate, we also added freight costs to the surrogate values that we calculated for the respondents' material inputs to make these prices delivered prices. We calculated these freight costs by multiplying surrogate freight rates by the shorter of the reported distance from the domestic supplier to the factory that produced the subject merchandise or the distance from the nearest seaport to the factory that produced the subject merchandise, as appropriate. Where there were multiple domestic suppliers of a material input, we calculated a weighted-average distance after limiting each supplier's distance to no more than the distance from the nearest seaport to the factory of each of the two respondents. This adjustment is in accordance with the decision by the U.S. Court of Appeals for the Federal Circuit in *Sigma Corp.* v. *United States,* 117 F. 3d 1401, 1407–1408 (Fed. Cir. 1997). We increased the calculated costs of the FOPs for surrogate general expenses and profit. *See* Surrogate Values Memorandum at page 12.

Because Colombian surrogate values were denominated in Colombian Pesos, we converted these data to U.S. dollars (''USD'') using the applicable average exchange rate based on exchange rate data from the Department's Web site.

For further details regarding the specific surrogate values used for direct materials, energy inputs, and packing materials in these preliminary results, *see* the Surrogate Values Memorandum at Exhbit 1.

To calculate the labor input, we based our calculation on the methodology which the Department enunciated on June 21, 2011, in *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor,* 76 FR 36092 (June 21, 2011) (''*Labor Methodologies''*). Prior to 2010, the Department used regression-based wages that captured the worldwide relationship between per capita Gross National Income and hourly manufacturing wages, pursuant to 19 CFR 351.408(c)(3). On May 14, 2010, the Federal Circuit in *Dorbest Ltd.* v. *United States,* 604 F. 3d 1363, 1372–73 (Fed Cir. 2010) (''*Dorbest''*), invalidated part of that regulation. As a consequence of the Federal Circuit's ruling in *Dorbest,* the Department no longer relies on the regression-based methodology described in 19 CFR 351.408(c)(3).

In *Labor Methodologies,* the Department explained that the best methodology to value the labor input is to use industry-specific labor rates from the primary surrogate country. *See Labor Methodologies,* 76 FR at 36093. Additionally, the Department determined that the best data source for industry-specific labor rates is Chapter 6A: Labor Cost in Manufacturing, from the International Labor Organization's (''ILO'') *Yearbook of Labor Statistics* (''*Yearbook''*). *See Labor Methodologies,* 76 FR at 36093–36094.

Consistent with this methodology, to calculate labor expense in this review, we used 2005 data from Colombia that falls under International Standard Industrial Classification (''ISIC'') 15 ''Manufacture of Food Products and Beverages'' in Chapter 6A of the ILO' *Yearbook.* We used Colombian WPI data to inflate these values to POR amounts. This results in a calculated labor rate of 10,863 Colombia pesos per hour. Based on the reporting of financial ratios in this review, we find that the facts and information on the record do not warrant or permit an adjustment to the

[19] *See, e.g., Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Rescind in Part,* 70 FR 39744 (July 11, 2005), unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of 2003–2004 Administrative Review and Partial Rescission of Review,* 71 FR 2517 (January 17, 2006).

[20] *See, e.g., Drill Pipe From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, and Postponement of Final Determination,* 75 FR 51004 (August 18, 2010), unchanged in *Drill Pipe From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances,* 76 FR 196 (January 11, 2011).

[21] *See, e.g., Certain Preserved Mushrooms From the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Review,* 74 FR 50946, 50950 (October 2, 2009), unchanged in *Certain Preserved Mushrooms From the People's Republic of China: Final Results of Antidumping Duty New Shipper Review,* 74 FR 65520 (December 10, 2009).

surrogate financial statements. *See Labor Methodologies,* 76 FR at 36094. Accordingly, we made no offset to the surrogate financial statements in this review. A more detailed description of the wage rate calculation methodology is provided in the Factors Valuation Memorandum at page 9–10.

We offset the respondents' material costs for revenue generated from the sale of tin scrap. *See* Surrogate Values Memorandum at page 12.

Finally, to value overhead, SG&A, and profit, we have preliminarily determined that the 2010 financial statements of the Setas Colombianas S.A. constitute the best information available. *See* Surrogate Values Memorandum at page 12.

Preliminary Results of the Review

The Department has determined that the following preliminary dumping margins exist for the period February 1, 2010, through January 31, 2011. Respondents other than mandatory respondents will receive the weighted-average of the margins calculated for those companies selected for individual review (*i.e.,* mandatory respondents), excluding de minimis margins or margins based entirely on adverse facts available.

Exporter	Weighted-average margin (percent)
Blue Field	215.10
Xingda	222.78
Ayecue	215.41
Golden Banyan	215.41
Shandong Jiufa	215.41
PRC-wide rate *	198.63

* Includes Zhangzhou Golden.

Public Comment

The Department will disclose to parties to this proceeding the calculations performed in reaching the preliminary results within five days of the date of publication of these preliminary results. *See* 19 CFR 351.224(b). Interested parties may submit written comments (case briefs) within 30 days of publication of the preliminary results and rebuttal comments (rebuttal briefs) within five days after the time limit for filing case briefs. *See* 19 CFR 351.309(c)(1)(ii) and 351.309(d)(1). Pursuant to 19 CFR 351.309(d)(2), rebuttal briefs must be limited to issues raised in the case briefs. Parties who submit arguments are requested to submit with the argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities. Further, the Department requests that parties submitting written comments concurrently provide a public version of those comments.

In accordance with section 774 of the Act, we will hold a public hearing, if requested, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. Any interested party may request a hearing within 30 days of publication of this notice. *See* 19 CFR 351.310(c). Interested parties who wish to request a hearing or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, and electronically file the request via the Department's Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). *Id.* An electronically filed document must be received successfully in its entirety by 5 p.m. Eastern Time (ET). Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. *See id.* Issues raised in the hearing will be limited to those raised in the briefs.

Unless the deadline is extended pursuant to section 751(a)(2)(B)(iv) of the Act, the Department will issue the final results of this administrative review, including the results of our analysis of the issues raised by the parties in their comments, within 120 days after issuance of these preliminary results.

Deadline for Submission of Publicly Available Surrogate Value Information

In accordance with 19 CFR 351.301(c)(3), the deadline for submission of publicly available information to value factors of production under 19 CFR 351.408(c) is 20 days after the date of publication of the preliminary determination. In accordance with 19 CFR 351.301(c)(1), if an interested party submits factual information less than ten days before, on, or after (if the Department has extended the deadline) the applicable deadline for submission of such factual information, an interested party has ten days to submit factual information to rebut, clarify, or correct the factual information no later than ten days after such factual information is served on the interested party. However, the Department notes that 19 CFR 351.301(c)(1) permits new information only insofar as it rebuts, clarifies, or corrects information recently placed on the record. *See, e.g., Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, in Part,* 72 FR 58809 (October 17, 2007), and accompanying Issues and Decision Memorandum at Comment 2. Furthermore, the Department generally will not accept business proprietary information in either the surrogate value submissions or the rebuttals thereto, as the regulation regarding the submission of surrogate values allows only for the submission of publicly available information.

Assessment Rates

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review. The Department intends to issue assessment instructions directly to CBP 15 days after the date of publication of the final results of this review. In accordance with 19 CFR 351.212(b)(1), we calculated exporter/importer (or customer)-specific assessment rates for the merchandise subject to this review. Where the respondent has reported reliable entered values, we calculated importer or customer-specific *ad valorem* rates by aggregating the dumping margins calculated for all U.S. sales to each importer or customer, and dividing this amount by the total entered value of the sales to each importer or customer. *See* 19 CFR 351.212(b)(1). Where an importer or customer-specific *ad valorem* rate is greater than *de minimis,* we will apply the assessment rate to the entered value of the importers'/customers' entries during the POR. *See* 19 CFR 351.212(b)(1).

Where we do not have entered values for all U.S. sales, we calculated a per-unit assessment rate by aggregating the antidumping duties due for all U.S. sales to each importer or customer and dividing this amount by the total quantity sold to that importer or customer. *See* 19 CFR 351.212(b)(1). To determine whether the duty assessment rates are *de minimis,* in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer or customer-specific *ad valorem* ratios based on the estimated entered value. Where an importer or customer-specific *ad valorem* rate is zero or *de minimis,* we will instruct CBP to liquidate appropriate entries without regard to antidumping duties. *See* 19 CFR 351.106(c)(2).

For the companies that were not selected for individual review, we calculated an assessment rate based on the weighted-average of the cash deposit rates calculated for companies selected for individual review, where those rates were not *de minimis* or based on

adverse facts available, in accordance with Department practice.

Cash Deposit Requirements

The following cash deposit requirements, when imposed, will be effective upon publication of the final results of this administrative review for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) For the exporters listed above, the cash-deposit rate will be that established in the final results of this review (except, if the rate is zero or *de minimis, i.e.,* less than 0.5 percent, no cash deposit will be required for that company); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 198.63 percent; and (4) for all non-PRC exporters of subject merchandise that 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 cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and notice are in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: February 28, 2012.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. 2012–5413 Filed 3–5–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–810]

Stainless Steel Bar From India: Preliminary Results and Partial Rescission of the Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Department) is conducting an administrative review of the antidumping duty order on stainless steel bar (SSBar) from India. The period of review (POR) is February 1, 2010, through January 31, 2011. This review covers three exporters/producers, one of which is being individually reviewed as a mandatory respondent. We preliminarily determine that the mandatory respondent made sales of the subject merchandise at prices below normal value (NV). We have assigned the second respondent the margin calculated for the mandatory respondent. In addition, we have rescinded the review with respect to the remaining company. Interested parties are invited to comment on these preliminary results. If these preliminary results are adopted in our final results, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on appropriate entries.

DATES: *Effective Date:* March 6, 2012.

FOR FURTHER INFORMATION CONTACT: Joseph Shuler or Yasmin Nair, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone (202) 482–1293 or (202) 482–3813, respectively.

SUPPLEMENTARY INFORMATION:

Background

On February 21, 1995, the Department published in the **Federal Register** the antidumping duty order on SSBar from India. *See Antidumping Duty Orders: Stainless Steel Bar from Brazil, India and Japan,* 60 FR 9661 (February 21, 1995) (the *Order*). On February 1, 2011, the Department published its notice of opportunity to request an administrative review of the *Order* on SSBar from India. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 76 FR 5559, 5560 (February 1, 2011).

In February 2011, in accordance with 19 CFR 351.213(b)(2), the Department received self-requests to conduct administrative reviews of the *Order* from two producers/exporters of the subject merchandise: Venus Industries, Pvt. Ltd (Venus) and Chandan Steel Limited (Chandan). Additionally, pursuant to 19 CFR 351.213(b)(1), domestic interested parties Carpenter Technology Corp.; Electralloy Co., (a division of G.O. Carlson, Inc.); Outokumpu Stainless Bar, Inc.; Universal Stainless & Alloy Products, Inc.; and Valbruna Slater Stainless, Inc. (collectively, Petitioners), requested that the Department conduct an administrative review of the following producers/exporters: Venus, Ambica Steels Limited (Ambica), Atlas Stainless Corporation (Atlas), Bhansali Bright Bars Pvt. Ltd. (Bhansali), FACOR Steels Limited (Facor), Grand Foundry, Ltd. (Grand Foundry), India Steel Works, Ltd. (India Steel), Meltroll Engineering Pvt. Ltd. (Meltroll), Mukand Ltd. (Mukand), Sindia Steels Limited (Sindia), Snowdrop Trading Pvt. Ltd. (Snowdrop), and their respective affiliates.

On March 31, 2011, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), the Department published a notice of initiation of an administrative review for all twelve companies. *See Initiation of Antidumping Duty Administrative Reviews, Requests for Revocation in Part, and Deferral of Administrative Review,* 76 FR 17825 (March 31, 2011) (*Initiation Notice*). We indicated that we would select mandatory respondents for review based upon CBP data in the event we limited the number of respondents selected for individual review in accordance with section 777A(c)(2) of the Act. *See Initiation Notice.*

In our respondent selection memo, we determined that it was not practicable to examine all twelve producers/exporters for which a review was requested and, therefore, we limited the number of respondents selected for individual review. *See* Memorandum to Susan Kuhbach from Seth Isenberg, ''Respondent Selection Antidumping Duty Administrative Review: Stainless Steel Bar from India'' (April 19, 2011). As a result, we selected the two largest producers/exporters of SSBar from India during the POR for individual review, pursuant to section 777A(c)(2)(B) of the Act. The mandatory respondents selected were Mukand and Venus. Chandan had requested individual review, but was not selected.

On April 26, 2011, Petitioners timely withdrew their request for

administrative review of the companies that were not selected for individual review: Ambica, Atlas, Bhansali, Facor, Grand Foundry, India Steel, Meltroll, Sindia, and Snowdrop. In accordance with 19 CFR 351.213(d)(1), we rescinded this review with respect to these companies. *See Stainless Steel Bar From India: Partial Rescission of Antidumping Duty Administrative Review,* 76 FR 34964 (June 15, 2011).

In April 2011, the Department issued questionnaires to Venus and Mukand. Respondent companies submitted timely filed responses to the antidumping questionnaires between July and August, 2011. The Department issued supplemental questionnaires to Venus and Mukand to clarify, correct, and supplement information contained in the initial questionnaire responses. We received timely filed responses to supplemental questionnaires from Mukand from October 2011 through February 2012, and Venus in August and September 2011. We are relying on the most recent supplemental response submitted by Mukand on February 14, 2012, for these preliminary results, but anticipate requesting further information from the company for the final results.,

On October 11, 2011, the Department extended the time limit for completion of the preliminary results of this review by ninety days to January 29, 2012, in accordance with section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2).[1] *See Stainless Steel Bar From India: Extension of Time Limit for the Preliminary Results of the 2010–2011 Antidumping Duty Administrative Review,* 76 FR 62761 (October 11, 2011). On January 30, 2012, the Department extended the time limit for completion of the preliminary results of this review by an additional thirty days to February 28, 2012, in accordance with section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2). *See Stainless Steel Bar From India: Extension of Time Limit for the Preliminary Results of the 2010–2011 Antidumping Duty Administrative Review,* 77 FR 5486 (February 3, 2012).

Partial Rescission

On September 13, 2011, the Department published in the **Federal Register** notice of revocation of the *Order* with regard to Venus, effective February 1, 2010. *See Stainless Steel Bar from India: Final Results of the Antidumping Duty Administrative Review, and Revocation of the Order, in Part,* 76 FR 56401 (September 13, 2011) (*Venus Revocation Final*). Pursuant to this partial revocation of the *Order* we are rescinding this administrative review with regard to Venus.

Period of Review

The POR is February 1, 2010, through January 31, 2011.

Scope of the Order

Imports covered by the order are shipments of stainless steel bar. Stainless steel bar means articles of stainless steel in straight lengths that have been either hot-rolled, forged, turned, cold-drawn, cold-rolled or otherwise cold-finished, or ground, having a uniform solid cross section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles, hexagons, octagons, or other convex polygons. Stainless steel bar includes cold-finished stainless steel bars that are turned or ground in straight lengths, whether produced from hot-rolled bar or from straightened and cut rod or wire, and reinforcing bars that have indentations, ribs, grooves, or other deformations produced during the rolling process.

Except as specified above, the term does not include stainless steel semi-finished products, cut-to-length flat-rolled products (*i.e.,* cut-to-length rolled products which if less than 4.75 mm in thickness have a width measuring at least 10 times the thickness, or if 4.75 mm or more in thickness having a width which exceeds 150 mm and measures at least twice the thickness), wire (*i.e.,* cold-formed products in coils, of any uniform solid cross section along their whole length, which do not conform to the definition of flat-rolled products), and angles, shapes, and sections.

The stainless steel bar subject to this review is currently classifiable under subheadings 7222.10.00, 7222.11.00, 7222.19.00, 7222.20.00, 7222.30.00 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products sold by Mukand that are covered by the description in the ''Scope of the Order'' section, above, and were sold in the home market during the POR to be foreign-like products for purposes of determining appropriate product comparisons to U.S. sales.

We relied on six criteria to compare U.S. sales of subject merchandise to comparison market sales of the foreign-like product: (1) General type of finish; (2) grade; (3) remelting; (4) type of final finishing operation; (5) shape; and (6) size. This is consistent with our practice in the original investigation. *See Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Stainless Steel Bar From India,* 59 FR 39733, 39735 (August 4, 1994) (unchanged in the final results). Where there were no sales of identical merchandise in the comparison market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to the next most similar product on the basis of the characteristics listed above. Where there were no sales of identical or similar merchandise made in the ordinary course of trade in the comparison market, we compared U.S. sales to constructed value (CV).

Date of Sale

The Department normally will use the date of the invoice, as recorded in the producer's or exporter's records kept in the ordinary course of business, as the date of sale, but may use a date other than the invoice date if the Department is satisfied that a different date better reflects the date on which the material terms of sale are established. *See* 19 CFR 351.401(i).

Mukand reported that the material terms of its U.S. and comparison market sales are established by the sale invoice date. Accordingly, we are relying on invoice date as date of sale for Mukand's comparison market sales and its U.S. sales.

Level of Trade

In accordance with section 773(a)(1)(B)(i) of the Act, we determined NV using home market sales at the same level of trade as the U.S. sales. To determine whether home market sales are at the same or different level of trade than U.S. sales, we examine stages in the marketing process and selling functions along the chains of distribution between the producer and unaffiliated customers.[2] Pursuant to section 773(a)(1)(B)(i) of the Act, in identifying levels of trade for export price (EP) and comparison market sales (*i.e.,* NV based on either comparison

[1] Because January 29, 2012, was a Sunday, the deadline for completion of the preliminary results was no later than the next business day, January 30, 2012.

[2] Selling functions associated with a particular chain of distribution help us to evaluate the level of trade(s) in a particular market. For purposes of these preliminary results, we have organized the common selling functions into four major categories: sales process and marketing support, freight and delivery, inventory and warehousing, and quality assurance/warranty services.

market or third country prices), we consider the starting prices before any adjustments.[3] If the home-market sales are at a different level of trade from that of a U.S. sale and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and home-market sales at the level of trade of the export transaction, we make a level-of-trade adjustment under section 773(a)(7)(A) of the Act. *See, e.g., Stainless Steel Bar From Germany: Preliminary Results of Antidumping Duty Administrative Review,* 69 FR 5493 (February 5, 2004) (unchanged in the final results).

For its home market, Mukand reported that it made sales through five channels of distribution (*i.e.,* sales from the plant, with agent; sales from the plant, without agent; sales from warehouse, with agent; sales from warehouse, without agent; sales delivered to customer, with agent). We examined the selling activities performed for these channels, and found that Mukand performed sales/marketing support for all sales. For all sales made with agent, Mukand paid commissions. For delivered sales and sales from warehouse, Mukand contracted an unaffiliated provider for freight and freight insurance services. These selling activities can be generally grouped into two selling function categories for analysis: (1) Sales and marketing and (2) freight/delivery services. Because Mukand performed the same sales/marketing functions for all customers, we find no differences exist between channels. Because Mukand contracted with unaffiliated freight providers, we find these services were at a low level of intensity for the three channels that experienced the freight/delivery service. Accordingly, because the distinctions in selling functions are not significant for Mukand's five channels of distribution, we preliminarily determine that there is one level of trade for Mukand's home market.

Mukand reported that it made sales through two channels of distribution in the United States (*i.e.,* EP sales made with and without an agent). Mukand reported performing the following selling functions for all its U.S. sales: sales/marketing support and freight services. For sales to the United States with an agent, Mukand also paid commissions. These selling activities can be generally grouped into two selling function categories for analysis: (1) Sales and marketing; and (2) freight/delivery services. We find that Mukand's selling activities related to commission payments are relatively insignificant because they represent a low-intensity difference between Mukand's U.S. sales channels. Because Mukand performed the same freight/delivery functions for all its U.S. customers, we find no differences exist for freight/delivery between the two U.S. channels. Accordingly, because the distinctions in selling functions are not significant for Mukand's two U.S. channels of distribution, we preliminarily determine that there is one level of trade for Mukand's U.S. market.

Finally, we compared the U.S. level of trade to the home market level of trade and found that the selling functions performed for U.S. and home market customers are essentially the same. Mukand paid commissions on some sales in both its home and U.S. markets, and Mukand contracted with unaffiliated providers for freight and delivery services in both the home and U.S. markets. Therefore, we preliminarily determine that sales to the U.S. and home markets during the POR were made at the same level of trade and, as a result, no level of trade adjustment is warranted.

Comparisons to Normal Value

To determine whether sales of SSBar from India to the United States were made at less than NV, we compared the EP to the NV, as described in the ''Export Price'' and ''Normal Value'' sections of this notice.

Pursuant to section 777A(d)(2) of the Act, we compared the EPs of individual U.S. transactions to the weighted-average NV of the foreign like product in the appropriate corresponding calendar month where there were sales made in the ordinary course of trade, as discussed in the ''Cost of Production Analysis'' section below.

Export Price

Mukand reported that the subject merchandise was sold prior to importation by the exporter or producer outside the United States to the first unaffiliated purchaser in the United States. Therefore, we based the U.S. price on EP, as defined in section 772(a) of the Act.

Mukand's EP is based on the packed, delivered prices to unaffiliated purchasers in the United States. We adjusted the reported gross unit prices, where applicable, for early payment discounts in accordance with 19 CFR 351.401(c). Where appropriate, we made deductions for movement expenses, including home market freight expenses, home market brokerage and handling expenses, international freight expenses, marine insurance expenses, and U.S. brokerage and handling expenses, in accordance with section 772(c)(2)(A) of the Act. *See* Memorandum to the File from Joseph Shuler, International Trade Analyst, AD/CVD Operations, ''Mukand Preliminary Results Calculation Memorandum,'' February 28, 2012 (Mukand Preliminary Calculation Memo).

Further, section 772(c)(1)(B) of the Act states that EP should be increased by the amount of any import duties ''imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States.'' Mukand claimed a duty drawback adjustment under this provision for its export credits earned under the Government of India's (GOI) Duty Entitlement Passbook Scheme (DEPS). Mukand reported the DEPS credits earned on the free-on-board (FOB) value of its total exports during the POR.

India's DEPS enables exporting companies to earn import duty exemptions in the form of passbook credits rather than cash. All exporters are eligible to earn DEPS credits on a post-export basis, provided that the GOI has established a standard input-output norm (SION) for the exported product. DEPS credits can be used for any subsequent imports, regardless of whether they are consumed in the production of an exported product. DEPS credits are valid for twelve months and are transferable after the foreign exchange is realized from the export sales on which the DEPS credits are earned. *See Polyethylene Terephthalate Film, Sheet, and Strip From India: Final Results of Countervailing Duty Administrative Review,* 73 FR 75672 (December 12, 2008), and accompanying Issues and Decision Memorandum at ''Duty Entitlement Passbook Scheme (DEPS/DEPB).''

In determining whether an adjustment should be made to EP for this duty credit, we look for a reasonable link between the duties imposed and those rebated or exempted. *See, e.g., Saha Thai Steel Pipe (Public) Co., Ltd.* v. *United States,* 635 F.3d 1335, 1340 (Fed. Cir. 2011); *Mittal Steel USA, Inc.* v. *United States,* 31 CIT 1395, 1412–1413 (2007). We do not require that the imported input be traced directly from importation through exportation. We do require, however, that the company meet our ''two-pronged'' test in order for

[3] Where NV is based on CV, we determine the NV level of trade based on the level of trade of the sales from which we derive selling expenses, general and administrative (G&A) expenses and profit for CV, where possible.

this increase to be made to EP. The first element is that the import duty and its rebate or exemption be directly linked to, and dependent upon, one another; the second element is that the company must demonstrate that there were sufficient imports of the imported material to account for the duty drawback or exemption granted for the export of the manufactured product. *See Saha Thai,* 635 F.3d at 1340; *Mittal Steel,* 31 CIT at 1412–13.

Mukand failed to satisfy both prongs of the two-pronged test. First, Mukand did not report that there is a necessary link between the import duties paid on any inputs imported and the duty credit given by the GOI. Mukand reported that the credit is based on a fixed percentage determined by the FOB value of the export, rather than an actual quantity or value of imported input specific to the export.[4] Second, Mukand reported that the GOI does not have a system in place to confirm which inputs, and in what amounts, are consumed in the production of the exported product.[5] While there is a SION in place for the production of subject merchandise, the duty credit given is based on an assumed amount of import content, and fails to link the amount of duty credits to the amount of import duties actually paid on imported inputs. Furthermore, Mukand stated that it is not required to import to avail the benefit of the DEPS credits.[6]

With regard to the second prong, Mukand reported that the DEPS is available on a post-export basis and there is no obligation to fulfill the export obligation against imports.[7] Thus, because the GOI does not monitor imports against exports, Mukand is unable to report whether or not it imported in sufficient quantities during the POR to qualify for the export credit. Thus, for these preliminary results, we determine that Mukand has not demonstrated that it satisfies both prongs of the duty drawback test pursuant to section 772(c)(1)(B) of the Act. Accordingly, we have not made an adjustment to EP for duty drawback.

Normal Value

A. Home Market Viability

In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared the respondent's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a) of the Act. Because Mukand's aggregate volume of home market sales of the foreign like product was greater than five percent of its aggregate volume of U.S. sales of the subject merchandise, we determined the home market was viable. *See* section 773(a)(1)(B) of the Act. Therefore, we based NV on home market sales in the usual commercial quantities and in the ordinary course of trade.

B. Cost of Production Analysis

In accordance with section 773(b)(2)(A)(ii) of the Act, because we determined to disregard sales by Mukand that were below the cost of production (COP) in the most recently completed administrative review of SSBar, we requested Mukand to respond to section D of the April 26, 2011, questionnaire.

1. Cost Averaging Methodology

The Department's normal practice is to calculate an annual weighted-average cost for the entire period of investigation or POR. *See, e.g., Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review,* 65 FR 77852 (December 13, 2000), and accompanying Issues and Decision Memorandum at Comment 18. However, the Department recognizes that possible distortions may result if our normal annual-average cost methodology is used during a period of significant cost changes. The Department determines whether to deviate from its normal methodology of calculating an annual weighted-average cost by evaluating two primary factors: (1) Whether the change in the cost of manufacturing recognized by the respondent during the POR is deemed significant (*i.e.,* greater than 25 percent); and (2) whether the record evidence indicates that sales during the shorter averaging periods could be reasonably linked with the COP during the same shorter averaging periods. *See Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review,* 73 FR 75398, 75399 (December 11, 2008) and *Certain Welded Stainless Steel Pipes From the Republic of Korea: Final Results of Antidumping Duty Administrative Review,* 74 FR 31242 (June 30, 2009). Based on the review of record evidence, and the lack of significant cost changes, there is no support for the Department to deviate from its normal methodology of calculating an annual weighted-average cost.[8] Therefore, we followed our normal methodology of calculating an annual weighted-average cost for these preliminary results of review.

2. Calculation of Cost of Production

In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of the materials and conversion costs for the foreign like product, plus amounts for general and administrative (G&A) expenses and interest expenses. Generally, we relied on the COP information provided by Mukand in its questionnaire responses. However, based on our analysis of Mukand's questionnaire responses, we revised Mukand's reported G&A expense ratio to include in the numerator of the calculation the ''advances written off'' amount, and in the denominator of the calculation the ''traded goods'' amount. For additional details, *see* Memorandum to Neal M. Halper, Director, Office of Accounting from Sheikh M. Hannan, Senior Accountant, Antidumping Duty Administrative Review of Stainless Steel Bar from India, Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results—Mukand Limited, dated February 28, 2012.

3. Test of Comparison Market Sales Prices

On a product-specific basis, pursuant to section 773(a)(1)(B)(i) of the Act, we compared the adjusted weighted-average COP to the home market sales prices of the foreign like product, in order to determine whether the sale prices were below the COP. For purposes of this comparison, we used COP exclusive of selling and packing expenses. The prices were net of billing adjustments, movement charges, discounts, direct and indirect selling expenses, and packing expenses.

4. Results of the COP Test

Section 773(b)(1) of the Act provides that where sales made at less than the COP ''have been made within an extended period of time in substantial quantities'' and ''were not at prices which permit recovery of all costs within a reasonable period of time'' the Department may disregard such sales when calculating NV. Pursuant to section 773(b)(2)(C)(i) of the Act, we did not disregard below-cost sales that were not made in ''substantial quantities,'' *i.e.,* where less than 20 percent of sales of a given product were at prices less than the COP. We disregarded below-cost sales when they were made in

[4] Mukand's November 25, 2011, Sections A, B, and C Supplemental Questionnaire Response at 10; *see also* Mukand's January 3, 2012, Second Section C Supplemental Questionnaire Response, at Annexure SQC2–4

[5] Mukand's January 3, 2012, Second Section C Supplemental Questionnaire Response at 4.

[6] *Id.*

[7] *Id.*

[8] *See* Mukand's June 22, 2011, Section D questionnaire response at D–6.

substantial quantities, *i.e.,* where 20 percent or more of a respondent's sales of a given product were at prices less than the COP and where ''the weighted average per unit price of the sales * * * is less than the weighted average per unit cost of production for such sales.'' *See* section 773(b)(2)(C)(ii) of the Act. Lastly, based on our comparison of prices to the weighted-average COPs for the POR, we considered whether the prices would permit the recovery of all costs within a reasonable period of time. *See* section 773(b)(2)(D) of the Act.

Our cost test for Mukand revealed that, for home market sales of certain models, more than 20 percent were sold at prices below the COP within an extended period of time and were at prices which would not permit the recovery of all costs within a reasonable period of time. Thus, in accordance with section 773(b)(1) of the Act, we excluded these below-cost sales from our analysis and used the remaining above-cost sales to determine NV. *See* Mukand Preliminary Calculation Memo.

For those U.S. sales of subject merchandise for which there were no home market sales in the ordinary course of trade, we compared EPs to CV in accordance with section 773(a)(4) of the Act. *See* ''Calculation of Normal Value Based on Constructed Value'' section, below.

C. Calculation of Normal Value Based on Home Market Prices

We calculated NV based on packed, ex-factory or delivered prices to unaffiliated customers in the home market. We made adjustments, where appropriate, to the starting price for discounts, in accordance with 19 CFR 351.401(c). We also made deductions for home market inland freight expenses, home market warehousing expenses, and home market freight insurance expenses, under section 773(a)(6)(B) of the Act.

In addition, we made deductions pursuant to section 773(a)(6)(C) of the Act for home market credit expenses (offset by interest revenue). We capped Mukand's interest revenue by the amount of credit expenses, in accordance with our practice. *See, e.g., Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review, Determination Not To Revoke Antidumping Duty Order in Part, and Final No Shipment Determination,* 76 FR 50176 (August 12, 2011), and accompanying Issues and Decision Memorandum at Comment 2. For home market sales with reported commissions, in accordance with 19 CFR 351.410(e), we offset the commission paid on a U.S. sale by reducing NV by the amount of the home market commission. For sales where Mukand did not report home market commissions, in accordance with 19 CFR 351.410(e), we offset any commission paid on a U.S. sale by reducing the NV by the amount of home market indirect selling expenses and inventory carrying costs, up to the amount of the U.S. commission. For further discussion of these adjustments, *see* the Mukand Preliminary Calculation Memo.

We deducted home market packing costs, when applicable, and added U.S. packing costs, where appropriate, in accordance with sections 773(a)(6)(A) and (B) of the Act. Finally, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise, in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411.

D. Calculation of Normal Value Based on Constructed Value

Section 773(a)(4) of the Act provides that where NV cannot be based on comparison market sales, NV may be based on CV. Accordingly, for Mukand's products for which we could not determine the NV based on home market sales, we based NV on CV.

In accordance with section 773(e) of the Act, we calculated CV for Mukand based on the sum of its material and fabrication costs, selling, general and administrative (SG&A) expenses, profit, and U.S. packing costs. We calculated the COP component of CV as described in the ''Cost of Production Analysis'' section of this notice, above. In accordance with section 773(e)(2)(A) of the Act, we based SG&A expenses and profit on the amounts incurred and realized by Mukand in connection with the production and sale of the foreign like product in the ordinary course of trade, for consumption in the foreign country.

Currency Conversion

Pursuant to 19 CFR 351.415 and section 773A of the Act, we made currency conversions based on the exchange rates in effect on the date of the U.S. sale, as certified by the Federal Reserve Bank. *See* Import Administration Web site at: *http://ia.ita.doc.gov/exchange/index.html.*

Preliminary Results of the Review

We preliminarily determine that a weighted-average dumping margin exists for Mukand for the period February 1, 2010, through January 31, 2011. The companies subject to the administrative review but not selected as mandatory respondents normally receive the weighted-average of the margins calculated for mandatory respondents, excluding *de minimis* margins or margins based entirely on adverse facts available. In this case, we are assigning Chandan Mukand's margin as Mukand is the only remaining mandatory respondent.

Exporter/manufacturer	Margin percent
Mukand Ltd	30.92
Chandan Steel Limited	30.92

Disclosure and Public Comment

The Department will disclose the calculations performed within five days of publication of this notice to the parties to this proceeding in accordance with 19 CFR 351.224(b).

Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs within 30 days of the date of publication of this notice. Rebuttal briefs, which must be limited to issues raised in the case briefs, should be filed not later than five days after the time limit for filing case briefs. *See* 19 CFR 351.309(d). Parties submitting arguments in this proceeding are requested to submit with each argument: (1) A statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities, in accordance with 19 CFR 351.309(d)(2). Further, case and rebuttal briefs must be served on interested parties in accordance with 19 CFR 351.303(f).

Interested parties, who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, filed electronically using Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). An electronically filed document must be received successfully in its entirety by the Department's electronic records system, IA ACCESS, by 5 p.m. Eastern Standard Time within 30 days after the date of publication of this notice. *See* 19 CFR 351.310(c). Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. If a request for a hearing is made, we will inform parties of the scheduled date for the hearing which will be held at the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, at a time and location to be determined. *See* 19 CFR 351.310. Parties should confirm by

telephone the date, time, and location of the hearing.

Unless the deadline is extended pursuant to section 751(a)(2)(B)(iv) of the Act, the Department will issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such comments or at a hearing, if requested, within 120 days of publication of these preliminary results. *See* section 751(a)(3)(A) of the Act and 19 CFR 351.213(h).

Assessment Rates

The Department shall determine, and CBP will assess, antidumping duties on all appropriate entries in accordance with 19 CFR 351.212(b)(1). The Department intends to issue appropriate assessment instructions for the companies subject to this review directly to CBP 15 days after publication of the final results of review.

Mukand reported that it was the importer of record for all of its U.S. sales of subject merchandise. If Mukand's antidumping rate exceeds 0.5 percent *ad valorem* for the final results of this review, we will instruct CBP to assess duties on all of Mukand's entries. *See* 19 CFR 351.106(c)(2).

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003) (*Assessment Policy Notice*). This clarification will apply to entries of subject merchandise during the POR produced by Mukand for which this company did not know that its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate un-reviewed entries at the all-others rate if there is no rate for the intermediate involved in the transaction. For a full discussion of this clarification, *see Assessment Policy Notice.*

Pursuant to the revocation of the *Order* with regard to Venus effective February 1, 2010, and in accordance with 19 CFR 351.222(f)(3), the Department directed CBP to terminate the suspension of liquidation for all entries of SSBar from India produced/exported by Venus, effective February 1, 2010, as indicated in *Venus Revocation Final.*

Cash Deposit Requirements

The following cash deposit requirements will be effective upon completion of the final results of this administrative review for all shipments of SSBar from India entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(1) of the Act: (1) The cash deposit rate for the reviewed companies will be the rate established in the final results of this administrative review, except if the rate is less than 0.5 percent and is, therefore, *de minimis,* the cash deposit rate will be zero; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent final results in which that manufacturer or exporter participated; (3) if the exporter is not a firm covered in this review, but was covered in a previous review or the original less than fair value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent final results for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will be 12.45 percent, the ''all others'' rate established in the LTFV investigation. *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from India,* 59 FR 66915 (December 28, 1994). These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these preliminary results of review in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: February 28, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2012–5416 Filed 3–5–12; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–840]

Certain Frozen Warmwater Shrimp From India: Preliminary Results of Antidumping Duty Administrative Review, and Preliminary No Shipment Determination

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Department) is conducting the sixth administrative review of the antidumping duty order on certain frozen warmwater shrimp (shrimp) from India. The respondents which the Department selected for individual examination are Apex Exports (Apex) and Falcon Marine Exports Limited (Falcon). The respondents which were not selected for individual examination are listed in the ''Preliminary Results of the Review'' section of this notice. The period of review (POR) is February 1, 2010, through January 31, 2011.

We preliminarily determine that Falcon has not made sales at below normal value (NV), while Apex has made sales at below NV, and, therefore, these sales are subject to antidumping duties. In addition, based on the preliminary results for the respondents selected for individual examination, we have preliminarily determined a margin for those companies that were not individually examined.

If the preliminary results are adopted in our final results of administrative review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Interested parties are invited to comment on the preliminary results.

DATES: *Effective Date:* March 6, 2012.

FOR FURTHER INFORMATION CONTACT: Henry Almond or Elizabeth Eastwood, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–0049, or (202) 482–3874, respectively.

SUPPLEMENTARY INFORMATION:

Background

In February 2005, the Department published in the **Federal Register** an antidumping duty order on certain frozen warmwater shrimp from India.[1]

[1] *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp*

Continued

On February 1, 2011, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order of certain frozen warmwater shrimp from India for the period February 1, 2010, through January 31, 2011.[2] In response to timely requests from interested parties pursuant to 19 CFR 351.213(b)(1) and (2) to conduct an administrative review of the U.S. sales of shrimp by numerous Indian producers/exporters, the Department published a notice of initiation of administrative review for 185 companies.[3]

In the *Initiation Notice,* the Department indicated that, in the event that we would limit the respondents selected for individual examination in accordance with section 777A(c)(2) of the Tariff Act of 1930, as amended (the Act), we would select mandatory respondents for individual examination based upon CBP entry data. *See Initiation Notice,* 76 FR at 18157. In April 2011, we received comments on the issue of respondent selection from the petitioner,[4] the American Shrimp Processors Association (ASPA), and Apex.

In April and May 2011, we received statements from 13 companies that indicated that they had no shipments of subject merchandise to the United States during the POR. Also in May 2011, after considering the large number of potential exporters or producers involved in this administrative review, and the resources available to the Department, we determined that it was not practicable to examine all exporters/producers of subject merchandise for which a review was requested.[5] As a result, pursuant to section 777A(c)(2)(B) of the Act, we determined that we could reasonably individually examine only the two largest producers/exporters accounting for the largest volume of shrimp from India during the POR (*i.e.,* Apex and Falcon). Accordingly, we issued the antidumping duty questionnaire to these companies.

In June and July 2011, we received responses from Apex and Falcon to section A (*i.e.,* the section related to general information), and sections B and C (*i.e.,* the sections covering comparison market and U.S. sales, respectively) of the questionnaire.

In August 2011, we selected Japan as the appropriate third country comparison market for Falcon.[6] Also in this month, we received the response to section D (*i.e.,* the section covering cost of production (COP) and constructed value (CV) of the questionnaire) of the questionnaire from Falcon, as well as requests from the petitioner and the ASPA that the Department initiate a sales-below-cost investigation related to Apex's sales to the United Kingdom.[7]

In September 2011, we initiated a sales-below-cost investigation for Apex.[8] On this same date, we required Apex to respond to section D of the questionnaire. Apex submitted its response in October 2011.

On October 5, 2011, the Department extended the preliminary results in the current review to no later than February 28, 2012.[9] From October 2011 through January 2012, we issued supplemental sales and cost questionnaires to Apex and Falcon. Apex and Falcon responded to these questionnaires from November 2011 through February 2012.

Scope of the Order

The scope of this order includes certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[10] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Thai white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order.

Excluded from the scope are: (1) Breaded shrimp and prawns (HTSUS subheading 1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (HTSUS subheadings 0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (HTSUS subheading 1605.20.05.10); (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns (HTSUS subheading 1605.20.10.40); and (7) certain battered shrimp. Battered shrimp is a shrimp-based product: (1) That is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a ''dusting'' layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and ten percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to IQF freezing immediately after application of the dusting layer. When dusted in

from India, 70 FR 5147 (Feb. 1, 2005) (*Shrimp Order*).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 76 FR 5559 (Feb. 1, 2011).

[3] *See Certain Frozen Warmwater Shrimp from Brazil, India, and Thailand: Notice of Initiation of Antidumping Duty Administrative Reviews,* 76 FR 18157 (Apr. 1, 2011) (*Initiation Notice*).

[4] The petitioner is the Ad Hoc Shrimp Trade Action Committee.

[5] *See* Memorandum to James Maeder, Director, Office 2, AD/CVD Operations, from Henry Almond, Senior Analyst, Office 2, AD/CVD Operations entitled, ''2010–2011 Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from India: Selection of Respondents for Individual Review,'' dated May 24, 2011 (Respondent Selection Memo).

[6] *See* the Memorandum to James Maeder, Director, Office 2, AD/CVD Operations, from the Team entitled, ''2010–2011 Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from India—Selection of the Appropriate Third Country Market for Falcon Marine Exports Limited,'' dated August 9, 2011 (Falcon Third Country Market Memo).

[7] The United Kingdom was Apex's only viable third country market.

[8] *See* the memorandum to James Maeder, Director, Office 2, AD/CVD Operations, from the Team entitled, ''The Ad Hoc Shrimp Trade Action Committee's and the American Shrimp Processors Association's Allegations of Sales Below the Cost of Production for Apex Exports,'' dated September 12, 2011 (Sales-Below-Cost-Memo for Apex).

[9] *See Certain Frozen Warmwater Shrimp From India and Thailand: Notice of Extension of Time Limits for the Preliminary Results of the 2010–2011 Administrative Reviews,* 76 FR 61668 (Oct. 5, 2011).

[10] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by this order are currently classified under the following HTSUS subheadings: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30, and 1605.29.10.10. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.

Preliminary Determination of No Shipments

As noted in the ''Background'' section above, in April and May 2011, 13 companies notified the Department that they had no shipments of subject merchandise to the United States during the POR. The Department subsequently confirmed with CBP the no-shipment claim made by nine of these companies. Because the evidence on the record indicates that these companies did not export subject merchandise to the United States during the POR, we preliminarily determine that the following nine companies had no reviewable transactions during the POR:

(1) Accelerated Freeze Drying Company Ltd.[11]
(2) Amulya Seafoods
(3) Baby Marine International
(4) Baby Marine Sarass
(5) BMR Exports
(6) Castlerock Fisheries Ltd.
(7) Esmario Export Enterprises
(8) Koluthara Exports Ltd.
(9) Penver Products (P) Ltd.

Since the implementation of the 1997 regulations, our practice concerning no-shipment respondents has been to rescind the administrative review if the respondent certifies that it had no shipments and we have confirmed through our examination of CBP data that there were no shipments of subject merchandise during the POR.[12] As a result, in such circumstances, we normally instruct CBP to liquidate any entries from the no-shipment company at the deposit rate in effect on the date of entry.

In our May 6, 2003, ''automatic assessment'' clarification, we explained that, where respondents in an administrative review demonstrate that they had no knowledge of sales through resellers to the United States, we would instruct CBP to liquidate such entries at the all-others rate applicable to the proceeding.[13]

Because ''as entered'' liquidation instructions do not alleviate the concerns which the May 2003 clarification was intended to address, we find it appropriate in this case to instruct CBP to liquidate any existing entries of merchandise produced by the nine companies listed above, and exported by other parties, at the all-others rate, should we continue to find that these companies had no shipments of subject merchandise during the POR in our final results.[14] In addition, the Department finds that it is more consistent with the May 2003 clarification not to rescind the review in part in these circumstances but, rather, to complete the review with respect to these nine companies and issue appropriate instructions to CBP based on the final results of the review. *See* the ''Assessment Rates'' section of this notice, below.

With respect to the remaining four companies (*i.e.,* Kay Kay Exports, Sharat Industries Limited, Uniroyal Marine Exports Ltd., and Veejay Impex) which certified that they had no shipments during the POR, we have requested entry documentation from CBP to clarify the no-shipment certifications. Because this information was not received in time for use in the preliminary results, we are unable to preliminarily conclude that Kay Kay Exports, Sharat Industries Limited, Uniroyal Marine Exports, and Veejay Impex had no reviewable transactions in this administrative review. Therefore we have assigned each of these companies a preliminary dumping rate based on the margin calculated for Apex (because it is the only mandatory respondent for which we calculated an above *de minimis* margin). However, we plan to consider the CBP entry documentation in the final results.

Comparisons to Normal Value

To determine whether sales of shrimp from India to the United States were made at less than NV, we compared the export price (EP) to the NV, as described in the ''Export Price'' and ''Normal Value'' sections of this notice.

Pursuant to sections 773(a)(1)(B)(ii) and 777A(d)(2) of the Act, for Apex and Falcon, we compared the EPs of individual U.S. transactions to the weighted-average NV of the foreign like product in the appropriate corresponding calendar month where there were sales made in the ordinary course of trade, as discussed in the ''Cost of Production Analysis'' section below.

Product Comparisons

In accordance with section 771(16)(A) of the Act, we considered all products produced by Apex and Falcon covered by the description in the ''Scope of the Order'' section, above, to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. Pursuant to 19 CFR 351.414(e)(2), we compared U.S. sales of shrimp to sales of shrimp made in the selected third country market within the contemporaneous window period, which extends from three months prior to the month of the first U.S. sale until two months after the month of the last U.S. sale.

Where there were no sales of identical merchandise in the comparison market made in the ordinary course of trade to compare to U.S. sales, according to section 771(16)(B) of the Act, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade. In making the product comparisons, we matched foreign like products based on the physical characteristics reported by Apex and Falcon in the following order: Cooked form, head status, count size, organic certification, shell status, vein status, tail status, other shrimp preparation, frozen form, flavoring, container weight, presentation, species, and preservative. Where there were no sales of identical or similar merchandise, we made product comparisons using constructed value (CV), as discussed in the ''Calculation of Normal Value Based on Constructed Value'' section, below. *See* section 773(a)(4) of the Act.

Export Price

For all U.S. sales made by Apex and Falcon, we used EP methodology, in accordance with section 772(a) of the Act, because the subject merchandise was sold by the producer/exporter outside of the United States directly to the first unaffiliated purchaser in the United States prior to importation and constructed export price (CEP)

[11] This company was listed in the *Initiation Notice* as ''Accelerated Freeze-Drying C.''

[12] *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27393 (May 19, 1997).

[13] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003) (*Assessment Policy Notice*).

[14] *See, e.g., Magnesium Metal From the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 26922 (May 13, 2010), unchanged in *Magnesium Metal From the Russian Federation: Final Results of Antidumping Duty Administrative Review,* 75 FR 56989 (Sept. 17, 2010); and *Stainless Steel Sheet and Strip in Coils From Taiwan: Final Results of Antidumping Duty Administrative Review,* 75 FR 76700, 76701 (Dec. 9, 2010).

methodology was not otherwise warranted based on the facts of record.

A. Apex

We based EP on packed prices to the first unaffiliated purchaser in the United States. We made deductions from the starting price for foreign inland freight expenses, foreign brokerage and handling expenses, foreign miscellaneous shipment charges, international freight expenses, terminal handling charges, marine insurance expenses, U.S. customs duties (including harbor maintenance fees and merchandise processing fees), U.S. brokerage and handling expenses, and U.S. inland freight expenses, where appropriate, in accordance with section 772(c)(2)(A) of the Act.

B. Falcon

We based EP on packed prices to the first unaffiliated purchaser in the United States. Where appropriate, we made deductions from the starting price for discounts, in accordance with 19 CFR 351.401(c). We also made deductions from the starting price for cold storage expenses, loading and unloading expenses, trailer hire expenses, foreign inland freight expenses, port charges, export survey charges, terminal handling charges, foreign brokerage and handling expenses, international freight expenses, marine insurance expenses, U.S. customs duties (including harbor maintenance fees and merchandise processing fees), and U.S. brokerage and handling expenses, where appropriate, in accordance with section 772(c)(2)(A) of the Act.

Normal Value

A. Home Market Viability and Selection of Comparison Markets

In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared the volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act.

We determined that the aggregate volume of home market sales of the foreign like product for each of the respondents was insufficient to permit a proper comparison with U.S. sales of the subject merchandise. Regarding Apex, we selected the United Kingdom as the comparison market because it was Apex's only viable third country market. For Falcon, we selected Japan as the comparison market because, among other things, Falcon's sales of foreign like product in Japan were the most similar to the subject merchandise. For further discussion, see the Falcon Third Country Market Memo. Therefore, as the basis for comparison market sales, we used sales to the United Kingdom and Japan, respectively, for Apex and Falcon, in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404.

B. Level of Trade

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, the Department will calculate NV based on sales at the same level of trade (LOT) as the EP or CEP. Sales are made at different LOTs if they are made at different marketing stages (or their equivalent). *See* 19 CFR 351.412(c)(2). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing.[15] In order to determine whether the comparison market sales were at different stages in the marketing process than the U.S. sales, we reviewed the distribution system in each market (*i.e.,* the chain of distribution), including selling functions, class of customer (customer category), and the level of selling expenses for each type of sale.

Pursuant to section 773(a)(1)(B)(i) of the Act, in identifying LOTs for EP and comparison market sales (*i.e.,* NV based on either home market or third country prices),[16] we consider the starting prices before any adjustments. For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act.[17]

When the Department is unable to match U.S. sales of the foreign like product in the comparison market at the same LOT as the EP or CEP, the Department may compare the U.S. sale to sales at a different LOT in the comparison market. In comparing EP or CEP sales at a different LOT in the comparison market, where available data make it possible, we make a LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales only, if the NV LOT is at a more advanced stage of distribution than the LOT of the CEP and there is no basis for determining whether the difference in LOTs between NV and CEP affects price comparability (*i.e.,* no LOT adjustment is possible), the Department shall grant a CEP offset, as provided in section 773(a)(7)(B) of the Act. *See, e.g., OJ from Brazil,* 75 FR at 51001.

In this administrative review, we obtained information from both respondents regarding the marketing stages involved in making the reported foreign market and U.S. sales, including a description of the selling activities performed by each respondent for each channel of distribution. Company-specific LOT findings are summarized below.

1. Apex

Apex reported that it made EP sales in the U.S. market through a single channel of distribution (*i.e.,* to trading companies). We examined the selling activities performed for U.S. sales and found that Apex performed the following selling functions: customer contact and price negotiation; order processing; arranging for freight and the provision of customs clearance/brokerage services (in India and the United States); cold storage and inventory maintenance; quality-assurance-related activities; and banking-related activities. These selling activities can be generally grouped into four selling function categories for analysis: (1) Sales and marketing; (2) freight and delivery; (3) inventory maintenance and warehousing; and (4) warranty and technical support. Accordingly, based on the selling function categories, we find that Apex performed sales and marketing, freight and delivery services, and inventory maintenance and warehousing for U.S. sales. Because all sales in the United States are made through a single distribution channel (*i.e.,* direct sales to unaffiliated customers) and the selling activities to Apex's customers did not vary within this channel, we preliminarily determine that there is one LOT in the U.S. market.

With respect to the third country market, Apex also reported that it made sales to trading companies and that all selling functions were performed at the same levels of intensity as in the U.S. market. We examined the selling activities performed for third country sales and found that Apex performed the following selling functions: Customer contact and price negotiation; order processing; arranging for freight and the provision of customs clearance/brokerage services (in India); cold storage and inventory maintenance;

[15] *Id; see also Certain Orange Juice From Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Antidumping Duty Order in Part,* 75 FR 50999, 51001 (Aug. 18, 2010), and accompanying Issues and Decision Memorandum at Comment 7 (*OJ from Brazil*).

[16] Where NV is based on CV, we determine the NV LOT based on the LOT of the sales from which we derive selling expenses, general and administrative (G&A) expenses, and profit for CV, where possible.

[17] *See Micron Tech., Inc.* v. *United States,* 243 F.3d 1301, 1314–16 (Fed. Cir. 2001).

quality-assurance-related activities; and banking-related activities. Accordingly, based on these selling functions noted above, we find that Apex performed sales and marketing, freight and delivery services, and inventory maintenance and warehousing for all third country sales. Because all third country sales are made through a single distribution channel and the selling activities to Apex's customers did not vary within this channel, we preliminarily determine that there is one LOT in the third country market for Apex.

Finally, we compared the U.S. LOT to the third country market LOT and found that the selling functions performed for U.S. and third country market customers do not differ, as Apex performed the same selling functions at the same relative level of intensity in both markets. Therefore, we determine that sales to the U.S. and third country markets during the POR were made at the same LOT, and as a result, no LOT adjustment is warranted.

2. Falcon

Falcon reported that it made EP sales in the U.S. market to trading companies. We examined the selling activities performed for U.S. sales and found that Falcon performed the following selling functions: Customer contact and price negotiation; order processing; arranging for freight and the provision of customs clearance/brokerage services (in India and the United States); cold storage and inventory maintenance; quality-assurance-related activities; and banking-related activities. These selling activities can be generally grouped into four selling function categories for analysis: (1) Sales and marketing; (2) freight and delivery; (3) inventory maintenance and warehousing; and (4) warranty and technical support. Accordingly, based on the selling function categories, we find that Falcon performed sales and marketing, freight and delivery services, and inventory maintenance and warehousing for U.S. sales. Because all sales in the United States are made through a single distribution channel (*i.e.,* direct sales to unaffiliated customers) and the selling activities to Falcon's customers did not vary within this channel, we preliminarily determine that there is one LOT in the U.S. market.

With respect to the third country market, Falcon reported that it made sales to trading companies and that all selling functions were performed at the same levels of intensity as in the U.S. market. We examined the selling activities performed for third country sales and found that Falcon performed the following selling functions: Customer contact and price negotiation; order processing; arranging for freight and the provision of customs clearance/brokerage services (in India); cold storage and inventory maintenance; quality-assurance-related activities; and banking-related activities. Accordingly, based on these selling functions noted above, we find that Falcon performed sales and marketing, freight and delivery services, and inventory maintenance and warehousing for all third country sales. Because all third country sales are made through a single distribution channel and the selling activities to Falcon's customers did not vary within this channel, we preliminarily determine that there is one LOT in the third country market for Falcon.

Finally, we compared the EP LOT to the third country market LOT and found that the selling functions performed for U.S. and third country market customers do not differ, as Falcon performed the same selling functions at the same relative level of intensity in both markets. Therefore, we determine that sales to the U.S. and third country markets during the POR were made at the same LOT, and as a result, no LOT adjustment is warranted.

C. Cost of Production Analysis

On August 12, 2011, the petitioner and the ASPA alleged that Apex made sales to the United Kingdom that were below the COP. Based on our analysis of the petitioner's allegation, we found that there were reasonable grounds to believe or suspect that Apex's sales of shrimp in the United Kingdom were made at prices below its COP. Accordingly, pursuant to section 773(b) of the Act, we initiated a sales-below-cost investigation to determine whether Apex's sales were made at prices below its COP. *See* Sales-Below-Cost-Memo for Apex.

In addition, we found that Falcon made sales in the same comparison market (*i.e.,* Japan) below the COP in the most recently completed segment of this proceeding as of the date of initiation of this review, and such sales were disregarded.[18] Thus, in accordance with section 773(b)(2)(A)(ii) of the Act, we preliminarily find that there are reasonable grounds to believe or suspect that Falcon made sales in the third country market at prices below the cost of producing the merchandise during the current POR.

1. Calculation of Cost of Production

In accordance with section 773(b)(3) of the Act, we calculated the respondents' COPs based on the sum of their costs of materials and conversion for the foreign like product, plus amounts for G&A expenses and interest expenses (*see* ''Test of Comparison Market Sales Prices'' section, below, for treatment of third country selling expenses).

The Department relied on the COP data submitted by each respondent in its most recently submitted cost database for the COP calculation, except that we revised the financial expenses reported by each respondent to exclude claimed interest income received on antidumping duty deposit refunds.[19]

Based on our review of the record evidence, neither Apex nor Falcon appeared to experience significant changes in the cost of manufacturing during the POR. Therefore, we followed our normal methodology of calculating an annual weighted-average cost.

2. Test of Comparison Market Sales Prices

On a product-specific basis, we compared the adjusted weighted-average COP to the comparison market sales prices of the foreign like product, as required under section 773(b) of the Act, in order to determine whether the sale prices were below the COP. For purposes of this comparison, we used COP exclusive of selling and packing expenses. The prices were exclusive of any applicable movement charges, discounts, direct and indirect selling expenses, and packing expenses.

3. Results of the COP Test

In determining whether to disregard third country sales made at prices below the COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act: (1) whether, within an extended period of time, such sales were made in substantial quantities; and (2) whether such sales were made at prices which permitted the recovery of all costs within a reasonable period of time in the normal course of trade. In accordance with sections 773(b)(2)(B)

[18] *See Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review, Partial Rescission, and Final No Shipment Determination,* 75 FR 41815 (July 19, 2010).

[19] *See* the memorandum from Stephanie Arthur, Accountant, to Neal M. Halper, Director, Office of Accounting, entitled, ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results—Apex Exports,'' and the memorandum from Robert Greger, Accountant, to Neal M. Halper, Director, Office of Accounting, entitled, ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results—Falcon Marine Exports Ltd.,'' dated February 28, 2012.

and (C) of the Act, where less than 20 percent of the respondent's third country sales of a given product are at prices less than the COP, we do not disregard any below-cost sales of that product because we determine that in such instances the below-cost sales were not made within an extended period of time and in ''substantial quantities.'' Where 20 percent or more of a respondent's sales of a given product are at prices less than the COP, we disregard the below-cost sales when: (1) They were made within an extended period of time in ''substantial quantities,'' in accordance with sections 773(b)(2)(B) and (C) of the Act; and (2) based on our comparison of prices to the weighted-average COPs for the POR, they were at prices which would not permit the recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act.

We found that, for certain products, more than 20 percent of Apex and Falcon's third country sales were at prices less than the COP and, in addition, such sales did not provide for the recovery of costs within a reasonable period of time. We therefore excluded these sales and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act.

For those U.S. sales of subject merchandise for which there were no comparable third country sales in the ordinary course of trade, we compared EP to CV in accordance with section 773(a)(4) of the Act. *See* ''Calculation of Normal Value Based on Constructed Value'' section below.

D. Calculation of Normal Value Based on Comparison Market Prices

1. Apex

For Apex, we calculated NV based on delivered prices to unaffiliated customers in the United Kingdom. We made adjustments to the starting price, where appropriate, for discounts, in accordance with 19 CFR 351.401(c). We also made deductions for foreign inland freight expenses, foreign brokerage and handling expenses, various foreign miscellaneous shipment charges and international freight expenses (including terminal handling charges), under section 773(a)(6)(B) of the Act.

In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for direct selling expenses (including bank charges, Export Credit Guarantee Corporation (ECGC) fees, export inspection agency (EIA) fees, imputed credit expenses, and other direct selling expenses), and commissions. Because commissions were paid only in the comparison market, we made an upward adjustment to NV for the lesser of: (1) The amount of commission paid in the comparison market; or (2) the amount of indirect selling expenses (including inventory carrying costs) incurred in the U.S. market. *See* 19 CFR 351.410(e).

We made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise, in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted third country packing costs and added U.S. packing costs, in accordance with sections 773(a)(6)(A) and (B)(i) of the Act.

2. Falcon

We based NV for Falcon on prices to unaffiliated customers in Japan. We made adjustments, where appropriate, to the starting price for discounts, in accordance with 19 CFR 351.401(c). We also made deductions, where appropriate, from the starting price for cold storage expenses, loading and unloading expenses, trailer hire expenses, foreign inland freight expenses, port charges, export survey charges, terminal and handling charges, foreign brokerage and handling expenses, and international freight expenses, under section 773(a)(6)(B)(ii) of the Act.

In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for direct selling expenses (including bank charges, ECGC fees, EIA fees, outside inspection/lab expenses, letter of credit amendment charges, imputed credit expenses, and other direct selling expenses) and commissions. Finally, where commissions were granted in the U.S. market but not in the comparison market, we made a downward adjustment to NV for the lesser of: (1) The amount of commission paid in the U.S. market; or (2) the amount of indirect selling expenses (including inventory carrying costs) incurred in the comparison market. *See* 19 CFR 351.410(e). If commissions were granted in the comparison market but not in the U.S. market, we made an upward adjustment to NV following the same methodology.

We recalculated Falcon's indirect selling expense ratio to exclude sales write-offs recorded in Falcon's financial statements after the POR, in accordance with our practice.[20]

We made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise, in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted third country packing costs and added U.S. packing costs, in accordance with sections 773(a)(6)(A) and (B) of the Act.

E. Calculation of Normal Value Based on Constructed Value

Section 773(a)(4) of the Act provides that where NV cannot be based on comparison market sales, NV may be based on CV. Accordingly, for those shrimp products for which we could not determine the NV based on comparison market sales because, as noted in the ''Results of the COP Test'' section above, all sales of the comparable products failed the COP test, we based NV on CV.

Sections 773(e)(1) and (2)(A) of the Act provide that CV shall be based on the sum of the cost of materials and fabrication for the imported merchandise, plus amounts for selling, general, and administrative (SG&A) expenses, profit, and U.S. packing costs. For each respondent, we calculated the cost of materials and fabrication based on the methodology described in the ''Cost of Production Analysis'' section, above. We based SG&A and profit for each respondent on the actual amounts incurred and realized by it in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in the comparison market, in accordance with section 773(e)(2)(A) of the Act.

We made adjustments to CV for differences in circumstances of sale, in accordance with section 773(a)(6)(C)(iii) and (a)(8) of the Act and 19 CFR 351.410. For comparisons to EP, we made circumstance-of-sale adjustments by deducting direct selling expenses incurred on comparison market sales from, and adding U.S. direct selling expenses to, CV. *See* 19 CFR 351.410(c). We also made an adjustment for Falcon, when applicable, for comparison market indirect selling expenses, adjusted as noted above, to offset U.S. commissions in EP comparisons. *See* 19 CFR 351.410(e).

[20] *See* the February 28, 2012, memorandum from David Crespo to the file entitled, ''Calculation Adjustments for Falcon Marine Exports Limited for the Preliminary Results in the 2010–2011 Administrative Review of Certain Frozen Warmwater Shrimp From India.''

Currency Conversion

We made currency conversions into U.S. dollars for all transactions by Apex and all spot transactions by Falcon, in accordance with section 773A of the Act and 19 CFR 351.415, based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank. In addition, Falcon reported that it purchased forward exchange contracts which were used to convert its sales prices into home market currency. Under 19 CFR 351.415(b), if a currency transaction on forward markets is directly linked to an export sale under consideration, the Department is directed to use the exchange rate specified with respect to such currency in the forward sale agreement to convert the foreign currency.[21] Therefore, for Falcon we used the reported forward exchange rates for currency conversions where applicable.

Preliminary Results of the Review

We preliminarily determine that weighted-average dumping margins exist for the respondents for the period February 1, 2010, through January 31, 2011, as follows:

Manufacturer/exporter	Percent margin
Apex Exports	2.51
Falcon Marine Exports Limited	0.13 (*de minimis)*
Review-Specific Average Rate Applicable to the Following Companies:[22]	
Abad Fisheries Pvt. Ltd	2.51
Accelerated Freeze-Drying Co	*
Adilakshmi Enterprises	2.51
Allana Frozen Foods Pvt. Ltd	2.51
Allansons Ltd	2.51
AMI Enterprises	2.51
Amulya Sea Foods	*
Ananda Aqua Applications/Ananda Aqua Exports (P) Limited/Ananda Foods	2.51
Anand Aqua Exports	2.51
Andaman Seafoods Pvt. Ltd	2.51
Angelique Intl	2.51
Anjaneya Seafoods	2.51
Arvi Import & Export	2.51
Asvini Exports	2.51
Asvini Fisheries Private Limited	2.51
Avanti Feeds Limited	2.51
Ayshwarya Seafood Private Limited	2.51
Baby Marine Exports	2.51
Baby Marine International	*
Baby Marine Sarass	*
Bhatsons Aquatic Products	2.51
Bhavani Seafoods	2.51
Bijaya Marine Products	2.51
Blue Water Foods & Exports P. Ltd	2.51
Bluefin Enterprises	2.51
Bluepark Seafoods Pvt. Ltd	2.51
BMR Exports	*
Britto Exports	2.51
C P Aquaculture (India) Ltd	2.51
Calcutta Seafoods Pvt. Ltd	2.51
Capithan Exporting Co	2.51
Castlerock Fisheries Pvt. Ltd	*
Chemmeens (Regd)	2.51
Cherukattu Industries (Marine Div.)	2.51
Choice Canning Company	2.51
Choice Trading Corporation Private Limited	2.51
Coastal Corporation Ltd	2.51
Cochin Frozen Food Exports Pvt. Ltd	2.51
Coreline Exports	2.51
Corlim Marine Exports Pvt. Ltd	2.51
Damco India Private	2.51
Devi Fisheries Limited	2.51
Devi Marine Food Exports Private Ltd./Kader Exports Private Limited/Kader Investment and Trading Company Private Limited/ Liberty Frozen Foods Pvt. Ltd./Liberty Oil Mills Ltd./Premier Marine Products/Universal Cold Storage Private Limited	2.51
Diamond Seafoods Exports/Edhayam Frozen Foods Pvt. Ltd./Kadalkanny Frozen Foods/Theva & Company	2.51
Digha Seafood Exports	2.51
Esmario Export Enterprises	*
Exporter Coreline Exports	2.51
Five Star Marine Exports Private Limited	2.51

[21] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From India,* 69 FR 76916 (Dec. 23, 2004), and accompanying Issues and Decision Memorandum at Comment 6; *see also Certain Frozen Warmwater Shrimp From India: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Preliminary No Shipment Determination,* 76 FR 12025, 12031 (Mar. 4, 2011), unchanged in *Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review, Partial Rescission, and Final No Shipment Determination,* 76 FR 41203 (July 13, 2011).

[22] This rate is based on the margin calculated for Apex because it is the only above *de minimis* margin calculated in this administrative review.

Manufacturer/exporter	Percent margin
Forstar Frozen Foods Pvt. Ltd	2.51
Frontline Exports Pvt. Ltd	2.51
G A Randerian Limited	2.51
Gadre Marine Exports	2.51
Galaxy Maritech Exports P. Ltd	2.51
Gayatri Seafoods	2.51
Geo Aquatic Products (P) Ltd	2.51
Geo Seafoods	2.51
Goodwill Enterprises	2.51
Grandtrust Overseas (P) Ltd	2.51
GVR Exports Pvt. Ltd	2.51
Haripriya Marine Export Pvt. Ltd	2.51
Harmony Spices Pvt. Ltd	2.51
HIC ABF Special Foods Pvt. Ltd	2.51
Hindustan Lever, Ltd	2.51
Hiravata Ice & Cold Storage	2.51
Hiravati Exports Pvt. Ltd	2.51
Hiravati International Pvt. Ltd. (located at APM—Mafco Yard, Sector—18, Vashi, Navi, Mumbai—400 705, India)	2.51
Hiravati International Pvt. Ltd. (located at Jawar Naka, Porbandar, Gujarat, 360 575, India)	2.51
IFB Agro Industries Ltd	2.51
Indian Aquatic Products	2.51
Indo Aquatics	2.51
Innovative Foods Limited	2.51
International Freezefish Exports	2.51
Interseas	2.51
ITC Ltd	2.51
ITC Limited, International Business	2.51
Jagadeesh Marine Exports	2.51
Jaya Satya Marine Exports	2.51
Jaya Satya Marine Exports Pvt. Ltd	2.51
Jayalakshmi Sea Foods Private Limited	2.51
Jinny Marine Traders	2.51
Jiya Packagings	2.51
K R M Marine Exports Ltd	2.51
Kalyanee Marine	2.51
Kanch Ghar	2.51
Kay Kay Exports	2.51
Kings Marine Products	2.51
Koluthara Exports Ltd	*
Konark Aquatics & Exports Pvt. Ltd	2.51
Landauer Ltd	2.51
Libran Cold Storages (P) Ltd	2.51
Magnum Estates Limited	2.51
Magnum Export	2.51
Magnum Sea Foods Limited	2.51
Malabar Arabian Fisheries	2.51
Malnad Exports Pvt. Ltd	2.51
Mangala Marine Exim India Pvt. Ltd	2.51
Mangala Sea Products	2.51
Meenaxi Fisheries Pvt. Ltd	2.51
MSC Marine Exporters	2.51
MSRDR Exports	2.51
MTR Foods	2.51
N.C. John & Sons (P) Ltd	2.51
Naga Hanuman Fish Packers	2.51
Naik Frozen Foods	2.51
Naik Frozen Foods Pvt., Ltd	2.51
Naik Seafoods Ltd	2.51
Navayuga Exports Ltd	2.51
Nekkanti Sea Foods Limited	2.51
NGR Aqua International	2.51
Nila Sea Foods Pvt. Ltd	2.51
Nine Up Frozen Foods	2.51
Overseas Marine Export	2.51
Paragon Sea Foods Pvt. Ltd	2.51
Penver Products (P) Ltd	*
Pijikay International Exports P Ltd	2.51
Pisces Seafood International	2.51
Premier Exports International	2.51
Premier Marine Foods	2.51
Premier Seafoods Exim (P) Ltd	2.51
R V R Marine Products Private Limited	2.51
Raa Systems Pvt. Ltd	2.51

Manufacturer/exporter	Percent margin
Raju Exports	2.51
Ram's Assorted Cold Storage Ltd	2.51
Raunaq Ice & Cold Storage	2.51
Raysons Aquatics Pvt. Ltd	2.51
Razban Seafoods Ltd	2.51
RBT Exports	2.51
RDR Exports	2.51
Riviera Exports Pvt. Ltd	2.51
Rohi Marine Private Ltd	2.51
S & S Seafoods	2.51
S. A. Exports	2.51
S Chanchala Combines	2.51
Safa Enterprises	2.51
Sagar Foods	2.51
Sagar Grandhi Exports Pvt. Ltd	2.51
Sagar Samrat Seafoods	2.51
Sagarvihar Fisheries Pvt. Ltd	2.51
SAI Marine Exports Pvt. Ltd	2.51
SAI Sea Foods	2.51
Sandhya Aqua Exports	2.51
Sandhya Aqua Exports Pvt. Ltd	2.51
Sandhya Marines Limited	2.51
Santhi Fisheries & Exports Ltd	2.51
Satya Seafoods Private Limited	2.51
Sawant Food Products	2.51
Seagold Overseas Pvt. Ltd	2.51
Selvam Exports Private Limited	2.51
Sharat Industries Ltd	2.51
Shimpo Exports	2.51
Shippers Exports	2.51
Shroff Processed Food & Cold Storage P Ltd	2.51
Silver Seafood	2.51
Sita Marine Exports	2.51
Sowmya Agri Marine Exports	2.51
Sprint Exports Pvt. Ltd	2.51
Sri Chandrakantha Marine Exports	2.51
Sri Sakkthi Cold Storage	2.51
Sri Sakthi Marine Products P Ltd	2.51
Sri Satya Marine Exports	2.51
Sri Venkata Padmavathi Marine Foods Pvt. Ltd	2.51
Srikanth International	2.51
SSF Ltd	2.51
Star Agro Marine Exports Private Limited	2.51
Sun Bio-Technology Ltd	2.51
Suryamitra Exim (P) Ltd	2.51
Suvarna Rekha Exports Private Limited	2.51
Suvarna Rekha Marines P Ltd	2.51
TBR Exports Pvt Ltd	2.51
Teekay Marine P. Ltd	2.51
Tejaswani Enterprises	2.51
The Waterbase Ltd	2.51
Triveni Fisheries P Ltd	2.51
Uniroyal Marine Exports Ltd	2.51
Usha Seafoods	2.51
V.S Exim Pvt Ltd	2.51
Veejay Impex	2.51
Victoria Marine & Agro Exports Ltd	2.51
Vinner Marine	2.51
Vishal Exports	2.51
Wellcome Fisheries Limited	2.51
West Coast Frozen Foods Private Limited	2.51

* No shipments or sales subject to this review.

Disclosure and Public Hearing

The Department will disclose to parties the calculations performed in connection with these preliminary results within five days of the date of publication of this notice. *See* 19 CFR 351.224(b). Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs not later than the later of 30 days after the date of publication of this notice or one week after the issuance of the final verification report for Falcon. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs. *See* 19 CFR 351.309(d). Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A

statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities. *See* 19 CFR 351.309(c)(2) and (d)(2).

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, filed electronically using Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). An electronically filed document must be received successfully in its entirety by the Department's electronic records system, IA ACCESS, by 5 p.m. Eastern Standard Time within 30 days after the date of publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. The Department will issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon completion of the administrative review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries, in accordance with 19 CFR 351.212(b)(1). The Department will issue appropriate appraisement instructions for the companies subject to this review directly to CBP 15 days after the date of publication of the final results of this review.

For Apex and Falcon, we will calculate importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the sales. *See* 19 CFR 351.212(b)(1).

For the companies which were not selected for individual review, we will calculate an assessment rate based on the weighted average of the cash deposit rates calculated for the companies selected for individual review excluding any which are *de minimis* or determined entirely on AFA.

We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any importer-specific assessment rate calculated in the final results of this review is above *de minimis.* Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis.* The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable. *See* section 751(a)(2)(C) of the Act.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Assessment Policy Notice.* This clarification will apply to entries of subject merchandise during the POR produced by companies included in the final results of this review for which the reviewed companies did not know that the merchandise they sold to the intermediary (*e.g.,* a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediary involved in the transaction. *See Assessment Policy Notice* for a full discussion of this clarification.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for each specific company listed above will be that established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously reviewed or investigated companies not participating in this review, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 10.17 percent, the all-others rate made effective by the LTFV investigation. *See Shrimp Order,* 70 FR at 5148. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and notice are published in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.221(b)(4).

Dated: February 28, 2012.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. 2012–5449 Filed 3–5–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–929]

Small Diameter Graphite Electrodes From the People's Republic of China: Preliminary Results and Partial Rescission of Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests from interested parties, the Department of Commerce (the Department) is conducting the administrative review of the antidumping duty order on small diameter graphite electrodes (graphite electrodes) from the People's Republic of China (PRC), covering the period February 1, 2010, through January 31, 2011. The Department has preliminarily determined that during the period of review (POR) respondents in this proceeding have made sales of subject merchandise at less than normal value (NV). If these preliminary results are adopted in our final results of review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries of subject merchandise during the POR. The Department is also rescinding this review for those exporters for which requests for review were timely withdrawn.[1] Furthermore, we determine that 16 companies for which a review was requested have not

[1] *See* ''Partial Rescission of the Administrative Review'' section below.

demonstrated entitlement to a separate rate.[2] As a result, we have preliminarily determined that they are part of the PRC-wide entity, and are subject to the PRC-wide entity rate.[3]

Interested parties are invited to comment on these preliminary results. We will issue final results no later than 120 days from the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act).

DATES: *Effective Date:* March 6, 2012.

FOR FURTHER INFORMATION CONTACT: Dmitry Vladimirov or Minoo Hatten, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington DC 20230; telephone: (202) 482–0665 or (202) 482–1690, respectively.

Background

On February 26, 2009, we published in the **Federal Register** the antidumping duty order on graphite electrodes from the PRC.[4] On February 1, 2011, we published a notice of opportunity to request an administrative review of this order.[5] On February 25 and February 28, 2011, we received timely review requests in accordance with 19 CFR 351.213(b) from Fushun Jinly Petrochemical Carbon Co., Ltd. (Fushun Jinly), Xinghe County Muzi Carbon Co., Ltd. (Muzi Carbon), Sichuan Guanghan Shida Carbon Co., Ltd. (Shida Carbon), and Beijing Fangda Carbon Tech Co., Ltd., Chengdu Rongguang Carbon Co., Ltd., Fangda Carbon New Material Co., Ltd., Fushun Carbon Co., Ltd., and Hefei Carbon Co., Ltd. (collectively, the Fangda Group). On February 25, 2011, the Department also received a timely request for an administrative review of 117 companies from SGL Carbon LLC and Superior Graphite Co. (the petitioners). On March 31, 2011, we initiated an administrative review of the antidumping duty order on graphite electrodes from the PRC with respect to 160 companies.[6]

On April 4, 2011, we released to interested parties CBP data covering POR imports of graphite electrodes from the PRC and invited comments on the Department's selection of respondents for individual examination.[7] On May 6, 2011, we selected Jilin Carbon Import and Export Company (Jilin Carbon) and Fushun Jinly for individual examination in this review.[8]

On May 11, 2011, we sent the antidumping duty questionnaire to Jilin Carbon and Fushun Jinly. On May 31, 2011, we received separate-rate certifications from the Fangda Group and Muzi Carbon, and a separate-rate application from Shida Carbon.[9] On June 13, 2011, and June 14, 2011, the petitioners submitted comments concerning separate-rate certifications provided by Muzi Carbon and the Fangda Group, respectively. On June 14, 2011, and June 27, 2011, in response to our requests for information, Muzi Carbon clarified certain information in its separate-rate certification. On June 30, 2011, the petitioners submitted comments concerning the separate-rate application provided by Shida Carbon. On July 20, 2011, in response to our request for information, Shida Carbon clarified certain information in its separate-rate application.

On June 29, 2011, the petitioners filed a timely request for rescission of review with respect to 134 of the 160 companies for which the Department initiated a review.[10] Between June 15 and November 29, 2011, Fushun Jinly responded to the Department's original and supplemental questionnaires. Jilin Carbon did not respond to the Department's questionnaire.

On November 1, 2011, and February 7, 2012, we extended the time limit for the preliminary results of review by 120 days as allowed under section 751(a)(3)(A) of the Act to February 28, 2012.[11]

Scope of the Order

The merchandise covered by the order includes all small diameter graphite electrodes of any length, whether or not finished, of a kind used in furnaces, with a nominal or actual diameter of 400 millimeters (16 inches) or less, and whether or not attached to a graphite pin joining system or any other type of joining system or hardware. The merchandise covered by the order also includes graphite pin joining systems for small diameter graphite electrodes, of any length, whether or not finished, of a kind used in furnaces, and whether or not the graphite pin joining system is attached to, sold with, or sold separately from, the small diameter graphite electrode. Small diameter graphite electrodes and graphite pin joining systems for small diameter graphite electrodes are most commonly used in primary melting, ladle metallurgy, and specialty furnace applications in industries including foundries, smelters, and steel refining operations. Small diameter graphite electrodes and graphite pin joining systems for small diameter graphite electrodes that are subject to the order are currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheading 8545.11.0000. The HTSUS number is provided for convenience and customs purposes, but the written description of the scope is dispositive.

Partial Rescission of the Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if a party that requested the review withdraws the request within 90 days of the date of publication of the initiation notice.

For 152 of the companies for which the Department initiated an administrative review, the petitioners were the only party that requested the review. On June 29, 2011, the petitioners timely withdrew their review requests for 134 of those 152 companies. Further, on May 17, 2011, Muzi Carbon clarified its request for review in which Muzi Carbon was named erroneously as Xinghe Muzi Carbon Co., Ltd.[12] Therefore, in accordance with 19 CFR 351.213(d)(1), we are rescinding this administrative review with respect to 135 companies named as follows in the *Initiation Notice:*

1. 5-Continent Imp. & Exp. Co., Ltd.
2. Acclcarbon Co., Ltd.
3. Allied Carbon (China) Co., Limited
4. AMGL

[2] *See* ''Separate Rates'' section below.

[3] *See* ''PRC-Wide Entity'' section below.

[4] *See Antidumping Duty Order: Small Diameter Graphite Electrodes from the People's Republic of China,* 74 FR 8775 (February 26, 2009).

[5] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 76 FR 5559 (February 1, 2011).

[6] In *Initiation of Antidumping Duty Administrative Reviews, Requests for Revocation in Part, and Deferral of Administrative Review,* 76 FR 17825 (March 31, 2011) (*Initiation Notice*), we listed additional names by which certain companies are also known, or were known formerly, as reflected in the petitioners' February 25, 2011, review request.

[7] *See* the Department's memorandum to ''All Interested Parties,'' dated April 4, 2011.

[8] *See* the Department's memorandum entitled ''Small Diameter Graphite Electrodes from the People's Republic of China: Selection of Respondents for Individual Examination,'' dated May 6, 2011 (Respondent Selection Memo).

[9] *See* ''Separate Rates'' section below.

[10] *See* ''Partial Rescission of the Administrative Review'' section below.

[11] *See Small Diameter Graphite Electrodes From the People's Republic of China: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review,* 76 FR 67411 (November 1, 2011), and *Small Diameter Graphite Electrodes from the People's Republic of China: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review,* 77 FR 6060 (February 7, 2012).

[12] The petitioners did not request a review on Xinghe Muzi Carbon Co., Ltd.

5. Anssen Metallurgy Group Co., Ltd.
6. Beijing Xinchengze Inc.
7. Beijing Xincheng Sci-Tech. Development Inc.
8. Brilliant Charter Limited
9. Chang Cheng Chang Electrode Co., Ltd.
10. Chengdelh Carbonaceous Elements Factory
11. Chengdu Jia Tang Corp.
12. China Industrial Mineral & Metals Group
13. China Shaanxi Richbond Imp. & Exp. Industrial Corp. Ltd.
14. China Xingyong Carbon Co., Ltd.
15. CIMM Group Co., Ltd.
16. Dalian Carbon & Graphite Corporation
17. Dalian Hongrui Carbon Co., Ltd.
18. Dalian Honest International Trade Co., Ltd.
19. Dalian Horton International Trading Co., Ltd.
20. Dalian LST Metallurgy Co., Ltd.
21. Dalian Shuangji Co., Ltd.
22. Dalian Thrive Metallurgy Imp. & Exp. Co., Ltd.
23. Datong Carbon
24. Datong Carbon Plant
25. Datong Xincheng Carbon Co., Ltd.
26. De Well Container Shipping Corp.
27. Dewell Group
28. Dignity Success Investment Trading Co., Ltd.
29. Double Dragon Metals and Mineral Tools Co., Ltd.
30. Fangda Lanzhou Carbon Joint Stock Company Co. Ltd.
31. Foset Co., Ltd.
32. GES (China) Co., Ltd.
33. Guangdong Highsun Yongye (Group) Co., Ltd.
34. Haimen Shuguang Carbon Industry Co., Ltd.
35. Handan Hanbo Material Co., Ltd.
36. Hebei Long Great Wall Electrode Co., Ltd.
37. Heilongjiang Xinyuan Carbon Products Co., Ltd.
38. Heilongjiang Xinyuan Metacarbon Company, Ltd.
39. Henan Sanli Carbon Products Co., Ltd.
40. Hopes (Beijing) International Co., Ltd.
41. Huanan Carbon Factory
42. Hunan Mec Machinery and Electronics Imp. & Exp. Corp.
43. Hunan Yinguang Carbon Factory Co., Ltd.
44. Inner Mongolia QingShan Special Graphite and Carbon Co., Ltd.
45. Inner Mongolia Xinghe County Hongyuan Electrical Carbon Factory
46. Jiang Long Carbon
47. Jiangsu Yafei Carbon Co., Ltd.
48. Jiaozuo Zhongzhou Carbon Products Co., Ltd.
49. Jichun International Trade Co. Ltd. of Jilin Province
50. Jiexiu Juyuan Carbon Co., Ltd./Jiexiu Ju-Yuan & Coaly Co., Ltd.
51. Jilin Songjiang Carbon Co Ltd.
52. Jinneng Group
53. Jinyu Thermo-Electric Material Co., Ltd.
54. Kaifeng Carbon Company Ltd.
55. KASY Logistics (Tianjin) Co., Ltd.
56. Kimwan New Carbon Technology and Development Co., Ltd.
57. Kingstone Industrial Group Ltd.
58. L & T Group Co., Ltd.
59. Laishui Long Great Wall Electrode Co. Ltd.
60. Lanzhou Carbon Co., Ltd./Lanzhou Carbon Import & Export Corp.
61. Lanzhou Hailong Technology
62. Lanzhou Ruixin Industrial Material Co., Ltd.
63. LH Carbon Factory of Chengde
64. Lianxing Carbon Qinghai Co., Ltd.
65. Lianxing Carbon Science Institute
66. Lianxing Carbon (Shandong) Co., Ltd.
67. Lianyungang Jianglida Mineral Co., Ltd.
68. Lianyungang Jinli Carbon Co., Ltd.
69. Liaoyang Carbon Co. Ltd.
70. Linghai Hongfeng Carbon Products Co., Ltd.
71. Linyi County Lubei Carbon Co., Ltd.
72. Maoming Yongye (Group) Co., Ltd.
73. Nantong Falter New Energy Co., Ltd.
74. Nantong River-East Carbon Co., Ltd.
75. Nantong River-East Carbon Joint Stock Co., Ltd.
76. Nantong Yangtze Carbon Corp. Ltd., Orient (Dalian) Carbon Resources Developing Co., Ltd.
77. Peixian Longxiang Foreign Trade Co. Ltd.
78. Qingdao Grand Graphite Products Co., Ltd.
79. Quingdao Haosheng Metals & Minerals Imp. & Exp. Co., Ltd.
80. Qingdao Haosheng Metals Imp. & Exp. Co., Ltd.
81. Qingdao Likun Graphite Co., Ltd.
82. Qingdao Liyikun Carbon Development Co., Ltd.
83. Qingdao Ruizhen Carbon Co., Ltd.
84. Rt Carbon Co., Ltd.
85. Ruitong Carbon Co., Ltd.
86. Shandong Basan Carbon Plant
87. Shandong Zibo Contient Carbon Factory
88. Shanghai Carbon International Trade Co., Ltd.
89. Shanghai GC Co., Ltd.
90. Shanghai Jinneng International Trade Co., Ltd.
91. Shanghai P.W. International Ltd.
92. Shanghai Shen-Tech Graphite Material Co., Ltd.
93. Shanghai Topstate International Trading Co., Ltd.
94. Shenyang Jinli Metals & Minerals Imp. & Exp. Co., Ltd.
95. Shanxi Datong Energy Development Co., Ltd.
96. Shanxi Foset Carbon Co. Ltd.
97. Shanxi Jiexiu Import and Export Co., Ltd.
98. Shanxi Jinneng Group Co., Ltd.
99. Shanxi Yunheng Graphite Electrode Co., Ltd.
100. Shenyang Jinli Metals & Minerals Imp. & Exp. Co., Ltd.
101. Shijaizhuang Carbon Co., Ltd.
102. Shijiazhuang Huanan Carbon Factory
103. Sichuan 5-Continent Imp. & Exp. Co., Ltd.
104. Sichuan GMT International Inc.
105. SMMC Group Co., Ltd.
106. Tangshan Kimwan Special Carbon & Graphite Co., Ltd.
107. Tengchong Carbon Co., Ltd.
108. Tianjin (Teda) Iron & Steel Trade Co., Ltd.
109. Tianjin Kimwan Carbon Technology and Development Co., Ltd.
110. Tianzhen Jintian Graphite Electrodes Co., Ltd.
111. Tianjin Yue Yang Industrial & Trading Co., Ltd.
112. Tielong (Chengdu) Carbon Co., Ltd.
113. UK Carbon & Graphite
114. United Carbon Ltd.
115. United Trade Resources, Inc.
116. Weifang Lianxing Carbon Co., Ltd.
117. World Trade Metals & Minerals Co., Ltd.
118. XC Carbon Group
119. Xinghe Muzi Carbon Co., Ltd
120. Xinghe Xingyong Carbon Co., Ltd.
121. Xinghe Xinyuan Carbon Products Co., Ltd.
122. Xinyuan Carbon Co., Ltd.
123. Xuanhua Hongli Refractory and Mineral Company
124. Xuchang Minmetals & Industry Co., Ltd.
125. Xuzhou Carbon Co., Ltd.
126. Xuzhou Electrode Factory
127. Xuzhou Jianglong Carbon Manufacture Co., Ltd.
128. Yangzhou Qionghua Carbon Trading Ltd.
129. Yixing Huaxin Imp & Exp Co. Ltd.
130. Youth Industry Co., Ltd.
131. Zhengzhou Jinyu Thermo-Electric Material Co., Ltd.
132. Zibo Continent Carbon Factory
133. Zibo DuoCheng Trading Co., Ltd.
134. Zibo Lianxing Carbon Co., Ltd.
135. Zibo Wuzhou Tanshun Carbon Co., Ltd.

Non-Market Economy Country Status

In every case conducted by the Department involving the PRC, the PRC has been treated as a non-market economy (NME) country.[13] In accordance with section 771(18)(C)(i) of the Act, any determination that a country is an NME country shall remain in effect until revoked by the administering authority. None of the parties to this proceeding has contested such treatment.

Separate Rates

In proceedings involving NME countries, the Department has a rebuttable presumption that all companies within the country are subject to government control and thus should be assigned a single antidumping duty rate.[14] It is the

[13] *See, e.g., Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Coated Free Sheet Paper from the People's Republic of China,* 72 FR 30758, 30760 (June 4, 2007), unchanged in *Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China,* 72 FR 60632 (October 25, 2007).

[14] *See, e.g., Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 75 FR 24892, 24899 (May 6, 2010),

Department's policy to assign all exporters of merchandise subject to review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate. Exporters can demonstrate this independence through the absence of both *de jure* and *de facto* government control over export activities. The Department analyzes each entity exporting the subject merchandise under a test articulated in the *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China,* 56 FR 20588 (May 6, 1991) (*Sparklers*), as further developed in the *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China,* 59 FR 22585 (May 2, 1994) (*Silicon Carbide*). If the Department determines, however, that a company is wholly foreign-owned or located in a market economy (ME), then a separate-rate analysis is not necessary to determine whether it is independent from government control.

In order to demonstrate separate-rate status eligibility, the Department normally requires entities for whom a review was requested, and who were assigned a separate rate in a previous segment of this proceeding, to submit a separate-rate certification stating that they continue to meet the criteria for obtaining a separate rate.[15] For entities that were not assigned a separate rate in the previous segment of a proceeding, to demonstrate eligibility for such, the Department requires a separate-rate application.[16]

In this administrative review, of the 23 companies not selected for individual examination [17] and for which the review has not been rescinded or for which the Department does not intend to rescind the review, only three entities, the Fangda Group, Shida Carbon, and Muzi Carbon, submitted separate-rate information. The remaining 16 companies under review provided neither a separate rate application nor separate rate certification, as applicable. Therefore, the Department preliminarily determines that there were exports of merchandise under review from 16 PRC exporters that did not demonstrate their eligibility for separate rate status. As a result, the Department is treating these 16 PRC exporters as part of the PRC-wide entity, subject to the PRC-wide rate.[18] Additionally, we received a complete response to Section A of the NME antidumping questionnaire from Fushun Jinly, which contained information pertaining to the company's eligibility for a separate rate.[19]

Absence of De Jure Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) other formal measures by the government decentralizing control of companies.[20]

The evidence provided by the Fangda Group, Fushun Jinly, Muzi Carbon, and Shida Carbon supports a preliminary finding of *de jure* absence of government control based on the following: (1) An absence of restrictive stipulations associated with the individual exporter's business and export licenses; (2) there are applicable legislative enactments decentralizing control of the companies; and (3) there are formal measures by the government decentralizing control of the companies.[21]

Absence of De Facto Control

Typically the Department considers four factors in evaluating whether each respondent is subject to *de facto* government control of its export functions: (1) Whether the export prices are set by or are subject to the approval of a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.[22]

The Department has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of government control over export activities which would preclude the Department from assigning separate rates. For the Fangda Group, Fushun Jinly, Muzi Carbon, and Shida Carbon we determine that the evidence on the record supports a preliminary finding of *de facto* absence of government control based on record statements and supporting documentation showing that each respondent: (1) Sets its own export prices independent of the government and without the approval of a government authority; (2) retains the proceeds from its sales and makes independent decisions regarding disposition of profits or financing of losses; (3) has the authority to negotiate and sign contracts and other agreements; and (4) has autonomy from the government regarding the selection of management.[23]

The evidence placed on the record of this review by the Fangda Group, Fushun Jinly, Muzi Carbon, and Shida Carbon demonstrates an absence of *de jure* and *de facto* government control with respect each company's respective exports of the merchandise under review, in accordance with the criteria identified in *Sparklers* and *Silicon Carbide.* Therefore, we are preliminarily granting the Fangda Group, Fushun Jinly, Muzi Carbon, and Shida Carbon each a separate rate.

Separate-Rate Comments

The petitioners assert that the Fangda Group and Shida Carbon do not qualify for separate-rate status because these entities did not have the requisite knowledge of destination of their respective sales. Specifically, the petitioners contend that because neither the Fangda Group nor Shida Carbon knew at the time of sale and shipment to U.S. ports whether their shipments would be entered for consumption in the United States during the POR, the Fangda Group and Shida Carbon did not

unchanged in *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 75 FR 59217 (September 27, 2010).

[15] *See Initiation Notice,* 76 FR at 17826.

[16] *See id.*

[17] These companies are the Fangda Group (comprising five collapsed companies), Shida Carbon, Muzi Carbon, Dechang Shida Carbon Co., Ltd., Fushun Carbon Plant, Fushun Jinli Petrochemical Carbon Co., Ltd., Guanghan Shida Carbon Co., Ltd., Jilin Carbon Graphite Material Co., Ltd., Lanzhou Hailong New Material Co., Liaoning Fangda Group Industrial Co., Ltd., Shida Carbon Group, Sichuan Dechang Shida Co., Ltd., Sichuan Shida Trading Co., Ltd., Sinosteel Anhui Co., Ltd., Sinosteel Corp., Sinosteel Jilin Carbon Co., Ltd., Sinosteel Jilin Carbon Imp. & Exp. Co., Ltd., Sinosteel Sichuan Co., Ltd., and Xinghe County Muzi Carbon Plant.

[18] *See* ''PRC-Wide Entity'' section below.

[19] *See* Fushun Jinly's Section A questionnaire response, dated June 15, 2011.

[20] *See Sparklers,* 56 FR at 20589.

[21] *See* Fushun Jinly's Section A questionnaire response, dated June 15, 2011; the Fangda Group's and Muzi Carbon's separate rate certifications, dated May 31, 2011, and Shida Carbon's separate rate application, dated May 31, 2011.

[22] *See Silicon Carbide,* 59 FR at 22586–87; *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China,* 60 FR 22544, 22545 (May 8, 1995).

[23] *See* Fushun Jinly's Section A questionnaire response, dated June 15, 2011; the Fangda Group's and Muzi Carbon's separate rate certifications, dated May 31, 2011, and Shida Carbon's separate rate application, dated May 31, 2011.

have any U.S. sales, as defined in the statute.

We preliminarily find that the petitioners' allegations with regard to the Fangda Group's and Shida Carbon's knowledge of destination are speculative and not supported by record evidence. It is the Department's policy to assign a separate rate to an exporter that can demonstrate that it is sufficiently independent from government control. *See Initiation Notice,* 76 FR at 17826. Moreover, 19 CFR 351.213(e)(1)(i) specifically instructs that an administrative review may cover ''entries, exports or sales of the subject merchandise'' during the POR. Because the Fangda Group and Shida Carbon were not selected as mandatory respondents, the companies were not required and did not report their U.S. sales information to the Department. Record evidence does indicate, however, that both the Fangda Group and Shida Carbon had reviewable U.S. transactions during the POR.[24] Because the Fangda Group and Shida Carbon had reviewable U.S. transactions during the POR, irrespective of their knowledge of U.S. entry, and because both companies also demonstrated their independence from the PRC government, we preliminarily conclude that the Fangda Group and Shida Carbon are both eligible to receive a separate rate.

The petitioners assert that the Department cannot consider Muzi Carbon's separate-rate request in this review. Specifically, the petitioners argue that because Muzi Carbon submitted a separate-rate certification instead of a separate-rate application, Muzi Carbon's submission is untimely. The petitioners assert that the Department's separate-rate instructions require the submission of a separate-rate application if an exporter underwent changes in corporate structure, ownership, or official company name. The petitioners also contend that Muzi Carbon had a change in ownership during the POR and, thus, was required to submit a separate-rate application. Information on the record indicates that Muzi Carbon's separate rate certification illuminated that the proprietor of Muzi Carbon acquired the remaining three percent of the value of outstanding shares that he did not already own from his nephew, thus becoming the sole shareholder of Muzi Carbon.[25] While this event established a change in the make-up of Muzi Carbon's shareholder structure, we find that it does not constitute a change in the company's ownership because the ownership stayed within the family and the control of the company remained with its proprietor. We therefore preliminarily find Muzi Carbon's filing of a separate-rate certification to be sufficient.

Rate for Non-Selected Companies

In accordance with section 777A(c)(2)(B) of the Act, the Department employed a limited examination methodology, as it did not have the resources to examine all companies for which a review request was made. We selected Fushun Jinly and Jilin Carbon as mandatory respondents in this review. *See* Respondent Selection Memo. As discussed above, the Fangda Group, Muzi Carbon, and Shida Carbon are exporters of graphite electrodes from the PRC that demonstrated their eligibility for a separate rate, but which were not selected for individual examination in this review. The statute and the Department's regulations do not directly address the establishment of a rate to be applied to individual companies not selected for individual examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. The Department's practice in cases involving limited selection based on exporters accounting for the largest volumes of trade has been to look to section 735(c)(5) of the Act for guidance, which provides instructions for calculating the all-others rate in an investigation. Section 735(c)(5)(A) of the Act instructs that we are not to calculate an all-others rate using any zero or *de minimis* margins or any margins based entirely on facts available. Section 735(c)(5)(B) of the Act also provides that, where all margins are zero rates, *de minimis* rates, or rates based entirely on facts available, we may use ''any reasonable method'' for assigning the rate to non-selected respondents. In this instance, we have calculated a rate above *de minimus* for Fushun Jinly and determined a rate for Jilin Carbon based entirely on facts available.

Consistent with the Department's practice, as the separate rate, we have established a margin for the Fangda Group, Muzi Carbon, and Shida Carbon based on the rate we calculated for the mandatory respondent, Fushun Jinly, excluding, where appropriate, any rates that were zero, *de minimis,* or based entirely on adverse facts available (AFA).[26]

PRC-Wide Entity

We have preliminarily determined that 16 companies did not demonstrate their eligibility for a separate rate and are properly considered part of the PRC-wide entity.[27] As explained above in the ''Separate Rates'' section, all companies within the PRC are considered to be subject to government control unless they are able to demonstrate an absence of government control with respect to their export activities. Such companies are thus assigned a single antidumping duty rate distinct from the separate rate(s) determined for companies that are found to be independent of government control with respect to their export activities. We consider the influence that the government has been found to have over the economy to warrant determining a rate for the entity that is distinct from the rates found for companies that have provided sufficient evidence to establish that they operate freely with respect to their export activities.[28]

Use of Facts Available and AFA

Section 776(a) of the Act provides that the Department shall apply ''facts otherwise available'' if (1) necessary information is not on the record or (2) an interested party or any other person (A) withholds information that has been requested, (B) fails to provide

[24] *See* the Department's memorandum entitled ''Administrative Review of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People's Republic of China: Identification of Reviewable Transactions for Certain Companies Under Review,'' dated concurrently with this notice. *See also Small Diameter Graphite Electrodes from the People's Republic of China: Final Results of the First Administrative Review of the Antidumping Duty Order and Final Rescission of the Administrative Review, in Part,* 76 FR 56397 (September 13, 2011), and accompanying Issues and Decision Memorandum at Comment 2 (finding that, because respondents properly reported their sales as export price sales, the knowledge test did not apply).

[25] *See* Muzi Carbon's submission, dated May 31, 2011, at 5.

[26] *See, e.g., Preliminary Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber from the People's Republic of China,* 71 FR 77373, 77377 (December 26, 2006), unchanged in *Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber from the People's Republic of China,* 72 FR 19690 (April 19, 2007).

[27] These companies are Dechang Shida Carbon Co., Ltd., Fushun Carbon Plant, Fushun Jinli Petrochemical Carbon Co., Ltd., Guanghan Shida Carbon Co., Ltd., Jilin Carbon Graphite Material Co., Ltd., Lanzhou Hailong New Material Co., Liaoning Fangda Group Industrial Co., Ltd., Shida Carbon Group, Sichuan Dechang Shida Co., Ltd., Sichuan Shida Trading Co., Ltd., Sinosteel Anhui Co., Ltd., Sinosteel Corp., Sinosteel Jilin Carbon Co., Ltd., Sinosteel Jilin Carbon Imp. & Exp. Co., Ltd., Sinosteel Sichuan Co., Ltd., and Xinghe County Muzi Carbon Plant.

[28] *See Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China,* 71 FR 53079, 53082 (September 8, 2006).

information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Furthermore, section 776(b) of the Act provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Such an adverse inference may include reliance on information derived from the petition, the final determination, a previous administrative review, or other information placed on the record.

Application of Total AFA to the PRC-Wide Entity

Jilin Carbon did not respond to the Department's antidumping questionnaire. Accordingly, we preliminarily determine that this company withheld information requested by the Department in accordance with sections 776(a)(2)(A) and (B) of the Act. Furthermore, this company's refusal to participate in the review significantly impeded the proceeding in accordance with section 776(a)(2)(C) of the Act. Specifically, had this company participated in the review, the Department would have been able to calculate an appropriate dumping margin.

Further, because there is no information on the record demonstrating this company's entitlement to a separate rate in accordance with section 776(a) of the Act, the Department has preliminarily treated Jilin Carbon as part of the PRC-wide entity.

Because Jilin Carbon did not respond to the Department's antidumping questionnaire, and is part of the PRC-wide entity, the PRC-wide entity's refusal to provide any information constitutes justifiable grounds under which the Department can conclude that less than full cooperation has been shown.[29] Hence, pursuant to section 776(b) of the Act, the Department has determined that, when selecting from among the facts otherwise available, an adverse inference is warranted with respect to the PRC-wide entity.

Selection of AFA Rate

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) authorize the Department to rely on information derived from: (1) The petition; (2) a final determination in the investigation; (3) any previous review or determination; or (4) any information placed on the record. In reviews, the Department normally selects as AFA the highest rate determined for any respondent in any segment of the proceeding.[30] The Court of International Trade (CIT) and the Court of Appeals for the Federal Circuit (Federal Circuit) have consistently upheld the Department's practice.[31] The Department's practice, when selecting an AFA rate from among the possible sources of information, has been to ensure that the margin is sufficiently adverse ''as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.'' [32] The Department's practice also ensures ''that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' [33] In choosing the appropriate balance between providing respondents with an incentive to respond accurately and imposing a rate that is reasonably related to the respondent's prior commercial activity, selecting the highest prior margin reflects a ''common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing the rule, would have produced *current* information showing the margin to be less.'' [34] Consistent with the statute, court precedent, and its normal practice, the Department has assigned 159.64 percent to the PRC-wide entity, including Jilin Carbon, as AFA, which is the PRC-wide rate determined in the investigation and the rate currently applicable to the PRC-wide entity.[35]

The Department preliminarily determines that this information is the most appropriate from the available sources to effectuate the purposes of AFA. The Department's reliance on the PRC-wide rate from the original investigation to determine an AFA rate is subject to the requirement to corroborate secondary information.[36]

Corroboration of Secondary Information

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall to the extent practicable, corroborate that information from independent sources that are reasonably at the Department's disposal. Secondary information is described in the SAA as ''information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise.'' [37] The SAA explains that ''corroborate'' means to determine that the information used has probative value.[38] The Department has determined that to have probative value, information must be reliable and relevant.[39] The SAA also explains that

[29] *See Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors From Taiwan,* 63 FR 8909, 8911 (February 23, 1998); *see also Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review,* 70 FR 69937, 69939 (November 18, 2005), and Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 870 (1994) (SAA).

[30] *See, e.g., Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review,* 68 FR 19504, 19507 (April 21, 2003).

[31] *See KYD, Inc.* v. *United States,* 607 F.3d 760, 766–67 (Fed. Cir. 2010) (*KYD*); *Rhone Poulenc, Inc.* v. *United States,* 899 F.2d 1185, 1190 (Fed. Cir. 1990) (*Rhone Poulenc*); *NSK Ltd.* v. *United States,* 346 F. Supp. 2d 1312, 1335 (CIT 2004) (upholding a 73.55 percent total AFA rate, the highest available dumping margin from a different respondent in a less-than-fair-value investigation); *Kompass Food Trading Int'l* v. *United States,* 24 CIT 678, 684 (2000) (upholding a 51.16 percent total AFA rate, the highest available dumping margin from a different, fully cooperative respondent); and *Shanghai Taoen International Trading Co., Ltd.* v. *United States,* 360 F. Supp. 2d 1339, 1348 (CIT 2005) (upholding a 223.01 percent total AFA rate, the highest available dumping margin from a different respondent in a previous administrative review).

[32] SAA at 870.

[33] *Id.; see also Notice of Final Determination of Sales at Less than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Brazil,* 69 FR 76910, 76912 (December 23, 2004), and *D&L Supply Co.* v. *United States,* 113 F.3d 1220, 1223 (Fed. Cir. 1997).

[34] *KYD,* 607 F.3d at 766 (citing *Rhone Poulenc,* 899 F.2d at 1190) (emphasis in original).

[35] *See Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances: Small Diameter Graphite Electrodes from the People's Republic of China,* 74 FR 2049, 2054–55 (January 14, 2009) (*Graphite Electrodes Final Determination*).

[36] *See* section 776(c) of the Act and the ''Corroboration of Secondary Information'' section.

[37] SAA at 870.

[38] *Id.*

[39] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 61 FR 57391, 57392 (November 6, 1996), unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part,* 62 FR 11825 (March 13, 1997).

independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation.[40]

As stated above, we are applying as AFA to the PRC-wide entity the highest rate from any segment of this administrative proceeding, which is the PRC-wide rate of 159.64 percent. The 159.64 percent is the highest rate on the record of any segment of the antidumping duty order. In the investigation, the Department relied upon our pre-initiation analysis of the adequacy and accuracy of the information in the petition.[41] During our pre-initiation analysis, we examined the information used as the basis of export price and NV in the petition, and the calculations used to derive the alleged margins. Also, during our pre-initiation analysis, we examined information from various independent sources provided either in the petition or, based on our requests, in supplements to the petition, which corroborated key elements of the export price and NV calculations.[42] Since the investigation, the Department has found no other corroborating information available in this case, and received no comments from interested parties as to the relevance or reliability of this secondary information. Based upon the above, for these preliminary results, the Department finds that the rates derived from the petition are corroborated to the extent practicable for purposes of the AFA rate assigned to the PRC-wide entity, including Jilin Carbon.

Because these are the preliminary results of review, the Department will consider all margins on the record at the time of the final results of review for the purpose of determining the most appropriate final margin for the PRC-wide entity.[43]

Surrogate Country

When the Department conducts an antidumping duty administrative review of imports from an NME country, section 773(c)(1) of the Act directs the Department to base NV, in most cases, on the NME producer's factors of production (FOP), valued in a surrogate ME country or countries considered appropriate by the Department. In accordance with section 773(c)(4) of the Act, the Department will value FOPs using ''to the extent possible, the prices or costs of the FOPs in one or more ME countries that are: (A) At a level of economic development comparable to that of the NME country, and (B) significant producers of comparable merchandise.'' [44] Once the Department has identified the countries that are economically comparable to the PRC, it identifies those countries which are significant producers of comparable merchandise. From the countries which are found to be both economically comparable to the PRC and significant producers of comparable or identical merchandise, the Department will then select a primary surrogate country based upon whether the data for valuing FOPs are both available and reliable.

In the instant review, the Department has identified Colombia, Indonesia, the Philippines, South Africa, Thailand, and Ukraine as countries that are at a level of economic development comparable to the PRC.[45] Therefore, we consider all six of these countries as having satisfied the first prong of the surrogate-country selection criteria of section 773(c)(4) of the Act.

With respect to the Department's selection of a surrogate country, the petitioners commented that Ukraine is the appropriate surrogate country from which to derive surrogate factor values for the PRC because Ukraine is most economically comparable to the PRC and is also a significant producer of graphite electrodes.[46] The petitioners suggested we use the 2010 publicly available financial statements for JSC Ukrainsky Grafit, a major Ukrainian producer of graphite electrodes, in order to derive surrogate financial ratios and placed such financial statements on the record. The petitioners also comment that Ukraine is a major importer of the inputs consumed in the production of graphite electrodes and placed the relevant POR Ukrainian import statistics on the record.

Fushun Jinly commented that, consistent with the Department's determination in the original investigation and in the 2008–2010 administrative review, India should be selected as the surrogate country.[47] Fushun Jinly commented that although India is not one of the countries identified by the Department as economically comparable to the PRC, the list identified by the Department is neither exclusive nor exhaustive. Fushun Jinly commented that World Bank's 2011 World Development Report (the source of 2009 Gross National Income (GNI) data used by the Department) classifies both the PRC and India as ''lower middle income countries,'' and while the PRC is at the higher end of the ''lower middle income'' scale and India is at the lower end of that scale, World Bank classifies both countries within the same economic grouping. Further, Fushun Jinly asserts that the economic growth trends shared by the PRC and India also support a finding that India is economically comparable to the PRC.

In *Steel Wheels*[48] we stated that, unless we find that all of the countries determined to be equally economically comparable are not significant producers of comparable merchandise, do not provide a reliable source of publicly available surrogate data, or are unsuitable for use for other reasons, we will rely on data from one of these countries. Because we found that one of the six countries listed in the Surrogate Country Memo meets the selection criteria, as explained below, we are not considering India as the primary surrogate country.

Because we were unable to find the actual production data to evaluate the significance of production of subject merchandise with respect to potential surrogate countries, we relied on export data as a proxy for overall production data in this review. From the countries

[40] *See* SAA at 870; *see also Notice of Final Determination of Sales at Less Than Fair Value: Live Swine From Canada,* 70 FR 12181, 12183 (March 11, 2005).

[41] *See Graphite Electrodes Final Determination,* 74 FR at 2054, and *Small Diameter Graphite Electrodes from the People's Republic of China: Initiation of Antidumping Duty Investigation,* 73 FR 8287 (February 13, 2008) (*Graphite Electrodes Investigation Initiation*); *see also Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China,* 73 FR 31970, 31972 (June 5, 2008) (where the Department relied upon pre-initiation analysis to corroborate the highest margin alleged in the petition).

[42] *See Graphite Electrodes Investigation Initiation,* 73 FR at 8288–8290.

[43] *See Notice of Preliminary Determination of Sales at Less Than Fair Value: Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation,* 65 FR 1139, 1141 (January 7, 2000), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value; Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation,* 65 FR 42669 (July 11, 2000).

[44] *See* the Department's Policy Bulletin No. 04.1, regarding, ''Non-Market Economy Surrogate Country Selection Process,'' (March 1, 2004), available on the Department's Web site at *http://ia.ita.doc.gov/policy/bull04-1.html.*

[45] *See* the Department's memorandum entitled ''Request for a List of Surrogate Countries for an Administrative Review of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People's Republic of China,'' dated August 29, 2011 (Surrogate Country Memo).

[46] *See* the petitioners' submission, dated September 22, 2011.

[47] *See* Fushun Jinly's submission, dated September 22, 2011.

[48] *See Certain Steel Wheels From the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Preliminary Determination of Critical Circumstances, and Postponement of Final Determination,* 76 FR 67703 (November 2, 2011) (*Steel Wheels*).

that we identified to be economically comparable to the PRC, only Ukraine and South Africa exported significant quantities of graphite electrodes during the POR based on Global Trade Atlas (GTA) data for exports under HTS 8545.11.00.[49] As such, we find that Ukraine and South Africa meet the ''significant producer'' requirement of Section 773(c)(4) of the Act.

Like the PRC, Ukraine has a broad and diverse production base, and we have reliable data from Ukraine that we can use to value the FOPs and derive surrogate financial ratios.[50] Unlike the data for Ukraine, we do not have the financial statements from the producers of graphite electrodes in South Africa or any data concerning certain freight expenses and electricity. Therefore, we have determined that it is appropriate to use Ukraine as a surrogate country for the purposes of this administrative review, pursuant to section 773(c)(4) of the Act, based on the following: (1) It is at a comparable level of economic development to the PRC; (2) it is a significant producer of comparable merchandise, and (3) we have reliable data from Ukraine that we can use to value the FOPs. Accordingly, we have calculated NV using Ukrainian prices to value Fushun Jinly's FOPs.[51]

Fair Value Comparisons

To determine whether Fushun Jinly's sales of subject merchandise were made at less than NV, we compared the NV to individual export price transactions in accordance with section 777A(d)(2) of the Act. *See* ''Export Price'' and ''Normal Value'' sections of this notice, below.

Export Price

In accordance with section 772(a) of the Act, export price is ''the price at which subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States,'' as adjusted under section 772(c) of the Act. For Fushun Jinly, we used export price methodology, in accordance with section 772(a) of the Act, for sales in which the subject merchandise was first sold prior to importation by the exporter outside the United States directly to an unaffiliated purchaser in the United States and for sales in which constructed export price was not otherwise indicated.

We based export price on the price to unaffiliated purchasers in the United States. In accordance with section 772(c)(2)(A) of the Act, where appropriate, we made deductions from the starting price (gross unit price) for foreign inland freight and foreign brokerage and handling. We valued brokerage and handling using a price list of export procedures necessary to export a standardized cargo of goods from Ukraine. The price list is compiled based on a survey case study of the procedural requirements for trading a standard shipment of goods by ocean transport from Ukraine as reported in World Bank Group's *Doing Business 2011—Ukraine; Trading Across Borders.*[52]

Normal Value

Section 773(c)(1) of the Act provides that the Department shall determine NV using an FOP methodology if: (1) The merchandise is exported from an NME country; and (2) the information does not permit the calculation of NV using home market prices, third country prices, or constructed value under section 773(a) of the Act. When determining NV in an NME context, the Department will base NV on FOPs because the presence of government controls on various aspects of these economies renders price comparisons and the calculation of production costs invalid under our normal methodologies. Under section 773(c)(3) of the Act, FOPs include but are not limited to: (1) Hours of labor required; (2) quantities of raw materials employed; (3) amounts of energy and other utilities consumed; and (4) representative capital costs. We used FOPs reported by Fushun Jinly for direct materials, energy, labor, packing and by-products.

Factor Valuations

In accordance with section 773(c) of the Act, we calculated NV based on FOPs reported by Fushun Jinly for the POR. In accordance with 19 CFR 351.408(c)(1), the Department will normally use publicly available information to find an appropriate surrogate value (SV) to value FOPs, but when a producer sources an input from a ME and pays for it in ME currency, the Department normally will value the factor using the actual price paid for the input if the quantities were meaningful and where the prices have not been distorted by dumping or subsidies.[53] To calculate NV, we multiplied the reported per-unit factor-consumption rates by publicly available SVs (except as discussed below). In selecting SVs, we considered the quality, specificity, and contemporaneity of the data.[54] As appropriate, we adjusted input prices by including freight costs to make them delivered prices. Specifically, we added to import SVs surrogate freight cost using the shorter of the reported distance from the domestic supplier to the factory or the distance from the nearest seaport to the factory, where appropriate. This adjustment is in accordance with the Federal Circuit's decision in *Sigma Corp.* v. *United States,* 117 F.3d 1401, 1407–08 (Fed. Cir. 1997).

On September 8, 2011, we invited all interested parties to submit publicly available information to value FOPs for our consideration in the preliminary results of this review. On September 22, 2011, and October 6, 2011, the petitioners and Fushun Jinly submitted, respectively, publicly available information to value FOPs for the preliminary results. *See* Factor Valuation Memorandum for a detailed description of all SVs used in this review.

For these preliminary results, in accordance with our practice, except where indicated below, we used data from the Ukrainian import statistics in the GTA and other publicly available Ukrainian sources in order to calculate SVs for Fushun Jinly's reported FOPs (*i.e.,* direct materials, energy, and packing materials) and certain movement expenses. In selecting the best available information for valuing FOPs in accordance with section 773(c)(1) of the Act, our practice is to select, to the extent practicable, SVs which are non-export average values, most contemporaneous with the POR, product-specific, and tax-exclusive.[55]

[49] *See* the Department's memorandum entitled ''Administrative Review of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People's Republic of China: Selection of Surrogate Values,'' dated concurrently with this notice (Factor Valuation Memorandum), at Exhibit 1.

[50] *See* Factor Valuation Memorandum.

[51] *See* Factor Valuation Memorandum; *see also* ''Factor Valuations'' section, below.

[52] *See* Factor Valuation Memorandum.

[53] *See* 19 CFR 351.408(c)(1); *see also Shakeproof Assembly Components, Div of Ill. Tool Works, Inc.* v. *United States,* 268 F.3d 1376, 1382–1383 (Fed. Cir. 2001) (affirming the Department's use of market-based prices to value certain FOPs).

[54] *See, e.g., Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty New Shipper Review,* 67 FR 72139 (December 4, 2002), and accompanying Issues and Decision Memorandum at Comment 6, and *Final Results of First New Shipper Review and First Antidumping Duty Administrative Review: Certain Preserved Mushrooms From the People's Republic of China,* 66 FR 31204 (June 11, 2001), and accompanying Issues and Decision Memorandum at Comment 5.

[55] *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical*

Continued

The record shows that data in the Ukrainian import statistics, as well as those from the other Ukrainian sources, are contemporaneous with the period of investigation, product-specific, and tax-exclusive.[56] In those instances where we could not obtain publicly available information contemporaneous to the POR with which to value factors, we adjusted the SVs using, where appropriate, the Ukrainian Wholesale Price Index (WPI) or, where appropriate, Consumer Price Index (CPI), as published in the International Monetary Fund's *International Financial Statistics.*[57]

As explained in the legislative history of the Omnibus Trade and Competitiveness Act of 1988, the Department continues to apply its long-standing practice of disregarding SVs if it has a reason to believe or suspect the source data may be subsidized.[58] In this regard, the Department has previously found that it is appropriate to disregard such prices from India, Indonesia, South Korea and Thailand because we have determined that these countries maintain broadly available, non-industry specific export subsidies.[59] Based on the existence of these subsidy programs that were generally available to all exporters and producers in these countries at the time of the POR, we find that it is reasonable to infer that all exporters from India, Indonesia, South Korea and Thailand may have benefitted from these subsidies. Additionally, we disregarded prices from NME countries.[60] Finally, imports that were labeled as originating from an ''unspecified'' country were excluded from the import average value, because we could not be certain that they were not from either an NME country or a country with generally available export subsidies.[61]

Fushun Jinly reported that certain of its raw material inputs were sourced from an ME country and paid for in ME currencies. When a respondent sources inputs from an ME supplier in meaningful quantities, we use the actual price paid by respondent for those inputs, except when prices may have been distorted by dumping or subsidies.[62] Where we found ME purchases to be of significant quantities (*i.e.,* 33 percent or more), in accordance with our statement of policy as outlined in *Antidumping Methodologies: Market Economy Inputs,*[63] we used the actual purchases of these inputs to value the inputs.

Accordingly, we valued certain of Fushun Jinly's inputs using the ME prices paid for in ME currencies for the inputs where the total volume of the input purchased from all ME sources during the POR exceeds or is equal to 33 percent of the total volume of the input purchased from all sources during the period. Where appropriate, we added freight to the ME prices of inputs.[64]

We valued truck freight expenses using a per-unit average rate we calculated from the data we obtained from budmo.org, as suggested by the petitioners. This Web site is an online provider of container shipping, logistics, and freight forwarding services. The Web site provides freight rates for transporting goods in containers by road from major ports in Ukraine to many large Ukrainian cities.[65] Because data reported in this source were current as of March, 2011, and, thus, not contemporaneous with the POR, we adjusted the value for inland truck freight using the Ukrainian WPI deflator.

We valued electricity using the electricity tariff data for corporate consumers, as published by the National Electricity Regulatory Commission of Ukraine, an administrative body of the government of Ukraine, at *www.nerc.gov.ua.* These electricity rates were furnished by major power distribution companies in Ukraine and represent actual, country-wide, publicly-available information on tax-exclusive basis.[66] We obtained electricity tariffs for each month of the POR and computed a single POR-average rate.[67]

To calculate the labor input, we based our calculation on the methodology which the Department enunciated on June 21, 2011 in *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor,* 76 FR 36092 (June 21, 2011) (*Labor Methodologies*). Prior to 2010, the Department used regression-based wages that captured the worldwide relationship between per capita GNI and hourly manufacturing wages, pursuant to 19 CFR 351.408(c)(3). On May 3, 2010, the Federal Circuit, in *Dorbest Ltd.* v. *United States,* 604 F.3d 1363, 1372 (Fed Cir. 2010) (*Dorbest*), invalidated part of that regulation. As a consequence of the Federal Circuit's ruling in *Dorbest,* the Department no longer relies on the regression-based methodology described in 19 CFR 351.408(c)(3).

In *Labor Methodologies,* the Department explained that the best methodology to value the labor input is to use industry-specific labor rates from the primary surrogate country.[68] Additionally, the Department determined that the best data source for industry-specific labor rates is Chapter 6A: Labor Cost in Manufacturing, from the International Labor Organization (ILO) Yearbook of Labor Statistics.[69]

We could not identify Chapter 6A labor data for Ukraine pertaining to the industry specific to subject

Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam, 69 FR 42672, 42682 (July 16, 2004), unchanged in *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam,* 69 FR 71005 (December 8, 2004).

[56] *See* Factor Valuation Memorandum.

[57] *See, e.g., Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 74 FR 9591, 9600 (March 5, 2009) (*Kitchen Racks Prelim*), unchanged in *Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Final Determination of Sales at Less than Fair Value,* 74 FR 36656 (July 24, 2009) (*Kitchen Racks Final*).

[58] Omnibus Trade and Competitiveness Act of 1988, Conf. Report to Accompany H.R. 3, H.R. Rep. No. 576, 100th Cong., 2nd Sess. (1988) at 590, reprinted in 1988 U.S.C.C.A.N. 1547, 1623–24.

[59] *See, e.g., Carbazole Violet Pigment 23 from India: Final Results of the Expedited Five-year (Sunset) Review of the Countervailing Duty Order,* 75 FR 13257 (March 19, 2010), and accompanying Issues and Decision Memorandum at 4–5; *Certain Cut-to-Length Carbon Quality Steel Plate from Indonesia: Final Results of Expedited Sunset Review,* 70 FR 45692 (August 8, 2005), and accompanying Issues and Decision Memorandum at 4; *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review,* 74 FR 2512 (January 15, 2009), and accompanying Issues and Decision Memorandum at 17, 19–20; *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From Thailand,* 66 FR 50410 (October 3, 2001), and accompanying Issues and Decision Memorandum at 23.

[60] *See, e.g., Kitchen Racks Prelim,* 74 FR at 9600, unchanged in *Kitchen Racks Final.*

[61] *See id.*

[62] *See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27366 (May 19, 1997).

[63] *See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments,* 71 FR 61716, 61717 (October 19, 2006) (*Antidumping Methodologies: Market Economy Inputs*).

[64] For a detailed description of the actual values used for the ME inputs reported, *see* the Department's memorandum entitled, ''Administrative Review of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People's Republic of China: Preliminary Results Analysis Memorandum for Fushun Jinly Petrochemical Carbon Co., Ltd.,'' dated concurrently with this notice.

[65] *See* Factor Valuation Memorandum.

[66] *See id.*

[67] *See, e.g., Wire Decking from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 75 FR 32905 (June 10, 2010), and accompanying Issues and Decision Memorandum at Comment 3.

[68] *See Labor Methodologies,* 76 FR at 36093.

[69] *See id.* 76 FR at 36093–94.

merchandise. In *Labor Methodologies,* the Department explained that, ''if there is no industry-specific data available for the surrogate country within the primary data source, *i.e.,* ILO Chapter 6A data, the Department will then look to national data for the surrogate country for calculating the wage rate.'' [70] The latest year for which ILO Chapter 6A reports national data for Ukraine is 2006. We selected this monthly labor value, converted it to an hourly basis, and inflated it to 2010 (the majority of the POR) using the Ukrainian CPI.

We find that the ILO Chapter 6A data constitute the best available information on the record with which to value labor costs in this review on the basis that it accounts for all direct and indirect labor costs, such as, for example, wages, benefits, housing, training, *etc.,* and, thus, more accurately reflective of the actual labor costs in Ukraine.[71] For more details on this calculation, *see* the Factor Valuation Memorandum.

Because the financial statements used to calculate the surrogate financial ratios do not include itemized detail of labor costs, we did not make adjustments to certain labor costs in the surrogate financial ratios.[72]

To value factory overhead, selling, general and administrative expenses and profit, we used the ratios we derived using the 2010 publicly available financial statements for JSC Ukrainsky Grafit, a major Ukrainian producer of graphite electrodes.[73]

Fushun Jinly reported that it recovered certain by-products in its production of subject merchandise and successfully demonstrated that all of them have commercial value. Therefore, we have granted a by-product offset for the quantities of Fushun Jinly's reported by-products. We valued the by-product using Ukrainian GTA data.[74]

Currency Conversion

Where appropriate, we made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

Preliminary Results of Review

The Department has determined that the following preliminary dumping margins exist for the period February 1, 2010, through January 31, 2011:

Company	Margin (percent)
Fushun Jinly Petrochemical Carbon Co., Ltd	36.87
Xinghe County Muzi Carbon Co., Ltd	36.87
Sichuan Guanghan Shida Carbon Co., Ltd	36.87
Beijing Fangda Carbon Tech Co., Ltd	36.87
Chengdu Rongguang Carbon Co., Ltd	36.87
Fangda Carbon New Material Co., Ltd	36.87
Fushun Carbon Co., Ltd	36.87
Hefei Carbon Co., Ltd	36.87
PRC-wide entity †	159.64

* Part of PRC-wide entity.

† The PRC-wide entity includes the following companies: Dechang Shida Carbon Co., Ltd., Fushun Carbon Plant, Fushun Jinli Petrochemical Carbon Co., Ltd., Guanghan Shida Carbon Co., Ltd., Jilin Carbon Graphite Material Co., Ltd., Jilin Carbon Import and Export Company, Lanzhou Hailong New Material Co., Liaoning Fangda Group Industrial Co., Ltd., Shida Carbon Group, Sichuan Dechang Shida Co., Ltd., Sichuan Shida Trading Co., Ltd., Sinosteel Anhui Co., Ltd., Sinosteel Corp., Sinosteel Jilin Carbon Co., Ltd., Sinosteel Jilin Carbon Imp. & Exp. Co., Ltd., Sinosteel Sichuan Co., Ltd., and Xinghe County Muzi Carbon Plant.

Disclosure and Public Comment

The Department intends to disclose to parties to this proceeding the calculations performed in reaching the preliminary results within five days of the date of publication of these preliminary results.[75] Interested parties may submit written comments (case briefs) within 30 days of publication of the preliminary results and rebuttal comments (rebuttal briefs) within five days after the time limit for filing case briefs.[76] Pursuant to 19 CFR 351.309(d)(2), rebuttal briefs must be limited to issues raised in the case briefs. Parties who submit arguments are requested to submit with the argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Interested parties, who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, filed electronically using Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). An electronically filed document must be received successfully in its entirety by the Department's electronic records system, IA ACCESS, by 5 p.m. Eastern Standard Time within 30 days after the date of publication of this notice.[77] Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. If a request for a hearing is made, we will inform parties of the scheduled date for the hearing which will be held at the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, at a time and location to be determined.[78] Parties should confirm by telephone the date, time, and location of the hearing.

Unless the deadline is extended pursuant to section 751(a)(2)(B)(iv) of the Act, the Department will issue the final results of this administrative review, including the results of our analysis of the issues raised by the parties in their comments, within 120 days after issuance of these preliminary results.

Deadline for Submission of Publicly Available Surrogate Value Information

In accordance with 19 CFR 351.301(c)(3), the deadline for submission of publicly available information to value FOPs under 19 CFR 351.408(c) is 20 days after the date of publication of these preliminary results. In accordance with 19 CFR 351.301(c)(1), if an interested party submits factual information less than ten days before, on, or after (if the Department has extended the deadline), the applicable deadline for submission of such factual information, an interested party may submit factual information to rebut, clarify, or correct the factual information no later than ten days after such factual information is served on the interested party. However, the Department notes that 19 CFR 351.301(c)(1), permits new information only insofar as it rebuts, clarifies, or corrects information recently placed on the record. The Department generally cannot accept in rebuttal the submission of additional, previously absent-from-the-record alternative SV information pursuant to 19 CFR 351.301(c)(1).[79] Furthermore, the Department generally will not accept business proprietary information in either the SV submissions or the rebuttals thereto, as the regulation regarding the submission of SVs allows only for the submission of publicly available information.

[70] *Id.* 76 FR at 36094, n.11.

[71] *See id.* 76 FR at 36093–94.

[72] *See id.* 76 FR at 36094.

[73] *See* Factor Valuation Memorandum.

[74] *See id.*

[75] *See* 19 CFR 351.224(b).

[76] *See* 19 CFR 351.309(c)(1)(ii) and 351.309(d)(1).

[77] *See* 19 CFR 351.310(c).

[78] *See* 19 CFR 351.310.

[79] *See, e.g., Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, in Part,* 72 FR 58809 (October 17, 2007), and accompanying Issues and Decision Memorandum at Comment 2.

Assessment Rates

Upon issuing the final results of the review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review.

Pursuant to 19 CFR 351.212(b)(1), we will calculate importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any importer-specific assessment rate calculated in the final results of this review is above *de minimis.* However, the final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

Cash Deposit Requirements

The following cash deposit requirements, when imposed, will apply to all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for Fushun Jinly, Muzi Carbon, Shida Carbon, and the companies comprising the Fangda Group will be the rate established in the final results of this administrative review; (2) for any previously reviewed or investigated PRC or non-PRC exporter, not covered in this administrative review, with a separate rate, the cash deposit rate will be the company-specific rate established in the most recent segment of this proceeding; (3) for all other PRC exporters, the cash deposit rate will continue to be the PRC-wide rate (*i.e.,* 159.64 percent); and (4) the cash-deposit rate for any non-PRC exporter of subject merchandise from the PRC will be the rate applicable to the PRC exporter that supplied that exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and notice are in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.213.

Dated: February 28, 2012.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. 2012–5448 Filed 3–5–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No.: 110107015–1402–02]

Announcing Approval of Federal Information Processing Standard (FIPS) Publication 180–4, Secure Hash Standard (SHS); a Revision of FIPS 180–3

AGENCY: National Institute of Standards and Technology (NIST), Commerce Department.

ACTION: Notice.

SUMMARY: This notice announces the Secretary of Commerce's approval of Federal Information Processing Standard (FIPS) Publication 180–4, Secure Hash Standard (SHS). FIPS 180–4 updates FIPS 180–3 by providing a general procedure for creating an initialization value, adding two additional secure hash algorithms to the Standard: SHA–512/224 and SHA–512/256 and removing a restriction that padding must be done before hash computation begins, which was required in FIPS 180–3.

DATES: The approved Standard is effective as of March 6, 2012.

FOR FURTHER INFORMATION CONTACT: Elaine Barker, (301) 975–2911, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 8930, Gaithersburg, MD 20899–8930, email: *elaine.barker@nist.gov,* or Quynh Dang, (301) 975–3610, email: *quynh.dang@nist.gov.*

SUPPLEMENTARY INFORMATION: This notice announces the Secretary of Commerce's approval of Federal Information Processing Standard (FIPS) Publication 180–4, Secure Hash Standard (SHS). FIPS 180–4 updates FIPS 180–3 by providing a general procedure for creating an initialization value, adding two additional secure hash algorithms to the Standard: SHA–512/224 and SHA–512/256, and removing a restriction that padding must be done before hash computation begins, which was required in FIPS 180–3. SHA–512/224 and SHA–512/256 may be more efficient alternatives to SHA–224 and SHA–256 respectively, on platforms that are optimized for 64-bit operations. Removing the restriction on the padding operation in the secure hash algorithms will potentially allow more flexibility and efficiency in implementing the secure hash algorithms in many computer network applications.

On February 11, 2011, NIST published a notice in the **Federal Register** (76 FR 7817) announcing the availability of draft FIPS 180–4, and soliciting comments on the draft standard from the public, research communities, manufacturers, voluntary standards organizations and Federal, State and local government organizations. Comments were received from two corporations and one individual. The following is a summary of the specific comments and NIST's responses to them:

Comment: One commenter requested NIST to provide more detail for the calculation of the initialization values for SHA–512/224 and SHA–512/256, especially for the variable t.

Response: Clarification of the variable ''t'' has been provided in the FIPS. Sufficient examples are provided at the Web site: *http://csrc.nist.gov/groups/ST/toolkit/examples.html,* as indicated in the APPENDIX A of the FIPS.

Comment: One commenter indicated that the notation for SHA–512 (''SHA–512/t'') and SHA–512 (''SHA–512/256'') needs to be further defined, including a definition for ASCII strings.

Response: Clarification of the variable ''t'' was provided in Section 5.3.6 of the FIPS, along with further clarification of the input string to the SHA–512 hash function.

Comment: One commenter requested NIST to define SHA–512/160 as an approved hash algorithm.

Response: NIST believes that there is not much demand for a new SHA–512-based hash algorithm with 160-bit hash output at this time, since generating digital signatures using 160-bit hash values will be not approved after the year 2013.

FIPS 180–4 is available electronically from the NIST Web site at: *http://csrc.nist.gov/publications/PubsFIPS.html.*

Authority: In accordance with the Information Technology Management Reform

Act of 1996 (Pub. L. 104–106) and the Federal Information Security Management Act (FISMA) of 2002 (Pub. L. 107–347), the Secretary of Commerce is authorized to approve Federal Information Processing Standards (FIPS). NIST activities to develop computer security standards to protect Federal sensitive (unclassified) information systems are undertaken pursuant to specific responsibilities assigned to NIST by section 20 of the National Institute of Standards and Technology Act (15 U.S.C. 278g–3), as amended by section 303 of the Federal Information Security Management Act of 2002.

Dated: March 1, 2012.

Willie E. May,

Associate Director for Laboratory Programs.

[FR Doc. 2012–5400 Filed 3–5–12; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA384

Marine Mammals; File No. 16053

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

ACTION: Notice; issuance of permit.

SUMMARY: Notice is hereby given that a permit has been issued to Paul E. Nachtigall, Ph.D., Marine Mammal Research Program Hawaii Institute of Marine Biology, P.O. Box 1106, Kailua, Hawaii 96734, to conduct scientific research on cetaceans stranded or in rehabilitation facilities in the U.S.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following offices: See **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Amy Sloan or Kristy Beard, (301) 427–8401.

SUPPLEMENTARY INFORMATION: On May 16, 2011, notice was published in the **Federal Register** (76 FR 28422) that a request for a permit to conduct research on stranded cetaceans had been submitted by the above-named applicant. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The permit authorizes the permit holder to conduct auditory measurements and recordings of stranded and rehabilitating cetaceans to provide insight into the nature of strandings including those that may be caused by man-made sounds. The research techniques may also be used as a medical diagnostic tool to determine the hearing capabilities of stranded cetaceans that may aid in decisions regarding release to the wild. Researchers are authorized to use evoked auditory potential recordings with non-invasive suction cup sensors on up to 15 individuals each of certain species of cetaceans and make passive recordings of the sounds produced by the animals using hydrophones. Research will occur in waters or on beaches in the U.S. and in rehabilitation facilities in the U.S. The permit is valid for five years from the date of issuance.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

As required by the ESA, issuance of this permit was based on a finding that such permit: (1) Was applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Documents may be reviewed in the following locations:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376;

Pacific Islands Region, NMFS, 1601 Kapiolani Blvd., Room 1110, Honolulu, HI 96814–4700; phone (808) 944–2200; fax (808) 973–2941;

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562) 980–4001; fax (562) 980–4018;

Northwest Region, NMFS, 7600 Sand Point Way NE., BIN C15700, Bldg. 1, Seattle, WA 98115–0700; phone (206) 526–6150; fax (206) 526–6426;

Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668; phone (907) 586–7221; fax (907) 586–7249;

Southeast Region, NMFS, 263 13th Avenue South, Saint Petersburg, Florida 33701; phone (727) 824–5312; fax (727) 824–5309; and

Northeast Region, NMFS, 55 Great Republic Drive, Gloucester, MA 01930; phone (978) 281–9328; fax (978) 281–9394.

Dated: February 29, 2012.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–5428 Filed 3–5–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Department of the Navy

Subcommittee Meeting of the Board of Advisors to the President of the Naval War College Subcommittee

AGENCY: Department of the Navy, DoD.

ACTION: Notice of Open Meeting.

SUMMARY: Pursuant to the provisions of The Federal Advisory Committee Act (Pub. L. 92–463, as amended), notice is hereby given that the following meeting of the aforementioned Subcommittee will be held. (Parent Committee is: Board of Advisors (BOA) to the Presidents of the Naval Postgraduate School and the Naval War College (NWC)). This meeting will be open to the public.

DATES: The meeting will be held on Thursday, April 12, 2012, from 2 p.m. to 4 p.m. and on Friday, April 13, 2012, from 9 a.m. to 3 p.m. Eastern Time Zone.

ADDRESSES: The meeting will be held at the U.S. Naval War College, 686 Cushing Road, Newport, RI.

FOR FURTHER INFORMATION CONTACT: Mr. Richard R. Menard, Naval War College, Newport, RI 02841–1207, telephone number 401–841–7004.

SUPPLEMENTARY INFORMATION: The purpose of the Board is to advise and assist the President, NWC in educational and support areas, providing independent advice and recommendations on items such as, but not limited to, organizational management, curricula, methods of instruction, facilities, and other matters of interest.

The agenda is as follows:

(1) April 12, 2012: Discussion of recently issued defense guidance and its implication for the military and Joint Professional Military Education; the College's role in updating of 'A Cooperative Strategy for the 21st Century.'

(2) April 13, 2012: General deliberations and inquiry into campus facilities and proposed Learning Center concept; mission priorities in an era of constrained resources; and faculty and student diversity.

Individuals without a DoD Government Common Access Card

require an escort at the meeting location. For access, information, or to send written comments regarding the NWC BOA Subcommittee contact Mr. Richard R. Menard, Alternate Designated Federal Official, Naval War College, 686 Cushing Rd, Newport, RI 02841–1207 or by fax 401–841–1297 by April 1, 2012.

Dated: February 28, 2012.

J.M. Beal,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2012–5348 Filed 3–5–12; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Subcommittee Meeting of the Board of Advisors to the President, Naval Postgraduate School

AGENCY: Department of the Navy, DoD.

ACTION: Notice of Open Meeting.

SUMMARY: Pursuant to the provisions of The Federal Advisory Committee Act (Pub. L. 92–463, as amended), notice is hereby given that the following meeting of the aforementioned subcommittee will be held. (Parent Committee is: Board of Advisors to the Presidents of the Naval Postgraduate School and the Naval War College). This meeting will be open to the public.

DATES: The meeting will be held on Wednesday, April 25, 2012, from 8 a.m. to 4 p.m. and on Thursday, April 26, 2012, from 8 a.m. to 12 p.m. Pacific Time Zone.

ADDRESSES: The meeting will be held at the Naval Postgraduate School, Herrmann Hall, 1 University Circle, Didactic Room #W410, Monterey, CA.

FOR FURTHER INFORMATION CONTACT: Ms. Jaye Panza, Naval Postgraduate School, Monterey, CA 93943–5001, telephone number 831–656–2514.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to elicit the advice of the Board on the Naval Service's Postgraduate Education Program and the collaborative exchange and partnership between the Naval Post Graduate School (NPS) and the Air Force Institute of Technology. The board examines the effectiveness with which the NPS is accomplishing its mission. To this end, the board will inquire into the curricula; instruction; physical equipment; administration; state of morale of the student body, faculty, and staff; fiscal affairs; and any other matters relating to the operation of the NPS as the board considers pertinent. Individuals without a DoD government Common Access Card card require an escort at the meeting location. For access, information, or to send written comments regarding the NPS Board of Advisors contact Ms. Jaye Panza, Designated Federal Officer, Naval Postgraduate School, 1 University Circle, Monterey, CA 93943–5001 or by fax 831–656–3145 by April 6, 2012.

Dated: February 28, 2012.

J.M. Beal

Lieutenant Commander, Judge Advocate Generals Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2012–5350 Filed 3–5–12; 8:45 am]

BILLING CODE 3810–FF–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 May 7, 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 29, 2012.

Tomakie Washington,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

Office of Special Education and Rehabilitative Services

Type of Review: Extension.

Title of Collection: Protection and Advocacy for Assistive Technology (PAAT) Program Performance Report, Form Rehabilitative Services Administration (RSA) 661.

OMB Control Number: 1820–0661.

Agency Form Number(s): RSA 661.

Total Estimated Number of Annual Responses: 57.

Total Estimated Number of Annual Burden Hours: 912.

Abstract: The Annual Protection and Advocacy for Assistive Technology Program Performance Report, Form RSA–661 is used to analyze and evaluate the PAAT Program administered by eligible systems in states. These systems provide services to eligible individuals with disabilities to assist in the acquisition, utilization, or maintenance of assistive technology devices or assistive technology services. The RSA uses the form to meet specific data collection requirements of Section 5 of the Assistive Technology Act of 1998, as amended (AT Act). PAAT programs must report annually using the form, which is due on or before December 30 each year. The Annual PAAT Performance Report has enabled RSA to furnish the President and Congress with data on the provision of protection and advocacy services and has helped to establish a sound basis for

future funding requests. Data from the form has been used to evaluate the effectiveness of eligible systems within individual states in meeting annual priorities and objectives. These data also have been used to indicate trends in the provision of services from year to year.

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 04820. 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. 2012–5374 Filed 3–5–12; 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 May 7, 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 29, 2012.

Tomakie Washington,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

Office of Special Education and Rehabilitative Services

Type of Review: Revision.

Title of Collection: Annual State Application Under Part B of the Individuals with Disabilities Education Act as Amended in 2004.

OMB Control Number: 1820–0030.

Agency Form Number(s): ED 9055.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Total Estimated Number of Annual Responses: 60.

Total Estimated Number of Annual Burden Hours: 840.

Abstract: The Individuals with Disabilities Education Act, signed on December 3, 2004, became Public Law (Pub. L.) 108–446. In accordance with 20 U.S.C. 1412(a) a State is eligible for assistance under Part B for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the conditions found in 20 U.S.C. 1412. Information Collection 1820–0030 is being extended so that a State can provide assurances that it either has or does not have in effect policies and procedures to meet the eligibility requirements of Part B of the Act as found in Public Law 108–446. Information Collection 1820–0030 corresponds with 34 CFR sections 300.100–176; 300.199; 300.640–645; and 300.705. These sections include the requirement that the Secretary and local educational agencies located in the State be notified of any State-imposed rule, regulation, or policy that is not required by this title and Federal regulations.

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 04816. 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. 2012–5375 Filed 3–5–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Education Research and Special Education Research Grant Programs

AGENCY: Institute of Education Sciences.

ACTION: Notice.

Overview Information:

Education Research and Special Education Research Grant Programs.

Notice inviting applications for new awards for fiscal year (FY) 2013.

Catalog of Federal Domestic Assistance (CFDA) Numbers: 84.305A, 84.305B, 84.305D, 84.305E, 84.305H, 84.324A, 84.324B, and 84.324D.

SUMMARY: The Director of the Institute of Education Sciences (Institute) announces the Institute's FY 2013 competitions for grants to support

education research and special education research. The Director takes this action under the Education Sciences Reform Act of 2002. The Institute's purpose in awarding these grants is to provide national leadership in expanding fundamental knowledge and understanding of developmental and school readiness outcomes for infants and toddlers with or at risk for disability, and of education outcomes for all students from early childhood education through postsecondary and adult education.

DATES: The dates when applications are available and the deadlines for transmittal of applications invited under this notice are indicated in the chart at the end.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The central purpose of the Institute's research grant programs is to provide parents, educators, students, researchers, policymakers, and the general public with reliable and valid information about education practices that support learning and improve academic achievement and access to education opportunities for all students. In carrying out its grant programs, the Institute provides support for programs of research in areas of demonstrated national need.

Competitions in this Notice: The Institute will conduct 10 research competitions in FY 2013 through two of its National Education Centers.

The Institute's National Center for Education Research (NCER) will hold six competitions: two competitions for education research; one competition for education research training; one competition for research on statistical and research methodology in education; one competition for evaluation of State and local education programs and policies; and one competition for researcher-practitioner partnerships in education research.

The Institute's National Center for Special Education Research (NCSER) will hold four competitions: two competitions for special education research; one competition for special education research training; and one competition for a new Accelerating the Academic Achievement of Students with Disabilities Research Initiative.

NCER Competitions

The Education Research Competitions. Under these two competitions, NCER will consider only applications that address one of the following education research topics:

- Cognition and Student Learning
- Early Learning Programs and Policies
- Education Technology
- Effective Teachers and Effective Teaching
- English Learners
- Improving Education Systems: Policies, Organization, Management, and Leadership
- Mathematics and Science Education
- Postsecondary and Adult Education
- Reading and Writing
- Social and Behavioral Context for Academic Learning

The Education Research Training Competition. Under this competition, NCER will consider only applications that address one of the following two topics:

- Postdoctoral Research Training
- Researcher and Policymaker Training

The Research on Statistical and Research Methodology in Education Competition. Under this competition, NCER will consider only applications that address research on statistical and research methodology in education.

The Evaluation of State and Local Education Programs and Policies Competition. Under this competition, NCER will consider only applications that address the evaluation of State and local education programs and policies.

The Researcher-Practitioner Partnerships in Education Research Competition. Under this competition, NCER will consider only applications that address the partnering of researchers with State and local education agencies in the development of joint research projects.

NCSER Competitions

The Special Education Research Competitions. Under these two competitions, NCSER will consider only applications that address one of the following special education research topics:

- Early Intervention and Early Learning in Special Education
- Reading, Writing, and Language Development
- Mathematics and Science Education
- Social and Behavioral Outcomes to Support Learning
- Transition Outcomes for Special Education Secondary Students
- Cognition and Student Learning in Special Education
- Professional Development for Teachers and Related Services Providers
- Special Education Policy, Finance, and Systems
- Autism Spectrum Disorders
- Technology for Special Education
- Families of Children with Disabilities

The Special Education Research Training Competition. Under this competition, NCSER will consider only applications that address the following topic:

- Early Career Development and Mentoring in Special Education Research

The Accelerating the Academic Achievement of Students with Disabilities Research Initiative Competition. Under this competition, NCSER will consider only applications that address the acceleration of reading and mathematics achievement of students with disabilities.

Program Authority: 20 U.S.C. 9501 *et seq.*

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 77, 80, 81, 82, 84, 85, 86, 97, 98, and 99. In addition, 34 CFR part 75 is applicable, except for the provisions in 34 CFR 75.100, 75.101(b), 75.102, 75.103, 75.105, 75.109(a), 75.200, 75.201, 75.209, 75.210, 75.211, 75.217(a)–(c), 75.219, 75.220, 75.221, 75.222, and 75.230.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants and cooperative agreements.

Fiscal Information: Although Congress has not yet enacted an appropriation for fiscal year 2013, the Institute is inviting applications for these competitions now so that it may give applicants adequate time to prepare their applications this spring before the first round of competitions takes place. The Department may announce additional topics later in 2012. The actual award of grants will depend on the availability of funds. The size of the awards will depend on the scope of the projects proposed.

The number of awards made under each competition will depend on the quality of the applications received for that competition, the availability of funds, and the following limits on awards for specific competitions and topics set by the Institute.

For the National Center for Education Research's Education Research Training competition, no more than five grants will be awarded under the Postdoctoral Research Training topic, and no more than three grants will be awarded under the Researcher and Policymaker Training topic.

For the National Center for Special Education Research's Education Research Training competition, no more

than ten grants will be awarded under the Early Career Development and Mentoring in Special Education Research topic.

For the National Center for Special Education Research's Accelerating the Academic Achievement of Students with Disabilities Research Initiative competition, no more than three grants will be awarded.

III. Eligibility Information

1. *Eligible Applicants:* Applicants that have the ability and capacity to conduct scientifically valid research are eligible to apply. Eligible applicants include, but are not limited to, non-profit and for-profit organizations and public and private agencies and institutions, such as colleges and universities.

2. *Cost Sharing or Matching:* These programs do not require cost sharing or matching.

IV. Application and Submission Information

1. *Request for Applications and Other Information:* Information regarding program and application requirements for the competitions will be contained in the NCER and NCSER Requests for Applications (RFAs), which will be available at the following Web site: *http://ies.ed.gov/funding/.*

RFAs Available: The RFAs for the Education Research, Special Education Research, Education Research Training, Special Education Research Training, Research on Statistical and Research Methodology in Education, and the Evaluation of State and Local Education Programs and Policies competitions will be available at the Web site listed above on or before March 9, 2012. The RFAs for the Researcher-Practitioner Partnerships in Education Research and the Accelerating the Academic Achievement of Students with Disabilities Research Initiative competitions will be available at the Web site listed above on or before March 23, 2012. The dates on which the application packages for these competitions will be available are indicated in the chart at the end of this notice.

Information regarding selection criteria, requirements concerning the content of an application, and review procedures for the competitions are in the RFAs. The RFAs also include information on the maximum award available under each grant competition. We will reject any application that proposes a budget exceeding the relevant maximum award. The Director of the Institute may change the maximum amount through a notice in the **Federal Register**.

2. *Deadline for Transmittal of Applications:* The deadline dates for transmittal of applications invited under this notice are indicated in the chart at the end of this notice and in the RFAs for the competitions.

3. *Submission Requirements:* Each competition will have its own application. Applications for grants under these competitions must be obtained from and submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section V. 1. *Electronic Submission of Applications* in this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VIII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet (*http://fedgov.dnb.com/webform*). A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: *www.grants.gov/applicants/get_registered.jsp.*

V. Submission of Applications

Applications for grants under these competitions must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

1. Electronic Submission of Applications

Applications for grants under the Education Research, Education Research Training, Research on Statistical and Research Methodology in Education, Evaluation of State and Local Education Programs and Policies, and Researcher-Practitioner Partnerships competitions, CFDA Numbers 84.305A, 84.305B, 84.305D, 84.305E, and 84.305H and for grants under the Special Education Research, Special Education Research Training, and the Accelerating the Academic Achievement of Students with Disabilities Research Initiative competitions, CFDA Numbers 84.324A, 84.324B, and 84.324D must be submitted electronically using the Governmentwide Grants.gov Apply site at *www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks

before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant applications for the Education Research, Education Research Training, Research on Statistical and Research Methodology in Education, Evaluation of State and Local Education Programs and Policies, Researcher-Practitioner Partnerships, Special Education Research, Special Education Research Training, and the Accelerating the Academic Achievement of Students with Disabilities Research Initiative competitions at *www.Grants.gov.* You must search for the downloadable application package for each competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.324, not 84.324A).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for the competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *http://www.G5.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: Application for Federal Assistance (SF 424 Research & Related (R&R)) and the other R&R forms including, Project Performance Site Locations, Other Project Information, Senior/Key Person Profile (Expanded), Research and Related Budget (Total Federal and Non-Federal), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a PDF (Portable Document) read-only, non-modifiable format. Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VIII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system; *and*
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Ellie McCutcheon, U.S. Department of Education, 555 New Jersey Avenue NW., Room 602e, Washington, DC 20208. FAX: (202) 219–1466.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

2. *Submission of Paper Applications by Mail*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number: *[Identify the CFDA number, including suffix letter, if any, for the competition under which you are submitting an application.]*), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

3. Submission of Paper Applications by Hand Delivery

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number: *[Identify the CFDA number, including suffix letter, if any, for the competition under which you are submitting an application.]*), 550 12th Street SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 10 of the SF 424 (R&R) the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

VI. Application Review Information

1. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

2. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VII. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Grant Administration:* Applicants should budget for a three-day meeting for project directors to be held in Washington, DC.

4. *Reporting:* (a) If you apply for a grant under one of the competitions announced in this notice, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

5. *Performance Measures:* To evaluate the overall success of its education research grant program, the Institute annually assesses the number of IES-supported interventions with evidence of efficacy in improving student outcomes including school readiness, academic outcomes (reading, writing, mathematics, and science), high school graduation and dropout, postsecondary enrollment and completion, and in enhancing teacher characteristics that have been shown to have a positive effect on student outcomes. For the

special education research grant program, the Institute annually assesses the number of IES-supported interventions with evidence of efficacy in improving student outcomes in early learning, academics, and behavior. The data for these annual measures are based on What Works Clearinghouse (WWC) reviews of initial findings on interventions from IES research grants, such as findings that will have been presented as papers at a convention or working papers provided to IES by its grantees. The WWC reviews these reports and rates them using the WWC published standards to determine whether the evidence from these research grants meets evidence standards of the WWC and demonstrates a statistically significant positive effect in improving the relevant outcome. The Institute also annually assesses the performance of its research training and special education research training programs by measuring the number of individuals who have been or are being trained in IES-funded research training programs and the number of fellows working in the field of education after they have completed the training program.

6. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made ''substantial progress toward meeting the objectives in its approved application.'' This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VIII. Agency Contact

FOR FURTHER INFORMATION CONTACT: The contact person associated with a particular research competition is listed in the chart at the end of this notice and in the RFA package. The date on which applications will be available, the deadline for transmittal of applications, the estimated range of awards, and the project period are also listed in the chart and in the RFAs that are posted at the following Web sites: *http://ies.ed.gov/funding/. www.ed.gov/about/offices/list/ies/programs.html.*

Accessible Format: Individuals with disabilities can obtain this document and a copy of the RFA package in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the appropriate program contact person listed in the chart at the end of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: March 1, 2012.

John Q. Easton,

Director, Institute of Education Sciences.

INSTITUTE OF EDUCATION SCIENCES

[FY 2013 grant competitions to support education research and special education research]

CFDA No. and name	Application package available	Deadline for transmittal of applications	Estimated range of awards*	Project period	For further information contact
National Center for Education Research (NCER)					
84.305A–1 Education Research ▪ Reading and Writing. ▪ Mathematics and Science Education. ▪ Cognition and Student Learning. ▪ Effective Teachers and Effective Teaching. ▪ Social and Behavioral Context for Academic Learning. ▪ Improving Education Systems: Policies, Organization, Management, and Leadership. ▪ Early Learning Programs and Policies. ▪ English Learners. ▪ Postsecondary and Adult Education. ▪ Education Technology.	April 19, 2012	June 21, 2012	$100,000 to $1,000,000	Up to 5 years	Emily Doolittle, *Emily.Doolittle@ed.gov*
84.305A–2 Education Research ▪ Reading and Writing. ▪ Mathematics and Science Education. ▪ Cognition and Student Learning. ▪ Effective Teachers and Effective Teaching. ▪ Social and Behavioral Context for Academic Learning. ▪ Improving Education Systems: Policies, Organization, Management, and Leadership.	July 19, 2012	September 20, 2012	$100,000 to $1,000,000	Up to 5 years	Emily Doolittle *Emily.Doolittle@ed.gov*

INSTITUTE OF EDUCATION SCIENCES—Continued

[FY 2013 grant competitions to support education research and special education research]

CFDA No. and name	Application package available	Deadline for transmittal of applications	Estimated range of awards*	Project period	For further information contact
▪ Early Learning Programs and Policies. ▪ English Learners. ▪ Postsecondary and Adult Education. ▪ Education Technology.					
84.305B Research Training Programs in the Education Sciences. ▪ Postdoctoral Research Training Program. ▪ Researcher and Policymaker Training Program.	July 19, 2012 ..	September 20, 2012 ..	$50,000 to $300,000	Up to 5 years	Meredith Larson, *Meredith.Larson@ed.gov*
84.305D Research on Statistical and Research Methodology in Education.	July 19, 2012 ..	September 20, 2012 ..	$40,000 to $300,000	Up to 3 years	Phill Gagne, *Phill.Gagne@ed.gov*
84.305E Evaluation of State and Local Education Programs and Policies.	April 19, 2012 ..	June 21, 2012	$200,000 to $1,000,000	Up to 5 years	Allen Ruby, *Allen.Ruby@ed.gov*
84.305H Researcher-Practitioner Partnerships in Education Research.	July 19, 2012 ..	September 20, 2012 ..	$100,000 to $400,000	Up to 3 years	Allen Ruby, *Allen.Ruby@ed.gov*
National Center for Special Education Research (NCSER)					
84.324A–1 Special Education Research ▪ Early Intervention and Early Learning in Special Education. ▪ Reading, Writing, and Language Development. ▪ Mathematics and Science Education. ▪ Social and Behavioral Outcomes to Support Learning. ▪ Transition Outcomes for Special Education Secondary Students. ▪ Cognition and Student Learning in Special Education. ▪ Professional Development for Teachers and Related Services Providers. ▪ Special Education Policy, Finance, and Systems. ▪ Autism Spectrum Disorders. ▪ Technology for Special Education. ▪ Families of Children with Disabilities.	April 19, 2012 ..	June 21, 2012	$100,000 to $1,000,000	Up to 5 years	Jacquelyn Buckley, *Jacquelyn.Buckley@ed.gov*
84.324A–2 Special Education Research ▪ Early Intervention and Early Learning in Special Education. ▪ Reading, Writing, and Language Development. ▪ Mathematics and Science Education. ▪ Social and Behavioral Outcomes to Support Learning. ▪ Transition Outcomes for Special Education Secondary Students. ▪ Cognition and Student Learning in Special Education. ▪ Professional Development for Teachers and Related Services Providers. ▪ Special Education Policy, Finance, and Systems. ▪ Autism Spectrum Disorders. ▪ Technology for Special Education. ▪ Families of Children with Disabilities.	July 19, 2012 ..	September 20, 2012 ..	$100,000 to $1,000,000	Up to 5 years	Jacquelyn Buckley, *Jacquelyn.Buckley@ed.gov*
84.324B Special Education Research Training. ▪ Early Career Development and Mentoring Program in Special Education Research.	July 19, 2012 ..	September 20, 2012 ..	$50,000 to $100,000	Up to 5 years	Amy Sussman, *Amy.Sussman@ed.gov*
84.324D Accelerating the Academic Achievement of Students with Disabilities Research Initiative.	July 19, 2012 ..	September 20, 2012 ..	$1,000,000 to $2,000,000	Up to 5 years	Kristen Lauer, *Kristen.Lauer@ed.gov*

*These estimates are annual amounts.

Note: The Department is not bound by any estimates in this notice.

Note: If you use a telecommunications device for the deaf (TDD) or a test telephone (TTY), call the Federal Relay Service, toll free, at 1-800–877–8339.

[FR Doc. 2012–5412 Filed 3–5–12; 8:45 am]
BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Application for New Awards; Charter Schools Program (CSP); Grants for Replication and Expansion of High-Quality Charter Schools

AGENCY: Office of Innovation and Improvement, Department of Education.

ACTION: Notice.

Overview Information

Charter Schools Program (CSP) Grants for Replication and Expansion of High-Quality Charter Schools

Notice inviting applications for new awards for fiscal year (FY) 2012.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.282M.

Applications Available: March 6, 2012.

Date of Pre-Application Meeting: March 27, 2012.

Deadline for Transmittal of Applications: May 7, 2012.

Deadline for Intergovernmental Review: July 5, 2012.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the CSP is to increase national understanding of the charter school model; to expand the number of high-quality charter schools available to students across the Nation by providing financial assistance for the planning, program design, initial implementation, and expansion of charter schools; and to evaluate the effects of charter schools, including their effects on students, student academic achievement, staff, and parents.

The purpose of the Replication and Expansion of High-Quality Charter Schools (Replication and Expansion) competition (CFDA 84.282M) is to award grants to eligible applicants to enable them to replicate or expand high-quality charter schools with demonstrated records of success, including success in increasing student academic achievement. Eligible applicants may use their grant funds to expand the enrollment of one or more existing charter schools by substantially increasing the number of available seats per school or to open one or more new charter schools that are based on the charter school model for which the eligible applicant has presented evidence of success.

Priorities: This notice includes one absolute priority, six competitive preference priorities, and one invitational priority. The absolute and competitive preference priorities are from the notice of final priorities, requirements, definitions, and selection criteria for this program, published in the **Federal Register** on July 12, 2011 (76 FR 40898); from the notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486), and corrected on May 12, 2011 (76 FR 27637); and from 34 CFR 75.225(a).

Absolute Priority: For FY 2012 and any subsequent year in which we make awards based on the list of unfunded applicants from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

Experience Operating or Managing High-Quality Charter Schools. (76 FR 40898)

This priority is for projects that will provide for the replication or expansion of high-quality charter schools by applicants that currently operate or manage more than one *high-quality charter school* (as defined in this notice).

Competitive Preference Priorities: For FY 2012 and any subsequent year in which we make awards based on the list of unfunded applicants from this competition, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i) we will award an additional 9 points to an application that meets *Competitive Preference Priority 1;* an additional point to an application that meets *Competitive Preference Priority 2;* up to an additional 4 points to an application that meets *Competitive Preference Priority 3,* depending on how well the application meets the priority; an additional point to an application that meets *Competitive Preference Priority 4;* an additional point to an application that meets *Competitive Preference Priority 5;* and an additional 4 points to an application that meets *Competitive Preference Priority 6.*

Note: In order to receive preference under these competitive preference priorities, the applicant must identify the priority or priorities that it believes it meets and provide documentation supporting its claims.

These priorities are:

Competitive Preference Priority 1—Low-Income Demographic. (76 FR 40900) (9 points)

To meet this priority, an applicant must demonstrate that at least 60 percent of all students in the charter schools it currently operates or manages are individuals from low-income families (as defined in this notice).

Competitive Preference Priority 2—School Improvement. (76 FR 40900) (1 point)

To meet this priority, an applicant must demonstrate that its proposed replication or expansion of one or more high-quality charter schools will occur in partnership with, and will be designed to assist, one or more local educational agencies (LEAs) in implementing academic or structural interventions to serve students attending schools that have been identified for improvement, corrective action, closure, or restructuring under section 1116 of the Elementary and Secondary Education Act of 1965, as amended (ESEA), and as described in the notice of final requirements for the School Improvement Grants, published in the **Federal Register** on October 28, 2010 (75 FR 66363).

Note: Applicants in States operating under ESEA Flexibility that have opted to waive the requirement in ESEA section 1116(b) for LEAs to identify for improvement, corrective action, or restructuring, as appropriate, their Title I schools that fail to make AYP for two or more consecutive years may partner with LEAs to serve students attending priority or focus schools (see the September 23, 2011 ''ESEA Flexibility'' document at *http://www.ed.gov/esea/flexibility*).

Competitive Preference Priority 3—Promoting Diversity. (76 FR 40900) (Up to 4 points)

This priority is for applicants that demonstrate a record of (in the schools they currently operate or manage), as well as an intent to continue (in schools that they will be creating or substantially expanding under this grant), taking active measures to—

(a) Promote student diversity, including racial and ethnic diversity, or avoid racial isolation;

(b) Serve students with disabilities at a rate that is at least comparable to the rate at which these students are served in public schools in the surrounding area; and

(c) Serve English learners at a rate that is at least comparable to the rate at which these students are served in public schools in the surrounding area.

In support of this priority, applicants must provide enrollment data as well as descriptions of existing policies and activities undertaken or planned to be undertaken.

Note: An applicant addressing this priority is invited to discuss how the proposed design of its project will encourage approaches by charter schools that help bring together students of different backgrounds, including students from different racial and ethnic backgrounds, to attain the benefits that flow from a diverse student body.

Note: For additional information, please refer to the Department's ''Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools'' guidance documents at *http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf.*

Competitive Preference Priority 4—Technology. (76 FR 27638) (1 point)

This priority is for projects that are designed to improve student achievement (as defined in this notice) or teacher effectiveness through the use of high-quality digital tools or materials, which may include preparing teachers to use the technology to improve instruction, as well as developing, implementing, or evaluating digital tools or materials.

Note: Section 504 of the Rehabilitation Act of 1973, and the Department's regulations implementing Section 504 at 34 CFR Part 104, prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department. The obligations under these laws—to provide an equal opportunity to individuals with disabilities to participate in, and receive the benefits of, the educational program and to provide accommodations or modifications when necessary to ensure equal treatment—apply to a recipient's use of technology, including digital tools and equipment. For additional information, please refer to the Department's May 26, 2011, Dear Colleague Letter available at *http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201105-ese.pdf*, and attached Frequently Asked Questions about the June 26, 2010, Dear Colleague Letter available at *http://www2.ed.gov/about/offices/list/ocr/docs/dcl-ebook-faq-201105.pdf.*

Competitive Preference Priority 5—Promoting Science, Technology, Engineering, and Mathematics (STEM) Education. (76 FR 27639) (1 point)

This priority is for projects that are designed to provide students with increased access to rigorous and engaging coursework in STEM.

Competitive Preference Priority 6—Novice Applicant (34 CFR 75.225(c)(2)) (4 points)

This priority is for applicants that qualify as novice applicants. ''Novice applicant'' means an applicant for a grant from the Department that (i) has never received a Replication and Expansion grant; (ii) has never been a member of a group application, submitted in accordance with 34 CFR 75.127–75.129, that received a Replication and Expansion grant; and (iii) has not had an active discretionary grant from the Federal Government in the five years before the deadline date for applications for new awards under this Replication and Expansion grant competition.

For the purposes of clause (iii) in the preceding paragraph, a grant is active until the end of the grant's project or funding period, including any extensions of those periods that extend the grantee's authority to obligate funds (34 CFR 75.225(b)).

Invitational Priority: For FY 2012 and any subsequent year in which we make awards based on the list of unfunded applicants from this competition, this priority is an invitational priority. Under 34 CFR 75.105(c)(1) we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

Students With Disabilities and English Learners

The Secretary is particularly interested in applications that demonstrate, through participant, achievement, and outcome data for students with disabilities, English learners, or both—

(1) Prior success in improving educational achievement and outcomes for these students; and

(2) That the charter school model the applicant proposes to replicate or expand serves these students at rates that are comparable to the enrollment rates of students with disabilities, English learners, or both, in the school districts in which the applicant's schools operate.

Note: An applicant addressing this priority should provide participant, achievement, and outcome data separately for students with disabilities and English learners.

Definitions

The following definitions are from the notice of final priorities, requirements, definitions, and selection criteria for this program published in the **Federal Register** on July 12, 2011 (76 FR 40898), and from the notice of final supplemental priorities and definitions for discretionary grant programs published in the **Federal Register** on December 15, 2010 (75 FR 78486), and corrected on May 12, 2011 (76 FR 27637), and apply to this competition.

Charter management organization (CMO) is a nonprofit organization that operates or manages multiple charter schools by centralizing or sharing certain functions and resources among schools. (76 FR 40901)

Educationally disadvantaged students includes, but is not necessarily limited to, individuals from low-income families (as defined in this notice), English learners, migratory children, children with disabilities, and neglected or delinquent children. (76 FR 40901)

High-quality charter school is a school that shows evidence of strong academic results for the past three years (or over the life of the school, if the school has been open for fewer than three years), based on the following factors:

(1) Increasing student academic achievement and attainment for all students, including, as applicable, educationally disadvantaged students served by the charter schools operated or managed by the applicant.

(2) Either (i) Demonstrated success in closing historic achievement gaps for the subgroups of students described in section 1111(b)(2)(C)(v)(II) of the ESEA at the charter schools operated or managed by the applicant, or

(ii) No significant achievement gaps between any of the subgroups of students described in section 1111(b)(2)(C)(v)(II) of the ESEA at the charter schools operated or managed by the applicant and significant gains in student academic achievement have been made with all populations of students served by the charter schools operated or managed by the applicant.

(3) Achieved results (including performance on statewide tests, annual student attendance and retention rates, high school graduation rates, college attendance rates, and college persistence rates where applicable and available) for low-income and other educationally disadvantaged students served by the charter schools operated or managed by the applicant that are above the average academic achievement results for such students in the State.

(4) No significant compliance issues (as defined in this notice), particularly in the areas of student safety and financial management. (76 FR 40901–02)

Individual from low-income family means an individual who is determined by an SEA or LEA to be a child, ages 5 through 17, from a low-income family on the basis of (a) data used by the Secretary to determine allocations under section 1124 of the ESEA, (b) data on children eligible for free or reduced-price lunches under the Richard B. Russell National School Lunch Act, (c) data on children in families receiving assistance under part A of title IV of the Social Security Act, (d) data on children eligible to receive medical assistance under the Medicaid program under Title XIX of the Social Security Act, or (e) an alternate method that combines or extrapolates from the data in items (a) through (d) of this definition (see 20 U.S.C. 6537(3)). (76 FR 40902)

Replicate means to open one or more new charter schools that are based on the charter school model or models for

which the applicant has presented evidence of success. (76 FR 40902)

Significant compliance issue means a violation that did, will, or could lead to the revocation of a school's charter. (76 FR 40902)

Student achievement means—

(a) For tested grades and subjects: (1) A student's score on the State's assessments under the ESEA; and, as appropriate, (2) other measures of student learning, such as those described in paragraph (b) of this definition, provided they are rigorous and comparable across schools.

(b) For non-tested grades and subjects: alternative measures of student learning and performance, such as student scores on pre-tests and end-of-course tests; student performance on English language proficiency assessments; and other measures of student achievement that are rigorous and comparable across schools. (76 FR 27641)

Substantially expand means to increase the student count of an existing charter school by more than 50 percent or to add at least two grades to an existing charter school over the course of the grant. (76 FR 40902)

Program Authority: 20 U.S.C. 7221–7221j; Consolidated Appropriations Act, 2012, Division F, Title III, Public Law 112–74.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 76, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99. (b) The notice of final priorities, requirements, definitions, and selection criteria for this program published in the **Federal Register** on July 12, 2011 (76 FR 40898). (c) The notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486), and corrected on May 12, 2011 (76 FR 27637). (d) The regulations in 34 CFR 75.225(a).

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply only to institutions of higher education.

Note: The regulations in 34 CFR part 99 apply only to an educational agency or institution.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $13,500,000.

Contingent upon the availability of funds, and the quality of the applications, we may make additional awards later in FY 2012 and in FY 2013 from the list of unfunded applicants from this competition.

Estimated Range of Awards: $200,000 to $3,000,000 per year.

Estimated Average Size of Awards: $1,600,000 per year.

Estimated Number of Awards: 7–11.

Note: The Department is not bound by any estimates in this notice. The estimated range, average size, and number of awards are based on a single 12-month budget period. However, the Department may choose to fund more than 12 months of a project using FY 2012 funds.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* Non-profit charter management organizations and other entities that are not for-profit entities. Eligible applicants may also apply as a group or consortium.

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

3. *Other:*

(a) *Reasonable and Necessary Costs:* The Secretary may elect to impose maximum limits on the amount of grant funds that may be awarded per charter school replicated, per charter school substantially expanded, or per new school seat created.

For this competition the maximum limit of grant funds that may be awarded per new school seat is $3,000, including a maximum limit per new school created of $800,000. The maximum limit per new school seat in a charter school that is substantially expanding its enrollment is $1,500, including a maximum limit per substantially expanded school of $800,000.

Note: Applicants must ensure that all costs included in the proposed budget are reasonable and necessary in light of the goals and objectives of the proposed project. Any costs determined by the Secretary to be unreasonable or unnecessary will be removed from the final approved budget.

(b) *Other CSP Grants:* A charter school that receives funds under this competition is ineligible to receive funds for the same purpose under section 5202(c)(2) of the ESEA, including for planning and program design or the initial implementation of a charter school (i.e., CFDA 84.282A or 84.282B).

A charter school that has received CSP funds for replication previously, or that has received funds for planning or initial implementation of a charter school (i.e., CFDA 84.282A or 84.282B), may not use funds under this grant for the same purpose. However, such charter schools may be eligible to receive funds under this competition to substantially expand the charter school beyond the existing grade levels or student count.

IV. Application and Submission Information

1. *Address to Request Application Package:*

Erin Pfeltz, U.S. Department of Education, 400 Maryland Avenue SW., room 4W255, Washington, DC 20202–5970. Telephone: (202) 205–3525 or by email: *erin.pfeltz@ed.gov*.

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. The Secretary strongly encourages applicants to limit Part III to the equivalent of no more than 60 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the page limit does apply to all of the application narrative section (Part III).

3. *Submission Dates and Times:*

Applications Available: March 6, 2012.

Date of Pre-Application Meeting: The Department will hold a pre-application meeting via webinar for prospective applicants on March 27, 2012, from 1

p.m. to 4 p.m., Washington, DC, time. Individuals interested in attending this meeting are encouraged to pre-register by emailing their name, organization, and contact information with the subject heading ''PRE-APPLICATION MEETING'' to *CharterSchools@ed.gov*. There is no registration fee for attending this meeting.

For further information about the pre-application meeting, contact Erin Pfeltz, U.S. Department of Education, 400 Maryland Avenue SW., room 4W255, Washington, DC 20202–5970. Telephone: (202) 205–3525 or by email: *erin.pfeltz@ed.gov*.

Deadline for Transmittal of Applications: May 7, 2012.

Applications for grants under this program must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: July 5, 2012.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* Grantees under this program must use the grant funds to replicate or substantially expand the charter school model or models for which the applicant has presented evidence of success. Grant funds must be used to carry out allowable activities, as described in section 5204(f)(3) of the ESEA (20 U.S.C. 7221c(f)(3)).

Pursuant to section 5204(f)(3) of the ESEA, grantees under this program must use the grant funds for—

(a) Post-award planning and design of the educational program, which may include: (i) Refinement of the desired educational results and of the methods for measuring progress toward achieving those results; and (ii) professional development of teachers and other staff who will work in the charter school; and

(b) Initial implementation of the charter school, which may include: (i) Informing the community about the school; (ii) acquiring necessary equipment and educational materials and supplies; (iii) acquiring or developing curriculum materials; and (iv) other initial operational costs that cannot be met from State or local sources.

Note: A grantee may use up to 20 percent of grant funds for initial operational costs associated with the expansion or improvement of the grantee's oversight or management of its charter schools, provided that: (i) the specific charter schools being created or substantially expanded under the grant are the intended beneficiaries of such expansion or improvement, and (ii) such expansion or improvement is intended to improve the grantee's ability to manage or oversee the charter schools created or substantially expanded under the grant.

We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: *www.grants.gov/applicants/get_registered.jsp.*

7. *Other Submission Requirements.* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. Electronic Submission of Applications

Applications for grants under the CSP Grants for Replication and Expansion of High-Quality Charter Schools, CFDA number 84.282M, must be submitted electronically using the Governmentwide Grants.gov Apply site at *www.Grants.gov*. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for CSP Grants for Replication and Expansion of High-Quality Charter Schools at *www.Grants.gov.* You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.282, not 84.282M).

Please note the following:

• When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.

• Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.

• The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.

• You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this program to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *www.G5.gov.*

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.

• You must upload any narrative sections and all other attachments to your application as files in a .PDF (Portable Document) read-only, non-modifiable format. Specifically, do not upload an interactive or fillable .PDF file. If you upload a file type other than a read-only, non-modifiable .PDF or submit a password-protected file, we will not review that material.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Grants.gov system; *and*

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Erin Pfeltz, U.S. Department of Education, 400 Maryland Avenue SW., room 4W255, Washington, DC 20202–5970. FAX: (202) 205–5630.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. Submission of Paper Applications by Mail

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: CFDA Number 84.282M, LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. Submission of Paper Applications by Hand Delivery

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: CFDA Number 84.282M, 550 12th Street SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Application Requirements:* Applicants applying for CSP grant funds must address the following application requirements and the selection criteria described in this notice. An applicant may choose to respond to the application requirements in the context of its responses to the selection criteria.

These application requirements are from the notice of final priorities, requirements, definitions, and selection criteria for this competition published in the **Federal Register** on July 12, 2011 (79 FR 40898).

(a) Describe the objectives of the project for replicating or substantially expanding high-quality charter schools and the methods by which the applicant will determine its progress toward achieving those objectives.

(b) Describe how the applicant currently operates or manages the charter schools for which it has presented evidence of success, and how the proposed new or substantially expanded charter schools will be operated or managed. Include a description of central office functions, governance, daily operations, financial management, human resources management, and instructional management. If applying as a group or consortium, describe the roles and responsibilities of each member of the group or consortium and how each member will contribute to this project.

(c) Describe how the applicant will ensure that each proposed new or substantially expanded charter school receives its commensurate share of Federal education funds that are allocated by formula each year, including during the first year of operation of the school and any year in which the school's enrollment substantially expands.

(d) Describe the educational program to be implemented in the proposed new or substantially expanded charter schools, including how the program will enable all students (including educationally disadvantaged students) to meet State student academic achievement standards, the grade levels or ages of students to be served, and the curriculum and instructional practices to be used.

(e) Describe the administrative relationship between the charter school or schools to be replicated or substantially expanded by the applicant and the authorized public chartering agency.

(f) Describe how the applicant will provide for continued operation of the proposed new or substantially expanded charter school or schools once the Federal grant has expired.

(g) Describe how parents and other members of the community will be involved in the planning, program design, and implementation of the proposed new or substantially expanded charter school or schools.

(h) Include a request and justification for waivers of any Federal statutory or regulatory provisions that the applicant believes are necessary for the successful operation of the proposed new or substantially expanded charter schools.

(i) Describe how the grant funds will be used, including how these funds will be used in conjunction with other Federal programs administered by the Secretary, and with any matching funds.

(j) Describe how all students in the community, including students with disabilities, English learners, and other educationally disadvantaged students, will be informed about the proposed new or substantially expanded charter schools and given an equal opportunity to attend such schools.

(k) Describe how the proposed new or substantially expanded charter schools that are considered to be LEAs under State law, or the LEAs in which the new or substantially expanded charter schools are located, will comply with sections 613(a)(5) and 613(e)(1)(B) of the Individuals with Disabilities Education Act.

(l) Provide information on any significant compliance issues identified within the past three years for each school managed by the applicant, including compliance issues in the areas of student safety, financial management, and statutory or regulatory compliance.

(m) For each charter school currently operated or managed by the applicant, provide the following information: The year founded, the grades currently served, the number of students, the address, the percentage of students in each subgroup of students described in section 1111(b)(2)(C)(v)(II) of the ESEA, results on the State assessment for the past three years (if available) by subgroup, attendance rates, student attrition rates for the past three years, and (if the school operates a 12th grade) high school graduation rates and college attendance rates (maintaining standards to protect personally identifiable information).

(n) Provide objective data showing applicant quality. In particular, the Secretary requires the applicant to provide the following data:

(1) Performance (school-wide and by subgroup) for the past three years (if available) on statewide tests of all charter schools operated or managed by the applicant as compared to all students in other schools in the State or States at the same grade level, and as compared with other schools serving similar demographics of students (maintaining standards to protect personally identifiable information);

(2) Annual student attendance and retention rates (school-wide and by subgroup) for the past three years (or over the life of the school, if the school has been open for fewer than three years), and comparisons with other similar schools (maintaining standards to protect personally identifiable information); and

(3) Where applicable and available, high school graduation rates, college attendance rates, and college persistence rates (school-wide and by subgroup) for the past three years (if available) of students attending schools operated or managed by the applicant, and the methodology used to calculate these rates (maintaining standards to protect personally identifiable information). When reporting data for schools in States that may have particularly demanding or low standards of proficiency, applicants are invited to discuss how their academic success might be considered against applicants from across the country.

(o) Provide such other information and assurances as the Secretary may require.

2. *Selection Criteria.* The selection criteria for this program are from the notice of final priorities, requirements, definitions, and selection criteria for this program published in the **Federal Register** on July 12, 2011 (76 FR 40898), and from 34 CFR 75.210. The maximum possible score for addressing all of the criteria in this section is 100 points. The maximum possible score for addressing each criterion is indicated in parentheses following the criterion.

In evaluating an application, the Secretary considers the following criteria:

(a) *Quality of the eligible applicant (50 points).* In determining the quality of the applicant, the Secretary considers the following factors:

(1) The degree, including the consistency over the past three years, to which the applicant has demonstrated success in significantly increasing student academic achievement and attainment for all students, including, as applicable, educationally disadvantaged students served by the charter schools operated or managed by the applicant (20 points).

(2) Either (i) The degree, including the consistency over the past three years, to which the applicant has demonstrated success in closing historic achievement gaps for the subgroups of students described in section 1111(b)(2)(C)(v)(II) of the ESEA at the charter schools operated or managed by the applicant, or

(ii) The degree, including the consistency over the past three years, to which there have not been significant achievement gaps between any of the subgroups of students described in section 1111(b)(2)(C)(v)(II) of the ESEA at the charter schools operated or managed by the applicant and to which significant gains in student academic achievement have been made with all populations of students served by the charter schools operated or managed by the applicant (15 points).

(3) The degree, including the consistency over the past three years, to which the applicant has achieved results (including performance on statewide tests, annual student attendance and retention rates, high school graduation rates, college attendance rates, and college persistence rates where applicable and available) for low-income and other educationally disadvantaged students served by the charter schools operated or managed by the applicant that are significantly above the average academic achievement results for such students in the State (15 points).

(b) *Contribution in assisting educationally disadvantaged students (10 points).*

The contribution the proposed project will make in assisting educationally disadvantaged students served by the applicant to meet or exceed State academic content standards and State student academic achievement standards, and to graduate college- and career-ready. When responding to this selection criterion, applicants must discuss the proposed locations of schools to be created or substantially expanded and the student populations to be served.

(c) *Quality of the project design (10 points).*

The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers the extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified, measurable, and attainable. Applicants proposing to open schools serving substantially different populations than those currently served by the model for which they have demonstrated evidence of success must address the attainability of outcomes given this difference.

(d) *Quality of the management plan and personnel (25 points).*

The Secretary considers the quality of the management plan and personnel to replicate and substantially expand high-quality charter schools. In determining the quality of the management plan and personnel for the proposed project, the Secretary considers:

(1) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(2) The business plan for improving, sustaining, and ensuring the quality and performance of charter schools created or substantially expanded under these grants beyond the initial period of Federal funding in areas including, but not limited to, facilities, financial management, central office, student academic achievement, governance, oversight, and human resources of the charter schools.

(3) A multi-year financial and operating model for the organization, a demonstrated commitment of current and future partners, and evidence of broad support from stakeholders critical to the project's long-term success.

(4) The plan for closing charter schools supported, overseen, or managed by the applicant that do not meet high standards of quality.

(5) The qualifications, including relevant training and experience, of the project director, chief executive officer or organization leader, and key project personnel, especially in managing projects of the size and scope of the proposed project.

(e) *Quality of the evaluation plan (5 points).*

The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers the extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data.

3. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial

assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

4. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html*.

4. *Performance Measures:* The goal of the CSP is to support the creation and development of a large number of high-quality charter schools that are free from State or local rules that inhibit flexible operation, are held accountable for enabling students to reach challenging State performance standards, and are open to all students. The Secretary has two performance indicators to measure progress towards this goal: (1) The number of charter schools in operation around the Nation, and (2) the percentage of fourth- and eighth-grade charter school students who are achieving at or above the proficient level on State examinations in mathematics and reading/language arts. Additionally, the Secretary has established the following measure to examine the efficiency of the CSP: Federal cost per student in implementing a successful school (defined as a school in operation for three or more consecutive years).

All grantees must submit an annual performance report with information that is responsive to these performance measures.

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made ''substantial progress toward meeting the objectives in its approved application.'' This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Erin Pfeltz, U.S. Department of Education, 400 Maryland Avenue SW., room 4W255, Washington, DC 20202–5970. Telephone: (202) 205–3525 or by email: *erin.pfeltz@ed.gov*.

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys*. At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov*. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: March 1, 2012.

James H. Shelton, III,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2012–5427 Filed 3–5–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Arbitration Panel Decision Under the Randolph-Sheppard Act

AGENCY: Department of Education.

ACTION: Notice of decision.

SUMMARY: The Department of Education (Department) gives notice that on October 12, 2011, an arbitration panel rendered a decision in the matter of the *Rutherford Beard* v. *Michigan Commission for the Blind,* Case no. R–S/08–8.

FOR FURTHER INFORMATION CONTACT: You can obtain a copy of the full text of the arbitration panel decision from Mary Yang, U.S. Department of Education, 400 Maryland Avenue SW., room 5162, Potomac Center Plaza, Washington, DC 20202–2800. Telephone: (202) 245–6327. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll-free, at 1–800–877–8339.

Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the program contact person listed in this section.

SUPPLEMENTARY INFORMATION: This arbitration panel was convened by the Department under 20 U.S.C. 107d–1(a), after receiving a complaint from the complainant, Rutherford Beard. Under section 6(c) of the Randolph-Sheppard Act (Act), 20 U.S.C. 107d–2(c), the

Secretary publishes in the **Federal Register** a synopsis of each arbitration panel decision affecting the administration of vending facilities on Federal and other property.

Background

Rutherford Beard (Complainant) alleged that the Michigan Commission for the Blind, the State licensing agency (SLA), violated the Act and implementing regulations in 34 CFR part 395. Specifically, Complainant alleged that the SLA violated the Act and its implementing regulations and State rules and regulations governing the Randolph-Sheppard Vending Facility Program with respect to the closing of his vending facility at the Lewis Cass Building for renovation and plumbing repairs, resulting in loss of income for the Complainant's cafeteria.

Complainant further alleged that the Lewis Cass Building Cafeteria was not a suitable location because the SLA was aware of a history of plumbing problems in the building. Consequently, when the cafeteria was closed for renovation and plumbing repairs, Complainant alleged that this was proof of the lack of suitability for a cafeteria at the Lewis Cass Building. Thus, the Complainant requested reimbursement from the SLA for loss of income during the renovation period.

The SLA argued that the Lewis Cass Building Cafeteria was a suitable vending location and opportunity for a blind vendor. The SLA acknowledged that, while it was aware that the building had previous plumbing problems, it was not aware of the severity of the plumbing issue. Also, the SLA alleged that it had no responsibility to repair the plumbing in the Lewis Cass Building because the building was under the jurisdiction of the State's Department of Management and Budget. The SLA further alleged that Complainant, as a small business operator, had the responsibility for his own profitability. Moreover, the SLA alleged that Complainant was unable to provide evidence showing the amount of lost income during the renovation period.

Complainant filed a request with the SLA for lost income. The SLA denied Complainant's request. Subsequently, Complainant appealed this decision with the SLA by filing a request for a State fair hearing. A hearing was held and the administrative law judge (ALJ) recommended that Complainant's claim be denied. The SLA adopted the ALJ's recommendation as a final administrative agency action and Complainant's grievance was denied.

Complainant then filed a request for Federal arbitration with the Department. A hearing on this matter was held on March 16, 2011. The central issue, as determined by the arbitration panel, was whether the SLA's failure to compensate Complainant for loss of income during the renovation period of the Lewis Cass Building Cafeteria violated the Act and its implementing regulations, and State rules and regulations governing the Randolph-Sheppard Vending Facility Program.

Synopsis of the Arbitration Panel Decision

After reviewing all of the testimony and evidence, the majority of the panel found that the Lewis Cass Building Cafeteria was a suitable opportunity for Complainant and as such, Complainant was responsible for routine building maintenance. The panel majority concluded that, although the SLA was aware of the previous building plumbing problems, the SLA had no authority to repair the plumbing problems. Additionally, the panel majority found that Complainant did not provide competent evidence to support his allegation of lost income. Although Complainant had anticipated larger profits from operating a cafeteria at this location, this grievance was not substantiated by the evidence provided to the panel. Thus, the panel majority found that Complainant's estimate of $70,000 for lost profits was speculative and that it had no basis to rule that Complainant actually lost income or, if so, how much income Complainant lost.

One panel member concurred in part and dissented in part. This panel member concurred with the panel majority's finding that there was no evidence presented by Complainant to support reimbursement by the SLA for his alleged loss of income during the renovation period of the cafeteria. At the same time, this panel member dissented from the panel majority's findings, suggesting that it was not reasonable to place the entire burden of property-related losses or damages on operators and suggested that the SLA undertake rulemaking to clarify such situations, should they occur in the future.

The views and opinions expressed by the panel do not necessarily represent the views and opinions of the Department.

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Dated: March 1, 2012.

Alexa Posny,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2012–5411 Filed 3–5–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Committee on Foreign Medical Education and Accreditation

AGENCY: National Committee on Foreign Medical Education and Accreditation, Office of Postsecondary Education, U.S. Department of Education.

ACTION: The purpose of this notice is to announce the upcoming meeting of the National Committee on Foreign Medical Education and Accreditation (NCFMEA). Parts of this meeting will be open to the public, and the public is invited to attend those portions.

Meeting Date and Place: The public meeting will be held on Tuesday, April 10, 2012, from 8:30 a.m. until approximately 5 p.m., at the U.S. Department of Education, Eighth Floor Conference Center, Office of Postsecondary Education, 1990 K St. NW., Washington, DC 20006.

Function: The NCFMEA was established by the Secretary of Education under Section 102 of the Higher Education Act of 1965, as amended. The NCFMEA's responsibilities are to:

- Upon request of a foreign country, evaluate the standards of accreditation applied to medical schools in that country; and,
- Determine the comparability of those standards to standards for accreditation applied to United States medical schools.

Comparability of the applicable accreditation standards is an eligibility requirement for foreign medical schools to participate in the William D. Ford Federal Direct Student Loan Program, 20 U.S.C. §§ 1087a et seq.

Meeting Agenda: The NCFMEA will review the standards of accreditation applied to medical schools by several foreign countries to determine whether those standards are comparable to the standards of accreditation applied to medical schools in the United States and/or reports previously requested of countries by the NCFMEA. Discussion of the standards of accreditation will be held in sessions open to the public. Discussions resulting in specific determinations of comparability are closed to the public in order that each country may be properly notified of the decision.

The countries scheduled to be discussed at the meeting include Canada, Dominica, Grenada, Nevis, and Saba. The meeting agenda, as well as the staff analyses pertaining to the meeting will be posted on the Department of Education's web site prior to the meeting at the following address: *http://www2.ed.gov/about/bdscomm/list/ncfmea.html*.

Reasonable Accommodations: The meeting site is accessible to individuals with disabilities. If you will need an auxiliary aid or service to participate in the meeting (e.g., interpreting service, assistive listening device, or materials in an alternate format), notify the contact person listed in this notice by March 23, 2012, although we will attempt to meet a request received after that date.

FOR FURTHER INFORMATION CONTACT: Carol Griffiths, Acting Executive Director for the NCFMEA, U.S. Department of Education, 1990 K Street NW., Room 8073, Washington, DC 20006–8129, telephone: 202 219–7035; fax: 202 502–7874, or email: *Carol.Griffiths@ed.gov.*

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You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Eduardo M. Ochoa,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2012–5377 Filed 3–5–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: U.S. Department of Energy.

ACTION: Notice and request for comments.

SUMMARY: The Department of Energy (DOE), pursuant to the Paperwork Reduction Act of 1995, intends to reinstate and extend for three years, an information collection request with the Office of Management and Budget (OMB). The information collection request, Historic Preservation for Energy Efficiency Programs, was initially approved on December 1, 2010 under OMB Control No. 1910–5155 and expired on June 30, 2011. The reinstatement and extension will allow DOE to continue data collection on the status of Weatherization Assistance Program (WAP), State Energy Program (SEP) and Energy Efficiency and Conservation Block Grant (EECBG) Program activities to ensure that recipients are compliant with Section 106 of the National Historic Preservation Act (NHPA). Comments are invited on: (a) Whether the extended collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before May 7, 2012. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Written comments may be sent to Christine Platt Patrick, EE–2K, U.S. Department of Energy, 1000 Independence Ave. SW., Washington, DC 20585, *Email: Christine.Platt@ee.doe.gov*.

FOR FURTHER INFORMATION CONTACT: Christine Platt Patrick, EE–2K, U.S. Department of Energy, 1000 Independence Ave. SW., Washington, DC 20585, *Email: Christine.Platt@ee.doe.gov*.

Additional information and reporting guidance concerning the Historic Preservation reporting requirement for the Weatherization Assistance Program (WAP), State Energy Program (SEP) and Energy Efficiency and Conservation Block Grant (EECBG) Program are available for review at the following Web site: *http://www1.eere.energy.gov/wip/historic_preservation.html*.

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) OMB No. 1910–5155; (2) Information Collection Request Title: Historic Preservation for Energy Efficiency Programs; (3) Type of Review: Reinstatement; (4) Purpose: To collect data on the status of Weatherization Assistance Program (WAP), State Energy Program (SEP), and Energy Efficiency and Conservation Block Grant (EECBG) Program activities to ensure compliance with Section 106 of the NHPA; (5) Annual Estimated Number of Respondents: 2,473; (6) Annual Estimated Number of Total Responses: 2,473; (7) Annual Estimated Number of Burden Hours: 5,264; (8) Annual Estimated Reporting and Recordkeeping Cost Burden: 0.

Statutory Authority: Section 106 of the National Historic Preservation Act (Pub. L. 89–665 106) establishes that WAP, SEP and EECBG recipients must retain sufficient documentation to demonstrate that the recipient (or subrecipient) has received required approval(s) prior to the expenditure of project funds to alter any historic structure or site.

Issued in Washington, DC, on February 27, 2012.

Henry Kelly,

Acting Assistance Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 2012–5382 Filed 3–5–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

U.S. Energy Information Administration

Agency Information Collection Extension

AGENCY: U.S. Energy Information Administration (EIA), U.S. Department of Energy.

ACTION: Agency information collection activities: Information collection extension; Notice and request for comments.

SUMMARY: EIA, pursuant to the Paperwork Reduction Act of 1995, intends to extend for three years the petroleum marketing survey forms listed below with the Office of Management and Budget (OMB):

EIA–14, ''Refiners' Monthly Cost Report;''

EIA–182, ''Domestic Crude Oil First Purchase Report;''

EIA–782A, ''Refiners'/Gas Plant Operators' Monthly Petroleum Product Sales Report;''

EIA–782C, ''Monthly Report of Prime Supplier Sales of Petroleum Products Sold For Local Consumption;''

EIA–821, ''Annual Fuel Oil and Kerosene Sales Report;''

EIA–856, ''Monthly Foreign Crude Oil Acquisition Report;''

EIA–863, ''Petroleum Product Sales Identification Survey;''

EIA–877, ''Winter Heating Fuels Telephone Survey;''

EIA–878, ''Motor Gasoline Price Survey;''

EIA–888, ''On-Highway Diesel Fuel Price Survey;''

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, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before May 7, 2012. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Send comments to Shawna Waugh. To ensure receipt of the comments by the due date, submission by FAX (202) 586–9739 or email (*Shawna.Waugh@eia.gov*) is recommended. The mailing address is Petroleum and Biofuels Statistics EI–25, Forrestal Building, U.S. Department of Energy, Washington, DC 20585. Alternatively, Shawna Waugh can be contacted by telephone at (202) 586–6484.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Shawna Waugh at the address listed above. Additionally, the draft forms and instructions may be viewed at *http://www.eia.gov/survey.*

SUPPLEMENTARY INFORMATION: This information collection request contains:

(1) OMB No. 1905–0174;

(2) *Information Collection Request Title:* Petroleum Marketing Program;

(3) *Type of Request:* Renewal with change;

(4) *Purpose:*

The Federal Energy Administration Act of 1974 (15 U.S.C. §§ 761 *et seq.*) and the DOE Organization Act (42 U.S.C. §§ 7101 *et seq.*) require EIA to carry out a centralized, comprehensive, and unified energy information program. This program collects, evaluates, assembles, analyzes, and disseminates information on energy resource reserves, production, demand, technology, and related economic and statistical information. This information is used to assess the adequacy of energy resources to meet near and longer term domestic demands.

EIA, as part of its effort to comply with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*), provides the general public and other Federal agencies with opportunities to comment on collections of energy information conducted by or in conjunction with EIA. Also, EIA will later seek approval for this collection by the Office of Management and Budget (OMB) under Section 3507(a) of the Paperwork Reduction Act of 1995.

EIA's petroleum marketing survey forms collect volumetric and price information needed for determining the supply of and demand for crude oil and refined petroleum products. These surveys provide a basic set of data pertaining to the structure, efficiency, and behavior of petroleum markets. These data are published by EIA on its Web site, *http://www.eia.gov,* as well as in publications such as the *Monthly Energy Review (http://www.eia.gov/totalenergy/data/monthly/), Annual Energy Review (http://www.eia.gov/totalenergy/data/annual/), Petroleum Marketing Monthly (http://www.eia.gov/oil_gas/petroleum/data_publications/petroleum_marketing_monthly/pmm.html), Week Petroleum Status Report (http://www.eia.gov/oil_gas/petroleum/data_publications/weekly_petroleum_status_report/wpsr.html),* and the *International Energy Outlook (http://www.eia.gov/forecasts/ieo/);*

(4a) *Proposed Changes to Information Collection:*

EIA will be requesting a three-year extension of approval to continue collecting ten petroleum marketing surveys (Forms EIA–14, EIA–182, EIA–782A, EIA–782C, EIA–821, EIA–856, EIA–863, EIA–877, EIA–878, and EIA–888) with the only substantive changes to the survey forms and instructions being the elimination of collecting information on No. 2 diesel fuel low-sulfur categories on Forms EIA–782A, EIA–821 and EIA–888. EIA proposes not to collect information on No. 2 diesel fuel sales through company operated outlets for diesel fuel with sulfur content of >15 and <=500 ppm on Form EIA–782A, and the category On-Highway Diesel Fuel use with sulfur content of >15 and <=500 ppm on Form EIA–821. EIA proposes not to collect price information for on-highway low sulfur diesel fuel on Form EIA–888. The proposed form changes are necessary because regulations issued by the U.S. Environmental Protection Agency prohibit the sale of low sulfur No. 2 diesel fuel with sulfur content of >15 and <=500 ppm for on-highway use. EIA does not seek renewal of the Form EIA–782B, ''Resellers'/Retailers' Monthly Petroleum Product Sales Report'' as part of this information collection. EIA suspended the use of Form EIA–782B in May, 2011, due to resource constraints and notified the respondents in the reporting sample by letter dated May 23, 2011 that they were no longer required to file this report.

Information Collection Burden Estimates

(5) *Annual Estimated Number of Respondents:* 11,953 Respondents;

(6) *Annual Estimated Number of Total Responses:* 106,661 Responses per year;

(7) *Annual Estimated Number of Burden Hours:* 56,186 hours per year;

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* EIA estimates that there are no additional costs to respondents associated with the surveys other than the costs associated with the burden hours.

Statutory Authority: Section 13(b) of the Federal Energy Administration Act of 1974, Pub. L. 93–275, codified at 15 U.S.C. 772(b) and Pub. L. 94–163 (Energy Policy and Conservation Act), Sec. 507.

Issued in Washington, DC, February 28, 2012.

Barbara Fichman,

Acting Director, Office of Survey Development and Statistical Integration, U.S. Energy Information Administration.

[FR Doc. 2012–5386 Filed 3–5–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1827–001; ER10–1825–001
Applicants: Cleco Power LLC, Cleco Evangeline LLC
Description: Amendment to Notice of Non-Material Change in Status Filing of Cleco Power LLC, *et al.*
Filed Date: 2/6/12
Accession Number: 20120206–5104
Comments Due: 5 p.m. ET 3/20/12

Docket Numbers: ER12–858–001
Applicants: Arizona Public Service Company
Description: Errata filing for Rate Schedule Nos. 211, 242 and 243 to be effective 3/21/2012.
Filed Date: 2/28/12
Accession Number: 20120228–5087
Comments Due: 5 p.m. ET 3/20/12

Docket Numbers: ER12–1171–000
Applicants: CWP Energy
Description: Application for MBR Authority and Request for Waivers and Blanket Authorization to be effective 2/29/2012.
Filed Date: 2/28/12
Accession Number: 20120228–5103
Comments Due: 5 p.m. ET 3/20/12

Docket Numbers: ER12–1172–000
Applicants: Arizona Public Service Company
Description: Arizona Public Service Company submits Notice of Cancellation.
Filed Date: 2/28/12
Accession Number: 20120228–5107
Comments Due: 5 p.m. ET 3/20/12

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 28, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–5339 Filed 3–5–12; 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: ER10–1276–002; ER10–1292–001; ER10–1287–001; ER10–1303–001; ER10–1319–003; ER10–1353–003
Applicants: Consumers Energy Company
Description: Consumers Energy Company, *et al.* submits Notice of Non-Material Change in Status.
Filed Date: 2/28/12
Accession Number: 20120228–5045
Comments Due: 5 p.m. ET 3/20/12

Docket Numbers: ER10–1285–002
Applicants: Craven County Wood Energy Limited Partnership
Description: Craven County Wood Energy Limited Partnership submits Notice of Non-Material Change in Status.
Filed Date: 2/27/12
Accession Number: 20120227–5234
Comments Due: 5 p.m. ET 3/19/12

Docket Numbers: ER11–1902–001
Applicants: KCP&L Greater Missouri Operations Company
Description: Attachment L Compliance Filing to be effective 8/4/2010.
Filed Date: 2/27/12
Accession Number: 20120227–5181
Comments Due: 5 p.m. ET 3/19/12

Docket Numbers: ER12–973–001
Applicants: Verus Energy Trading, LLC
Description: Amendment to Initial Market-Based Rate Application to be effective 2/2/2012.
Filed Date: 2/27/12
Accession Number: 20120227–5182
Comments Due: 5 p.m. ET 3/19/12

Docket Numbers: ER12–1166–000
Applicants: BluCo Energy LLC
Description: Baseline Filing to be effective 2/28/2012.
Filed Date: 2/28/12
Accession Number: 20120228–5011
Comments Due: 5 p.m. ET 3/20/12

Docket Numbers: ER12–1167–000
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc.'s Notice of Cancellation of Large Generator Interconnection Agreement.
Filed Date: 2/27/12
Accession Number: 20120227–5222
Comments Due: 5 p.m. ET 3/19/12

Docket Numbers: ER12–1168–000
Applicants: The Detroit Edison Company
Description: Detroit Edison MBR Compliance Filing to be effective 2/28/2012.
Filed Date: 2/28/12
Accession Number: 20120228–5019
Comments Due: 5 p.m. ET 3/20/12

Docket Numbers: ER12–1169–000
Applicants: DTE Energy Trading, Inc.
Description: DTE Energy Trading MBR Compliance Filing to be effective 2/28/2012.
Filed Date: 2/28/12
Accession Number: 20120228–5020
Comments Due: 5 p.m. ET 3/20/12

Docket Numbers: ER12–1170–000
Applicants: Imperial Valley Solar Company (IVSC) 1, LLC
Description: Initial Market-Based Rate Tariff of IVSC 1 to be effective 2/28/2012.
Filed Date: 2/27/12
Accession Number: 20120227–5231
Comments Due: 5 p.m. ET 3/19/12

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES12–1–001
Applicants: Northeast Utilities Service Company, The Connecticut Light and Power Company
Description: Supplemental Information, Exhibits/Request of Northeast Utilities Service Co.
Filed Date: 2/27/12
Accession Number: 20120227–5128
Comments Due: 5 p.m. ET 3/8/12

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 28, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–5338 Filed 3–5–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP12–406–000
Applicants: Trailblazer Pipeline Company LLC
Description: Negotiated Rate Filing-Concord to be effective 3/1/2012
Filed Date: 2/28/12
Accession Number: 20120228–5086
Comments Due: 5 p.m. ET 3/12/12

Docket Numbers: RP12–407–000
Applicants: Trailblazer Pipeline Company LLC
Description: Negotiated Rate Filing-Koch to be effective 3/1/2012
Filed Date: 2/28/12
Accession Number: 20120228–5094
Comments Due: 5 p.m. ET 3/12/12

Docket Numbers: RP12–408–000
Applicants: American Midstream (Midla), LLC
Description: Midla Non-Conforming Agreements to be effective 3/1/2012
Filed Date: 2/28/12
Accession Number: 20120228–5106
Comments Due: 5 p.m. ET 3/12/12

Docket Numbers: RP12–409–000
Applicants: Gulf South Pipeline Company, LP
Description: ONEOK 34951 to BG Energy 39587 Capacity Release Negotiated Rate Agreement to be effective 3/1/2012
Filed Date: 2/28/12
Accession Number: 20120228–5110
Comments Due: 5 p.m. ET 3/12/12

Docket Numbers: RP12–410–000
Applicants: Trailblazer Pipeline Company LLC
Description: Negotiated Rate Filing-Enserco to be effective 3/1/2012
Filed Date: 2/28/12
Accession Number: 20120228–5117
Comments Due: 5 p.m. ET 3/12/12

Docket Numbers: RP12–411–000
Applicants: Trailblazer Pipeline Company LLC
Description: Negotiated Rate Filing-United Energy to be effective 3/1/2012
Filed Date: 2/28/12
Accession Number: 20120228–5124
Comments Due: 5 p.m. ET 3/12/12

Docket Numbers: RP12–412–000
Applicants: Cheniere Creole Trail Pipeline, L.P.
Description: Semi-Annual Transportation Retainage Adjustment to be effective 4/1/2012
Filed Date: 2/28/12
Accession Number: 20120228–5125
Comments Due: 5 p.m. ET 3/12/12

Docket Numbers: RP12–413–000
Applicants: Tennessee Gas Pipeline Company, L.L.C.
Description: Volume No. 2—Name Change Negotiated Rate ERISE to be effective 4/1/2012
Filed Date: 2/28/12
Accession Number: 20120228–5139
Comments Due: 5 p.m. ET 3/12/12

Docket Numbers: RP12–414–000
Applicants: Trailblazer Pipeline Company LLC
Description: Negotiated Rate Filing-MIECO to be effective 3/1/2012
Filed Date: 2/28/12
Accession Number: 20120228–5140
Comments Due: 5 p.m. ET 3/12/12

Docket Numbers: RP12–415–000
Applicants: Guardian Pipeline, L.L.C.
Description: EPC Semi Annual Adjustment—Spring 2012 to be effective 4/1/2012
Filed Date: 2/28/12
Accession Number: 20120228–5143
Comments Due: 5 p.m. ET 3/12/12

Docket Numbers: RP12–416–000
Applicants: Viking Gas Transmission Company
Description: Semi Annual FLRP—Spring 2012 to be effective 4/1/2012
Filed Date: 2/28/12
Accession Number: 20120228–5144
Comments Due: 5 p.m. ET 3/12/12

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.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service 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 29, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–5332 Filed 3–5–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL12–2–000]

Southwest Power Pool, Inc.; Notice of Initiation of Proceeding and Refund Effective Date

On February 29, 2012, the Commission issued an order that initiated a proceeding in Docket No. EL12–2–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e (2006), to determine the justness and reasonableness of certain language in section VII.8(b) of Attachment O of Southwest Power Pool's existing open access transmission tariff. *Southwest Power Pool, Inc.,* 138 FERC ¶ 61,150 (2012).

The refund effective date in Docket No. EL12–2–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Dated: February 29, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary

[FR Doc. 2012–5340 Filed 3–5–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 14275–000, 14279–000, 14282–000]

FFP Project 91, LLC, Riverbank Hydro No. 23, LLC, Lock+ Hydro Friends Fund III; Notice Announcing Filing Priority for Preliminary Permit Applications

On February 28, 2012, the Commission held a drawing to determine priority between three competing preliminary permit applications with identical filing times. In the event that the Commission concludes that none of the applicants' plans are better adapted than the other

to develop, conserve, and utilize in the public interest the water resources of the region at issue, the priority established by this drawing will serve as the tiebreaker. Based on the drawing, the order of priority is as follows:

1. FFP Project 91, LLC: Project No. 14275–000.

2. Riverbank Hydro No. 23, LLC: Project No. 14279–000.

3. Lock+ Hydro Friends Fund III: Project No. 14282–000.

Dated: February 29, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–5347 Filed 3–5–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 14130–000, 14137–000, 14134–000]

Riverbank Hydro No. 2, LLC, Lock+ Hydro Friends Fund XXXVI, Qualified Hydro 21, LLC; Notice Announcing Filing Priority for Preliminary Permit Applications

On February 28, 2012, the Commission held a drawing to determine priority between three competing preliminary permit applications with identical filing times. In the event that the Commission concludes that none of the applicants' plans are better adapted than the other to develop, conserve, and utilize in the public interest the water resources of the region at issue, the priority established by this drawing will serve as the tiebreaker. Based on the drawing, the order of priority is as follows:

1. Lock+ Hydro Friends Fund XXXVI: Project No. 14137–000.

2. Qualified Hydro 21, LLC: Project No. 14134–000.

3. Riverbank Hydro No. 2, LLC: Project No. 14130–000.

Dated: February 29, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–5341 Filed 3–5–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 14260–000, 14264–000, et al.]

Lock+ Hydro Friends Fund XII, BOST2, LLC, et al.; Notice Announcing Filing Priority for Preliminary Permit Applications

	Project No.
Lock+ Hydro Friends Fund XII	14260–000
BOST2, LLC	14264–000
Riverbank Hydro No. 21, LLC	14267–000
FFP Project 96, LLC	14273–000

On February 28, 2012, the Commission held a drawing to determine priority between four competing preliminary permit applications with identical filing times. In the event that the Commission concludes that none of the applicants' plans are better adapted than the other to develop, conserve, and utilize in the public interest the water resources of the region at issue, the priority established by this drawing will serve as the tiebreaker. Based on the drawing, the order of priority is as follows:

1. FFP Project 96, LLC: Project No. 14273–000.

2. BOST2, LLC: Project No. 14264–000.

3. Lock+ Hydro Friends Fund XII: Project No. 14260–000.

4. Riverbank Hydro No. 21, LLC: Project No. 14267–000.

Dated: February 29, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–5343 Filed 3–5–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14262–000, Project No. 14276–000, and Project No. 14280–000]

Notice Announcing Filing Priority for Preliminary Permit Applications: Lock+ Hydro Friends Fund VIII; FFP Project 92, LLC; Riverbank Hydro No. 24, LLC

On February 28, 2012, the Commission held a drawing to determine priority between three competing preliminary permit applications with identical filing times. In the event that the Commission concludes that none of the applicants' plans are better adapted than the other to develop, conserve, and utilize in the public interest the water resources of the region at issue, the priority established by this drawing will serve as the tiebreaker. Based on the drawing, the order of priority is as follows:

1. FFP Project 92, LLC: Project No. 14276–000.

2. Riverbank Hydro No. 24, LLC: Project No. 14280–000.

3. Lock+ Hydro Friends Fund VIII: Project No. 14262–000.

Dated: February 29, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–5345 Filed 3–5–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 14269–000, 14270–000]

Riverbank Hydro No. 22, LLC, FFP Project 93, LLC; Notice Announcing Filing Priority for Preliminary Permit Applications

On February 28, 2012, the Commission held a drawing to determine priority between two competing preliminary permit applications with identical filing times. In the event that the Commission concludes that neither of the applicants' plans is better adapted than the other to develop, conserve, and utilize in the public interest the water resources of the region at issue, the priority established by this drawing will serve as the tiebreaker. Based on the drawing, the order of priority is as follows:

1. FFP Project 93, LLC: Project No. 14270–000.

2. Riverbank Hydro No. 22, LLC: Project No. 14269–000.

Dated: February 29, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–5346 Filed 3–5–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 14261–000, 14268–000, 14277–000, 14281–000]

Lock+ Hydro Friends Fund XVIII, Upper Hydroelectric, LLC, FFP Project 95, LLC, Riverbank Hydro No. 25, LLC; Notice Announcing Filing Priority for Preliminary Permit Applications

On February 28, 2012, the Commission held a drawing to

determine priority between four competing preliminary permit applications with identical filing times. In the event that the Commission concludes that none of the applicants' plans are better adapted than the other to develop, conserve, and utilize in the public interest the water resources of the region at issue, the priority established by this drawing will serve as the tiebreaker. Based on the drawing, the order of priority is as follows:

1. Lock+ Hydro Friends Fund XVIII: Project No. 14261–000.

2. Riverbank Hydro No. 25, LLC: Project No. 14281–000.

3. Upper Hydroelectric, LLC: Project No. 14268–000.

4. FFP Project 95, LLC: Project No. 14277–000.

Dated: February 29, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–5344 Filed 3–5–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 14185–000, 14196–000]

Lock+ Hydro Friends Fund IV, FFP Project 55, LLC; Notice Announcing Filing Priority for Preliminary Permit Applications

On February 28, 2012, the Commission held a drawing to determine priority between two competing preliminary permit applications with identical filing times. In the event that the Commission concludes that neither of the applicants' plans is better adapted than the other to develop, conserve, and utilize in the public interest the water resources of the region at issue, the priority established by this drawing will serve as the tiebreaker. Based on the drawing, the order of priority is as follows:

1. Lock+ Hydro Friends Fund IV: Project No. 14185–000.

2. FFP Project 55, LLC: Project No. 14196–000.

Dated: February 29, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–5342 Filed 3–5–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 14298–000, 14299–000, 14301–000]

SV Hydro, LLC, Coffeeville, LLC, FFP Project 99, LLC; Notice Announcing Filing Priority for Preliminary Permit Applications

On February 28, 2012, the Commission held a drawing to determine priority between three competing preliminary permit applications with identical filing times. In the event that the Commission concludes that none of the applicants' plans are better adapted than the other to develop, conserve, and utilize in the public interest the water resources of the region at issue, the priority established by this drawing will serve as the tiebreaker. Based on the drawing, the order of priority is as follows:

1. FFP Project 99, LLC: Project No. 14301–000.

2. SV Hydro, LLC: Project No. 14298–000.

3. Coffeeville, LLC: Project No. 14299–000.

Dated: February 29, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–5337 Filed 3–5–12; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9643–6]

Meeting of the Mobile Sources Technical Review Subcommittee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the Mobile Sources Technical Review Subcommittee (MSTRS) will meet in April 2012. The MSTRS is a subcommittee under the Clean Air Act Advisory Committee. This is an open meeting. The meeting will include discussion of current topics and presentations about activities being conducted by EPA's Office of Transportation and Air Quality. The preliminary agenda for the meeting and any notices about change in venue will be posted on the Subcommittee's Web site: *http://www.epa.gov/air/caaac/mobile_sources.html.* MSTRS listserver subscribers will receive notification when the agenda is available on the Subcommittee Web site. To subscribe to the MSTRS listserver, send a blank email to *lists-mstrs@lists.epa.gov.*

DATES: Thursday, April 19, 2011 from 9 a.m. to 4:30 p.m. Registration begins at 8:30 a.m.

ADDRESSES: The meeting is currently scheduled to be held at The Madison Hotel at 1177 15th St. NW., Washington, DC 20005. However, this date and location are subject to change and interested parties should monitor the Subcommittee Web site (above) for the latest logistical information. The hotel is located five blocks from the McPherson Square Metro Station.

FOR FURTHER INFORMATION CONTACT: *For technical information:* Jennifer Krueger, Designated Federal Officer, Transportation and Climate Division, Mailcode 6405J, U.S. EPA, 1200 Pennsylvania Ave. NW., Washington, DC 20460; Ph: 202–343–9302; email: *Krueger.jennifer@epa.gov.*

For logistical and administrative information: Ms. Cheryl Jackson, U.S. EPA, Transportation and Climate Division, Mailcode 6405J, U.S. EPA, 1200 Pennsylvania Ave. NW., Washington, DC 20460; 202–343–9653; email: *jackson.cheryl@epa.gov.*

Background on the work of the Subcommittee is available at: *http://www.epa.gov/air/caaac/mobile_sources.html.* Individuals or organizations wishing to provide comments to the Subcommittee should submit them to Ms. Krueger at the address above by April 6, 2012. The Subcommittee expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements.

SUPPLEMENTARY INFORMATION: During the meeting, the Subcommittee may also hear progress reports from some of its workgroups as well as updates and announcements on activities of general interest to attendees.

For Individuals with Disabilities: For information on access or services for individuals with disabilities, please contact Ms. Krueger or Ms. Jackson (see above). To request accommodation of a disability, please contact Ms. Krueger or Ms. Jackson, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: February 29, 2012.

Margo Tsirigotis Oge,

Director, Office of Transportation and Air Quality.

[FR Doc. 2012–5390 Filed 3–5–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Submitted to the Office of Management and Budget (OMB) for Emergency Review and Approval

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3502–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before April 5, 2012. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to Judith B. Herman, Federal Communications Commission, via the Internet at *Judith-b.herman@fcc.gov.* To submit your PRA comments by email send them to: *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, FCC, at 202–418–0214.

SUPPLEMENTARY INFORMATION: The Commission is requesting emergency OMB processing of the new information collection requirements contained in this notice. The Commission is requesting OMB approval by March 30, 2012.

OMB Control Number: 3060–0819.

Title: Sections 54.400 through 54.707, Lifeline Assistance (Lifeline) Connection Assistance (Link-Up) Reporting Worksheet and Instructions.

Form No.: FCC Form 497.

Type of Review: Revision of a currently approved collection.

Respondents: Individuals or households and business or other for-profit.

Number of Respondents: 13,500,940 respondents; 40,035,705 responses.

Estimated Time per Response: .25 hours to 50 hours.

Frequency of Response: On Occasion, Biennially, Monthly, and Annual reporting requirements, third party disclosure requirements and recordkeeping requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. Sections 1, 4(i), 201–205, 214, 254, and 403 of the Communications Act of 1934, as amended.

Total Annual Burden: 30,729,935 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: The Commission is not requesting that respondents submit confidential information to the Commission. We note that USAC must preserve the confidentiality of all data obtained from respondents and contributors to the universal service support program mechanism; must not use the data except for the purposes of administering the universal service program; and must not disclose data in company-specific form unless directed to do so by the Commission.

Needs and Uses: The Commission will submit this revised information collection to the Office of Management and Budget (OMB) during this 30 day comment period in order to obtain emergency approval from them. The Commission is requesting emergency OMB approval for this revised information collection by March 30, 2012.

This collection of information is critical to the prevention of waste, fraud and abuse of the Universal Service Fund (USF or Fund). Among other things, the *Lifeline Reform Report and Order,* (Order), FCC 12–11, adopts rules to eliminate waste and inefficiency, increase accountability, and transition the Fund from supporting stand-alone telephone service to broadband. The reforms adopted in the Order substantially strengthen protections against waste, fraud, and abuse; improve program administration and accountability; improve enrollment and consumer disclosures, and constrain the growth of the program in order to reduce the burden on all who contribute to the Fund. The Commission has set a budget target to eliminate $200 million in waste in 2012, which is dependent on certain rules going into effect as soon as possible. Among other things, the Commission has revised the FCC Form 497; incorporate the information collection requirements contained in OMB Control Number 3060–0774 into this information collection; removed or consolidated all low-income requirements requiring approval or revision into this submission; revised the certification of eligibility upon enrollment; revised annual reporting requirements; revised verification of continued eligibility (now referred to as Annual Recertification of Consumer Eligibility; revised resolution of duplicative claims; and adopt maintenance of National Lifeline Accountability database. Therefore, it is essential that the OMB grant this request for emergency processing of this revised information collection.

Federal Communications Commission.

Bulah P. Wheeler,

Deputy Manager, Office of the Secretary, Office of Managing Director.

[FR Doc. 2012–5359 Filed 3–5–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Submitted for Review and Approval to the Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3502–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s).

Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before April 5, 2012. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to Judith B. Herman, Federal Communications Commission, via the Internet at *Judith-b.herman@fcc.gov.* To submit your PRA comments by email send them to: *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, FCC, at 202–418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0718.

Title: Part 101 Rule Sections Governing the Terrestrial Microwave Fixed Radio Service.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, and state, local or tribal government.

Number of Respondents: 9,500 respondents; 27,292 responses.

Estimated Time per Response: .25 to 3 hours.

Frequency of Response: On occasion and every 10 years reporting requirement, recordkeeping requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. sections 151, 154(i), 301, 303(f), 303(g), 303(r), 307, 308, 309, 310, and 316 of the Communications Act of 1934, as amended.

Total Annual Burden: 35,242 hours.

Total Annual Cost: $760,000.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: No questions of a confidential nature are asked.

Needs and Uses: The Commission will submit this expiring information collection to the Office of Management and Budget (OMB) during this 30 day comment period in order to obtain the full three year clearance from them. The Commission is requesting OMB approval for an extension (no change in the reporting, recordkeeping and/or third party disclosure requirements).

There is a change in the Commission's previous cost estimates. The Commission is reporting a $207,000 increase in annual costs. This adjustment increase reflects an increase in the Commission's estimates of the cost of outside consultants.

Part 101 rule sections require various information to be reported to the Commission; coordinated with third parties; posting requirements; notification requirements to the public; and recordkeeping requirements maintained by the respondent to determine the technical, legal and other qualifications of applications to operate a station in the public and private operational fixed services.

The information is used to determine whether the public interest, convenience, and necessity are being served as required by 47 U.S.C. section 309. The Commission staff will also use this information to ensure that applicants and licensees comply with ownership and transfer restrictions imposed by 47 U.S.C. section 310. Without this information, the Commission would not be able to carry out its statutory responsibilities.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2012–5361 Filed 3–5–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Submitted for Review and Approval to the Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required b y the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3502–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before April 5, 2012. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to Judith B. Herman, Federal Communications Commission, via the Internet at *Judith-b.herman@fcc.gov.* To submit your PRA comments by email send them to: *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, FCC, at 202–418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0986.

Title: Competitive Carrier Line Count Report and Self-Certification as a Rural Carrier.

Form No.: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions and state, local or tribal government.

Number of Respondents: 4,934 respondents; 5,048 responses.

Estimated Time per Response: .50 hours to 80 hours.

Frequency of Response: On occasion, annual and quarterly reporting requirements, and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. sections 151–154, 201–206, 214, 218–220, 251, 252, 254, 256, 303(r), 332, 403, 405, and 410.

Total Annual Burden: 163,435 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: The Commission is not requesting that respondents submit confidential information to the Commission. We note that the Universal Service Administrative Company (USAC), who administers the Universal Service program, must preserve the confidentiality of all data obtained from respondents and contributors to the universal service support program mechanism; must not use the data except for purposes of administering the universal service support program; and must not disclose data in company-specific form unless directed to do so by the Commission.

Needs and Uses: The Commission will submit this revised information collection to the Office of Management and Budget (OMB) during this 30 day comment period in order to obtain the full three year clearance from them.

In November 2011, the Commission adopted a Report and Order, FCC 11–161, Connect America Fund; A National Broadband Plan for Our Future; Establish Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Life-line and Link-Up; and Universal Service Reform—Mobility Fund. This revision addresses several reforms adopted in the Report and Order. The Commission plans to submit additional revisions or new collections for OMB review and approval to address other reforms adopted in the Order at a later date.

During the review process, it was determined that the reporting requirements under OMB Control Number 3060–0894 should be eliminated. The Order eliminated the rate comparability review and certification, as well as the certification letter accounting for receipt of federal support in OMB Control Number 3060–0894 was duplicative of the certification pursuant to section 254(e) of the Act. Upon OMB approval of this revised information collection, the Commission will voluntarily discontinue OMB Control Number 3060–0894.

The Order also moved the recordkeeping requirement from 47 CFR section 54.202(e) to new 47 CFR section 54.320. The Commission is deleting this recordkeeping requirement from the information collections in OMB Control Numbers 3060–1081 and 3060–0774.

The Order provides:

(1) That existing high-cost support for price cap incumbent local exchange carriers will be frozen at the 2011 levels.

(2) Adopts a rule to reduce, dollar-for-dollar, a carrier's high-cost loop support (for rate of return carriers) or Connect America Fund Phase I frozen high-cost support (for price cap carriers) to the extent that the carrier's local end user rate plus state regulated fees do not meet a specified urban rate floor.

(3) Modifies section 54.307;

(4) Revises the certifications that states (or ETCs that are not subject to state jurisdiction) are required to file annually with the Commission and USAC to ensure that carriers use universal service support ''only for the provision, maintenance and upgrading of facilities and services for which the support is intended'' consistent with section 254(e) of the Act;

(5) Eliminates the eligibility for Safety Net Additive support for costs incurred after 2009;

(6) Eliminates the distinction between ''rural'' and ''non-rural'' carriers.

(7) Moves the recordkeeping requirement from 47 CFR 54.202(e) to new section 47 CFR 54.320.

(8) Extends current federal annual reporting requirements to all ETCs, including those designated by states.

The Commission will use the information requirements to determine whether and to what extent incumbent LECs and competitive ETCs providing the data are eligible to receive universal service support.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2012–5360 Filed 3–5–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 12–212]

Notice of Debarment

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Enforcement Bureau (the ''Bureau'') debars Mr. Jeremy R. Sheets from the schools and libraries universal service support mechanism (or ''E-Rate Program'') for a period of three years. The Bureau takes this action to protect the E-Rate Program from waste, fraud and abuse.

DATES: Debarment commences on the date Mr. Jeremy R. Sheets receives the debarment letter or April 5, 2012, whichever date comes first, for a period of three years.

FOR FURTHER INFORMATION CONTACT: Joy M. Ragsdale, Federal Communications Commission, Enforcement Bureau, Investigations and Hearings Division, Room 4–A236, 445 12th Street SW., Washington, DC 20554. Joy Ragsdale may be contacted by phone at (202) 418–1697 or by email at *Joy.Ragsdale@fcc.gov.* If Ms. Ragsdale is unavailable, you may contact Ms. Terry Cavanaugh, Acting Chief, Investigations and Hearings Division, by telephone at (202) 418–1420 and by email at *Theresa.Cavanaugh@fcc.gov.*

SUPPLEMENTARY INFORMATION: The Bureau debarred Mr. Jeremy R. Sheets from the schools and libraries universal service support mechanism for a period of three years pursuant to 47 CFR 54.8. Attached is the debarment letter, DA 12–212, which was mailed to Mr. Jeremy R. Sheets and released on February 14, 2012. The complete text of the notice of debarment is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portal II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. In addition, the complete text is available on the FCC's Web site at *http://www.fcc.gov.* The text may also be purchased from the Commission's duplicating inspection and copying during regular business hours at the contractor, Best Copy and Printing, Inc., Portal II, 445 12th Street SW., Room CY–B420, Washington, DC

20554, telephone (202) 488–5300 or (800) 378–3160, facsimile (202) 488–5563, or via email *http://www.bcpiweb.com.*

Federal Communications Commission.

Theresa Z. Cavanaugh,

Acting Chief, Investigations and Hearings Division, Enforcement Bureau.

The debarment letter follows:

February 14, 2012

DA 12–212

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED AND E-MAIL

Mr. Jeremy R. Sheets
c/o Mr. Martin E. Crandall
Clark Hill PLC
500 Woodward Ave., Suite 3500
Detroit, MI 48226–3435

Re: Notice of Debarment

File No. EB–11–IH–1122

Dear Mr. Sheets:

The Federal Communications Commission (Commission) hereby notifies you that, pursuant to Section 54.8 of its rules, you are prohibited from participating in the schools and libraries universal service support mechanism (E-Rate program) for three years from either the date of your receipt of this Notice of Debarment, or of its publication in the **Federal Register**, whichever is earlier in time (Debarment Date).[1]

On October 18, 2011, the Commission's Enforcement Bureau (Bureau) sent you a Notice of Suspension and Initiation of Debarment Proceeding (Notice of Suspension)[2] that was published in the **Federal Register** on November 7, 2011.[3] The Notice of Suspension suspended you from participating in activities associated with or relating to the E-Rate program and described the basis for initiating debarment proceedings against you, the applicable debarment procedures, and the effect of debarment.

As discussed in the Notice of Suspension, as president and co-owner of CMS Internet LLC (CMS), you devised and participated in a scheme to defraud the E-Rate program, which resulted in a loss to the program of up to $70,000.[4] Specifically, you made materially false representations that induced two school districts to steer E-rate contracts to CMS; and you paid the school applicants' share of E–Rate expenses with purported ''donations'' and ''leasing payments.''[5] Furthermore, you failed to disclose that you purchased ineligible goods and services with E–Rate funds.[6] Finally, you obstructed a 2007 federal grand jury investigation by instructing a CMS employee to testify falsely about receiving gifts and to destroy computer records.[7] As a result of your conviction for wire fraud, the United States District Court for the Western District of Michigan sentenced you to serve 15 months in federal prison, followed by two years of supervised release for defrauding the E–Rate program.[8] The court also prohibited you from ''having any involvement with any government-backed or federally-regulated programs during the course of supervision.''[9] The court ordered you to pay a $12,000 criminal fine in addition to paying Universal Service Administration Company (USAC) $115,534 in restitution.[10] Pursuant to Section 54.8(c) of the Commission's rules, your conviction of criminal conduct in connection with the E–Rate program serves as a basis for your debarment.[11]

In accordance with the Commission's debarment rules, you were required to file with the Commission any opposition to your suspension or its scope, or to your proposed debarment or its scope, no later than 30 calendar days from either the date of your receipt of the Notice of Suspension or of its publication in the **Federal Register**, whichever date occurred first.[12] The Commission did not receive any such opposition.

For the foregoing reasons, you are debarred from participating in the E–Rate program for three years from the Debarment Date.[13] During this debarment period, you are excluded from participating in any activities associated with or related to the E–Rate program, including the receipt of funds or discounted services through the E–Rate program, or consulting with, assisting, or advising applicants or service providers regarding the E–Rate program.[14]

Sincerely,

Theresa Z. Cavanaugh,
Acting Chief, Investigations and Hearings Division, Enforcement Bureau.

cc: Johnnay Schrieber, Universal Service Administrative Company (via email) Rashann Duvall, Universal Service Administrative Company (via email) Jason C. Turner, Antitrust Division, United States Department of Justice (via email) Jennifer M. Dixton, Antitrust Division, United States Department of Justice (via email) Meagan D. Johnson, Antitrust Division, United States Department of Justice (via email)

[FR Doc. 2012–5409 Filed 3–5–12; 8:45 am]

BILLING CODE 6712–01–P

[1] 47 CFR 54.8(g) (2010). See also 47 CFR 0.111 (delegating authority to the Enforcement Bureau to resolve universal service suspension and debarment proceedings).

[2] Letter from Theresa Z. Cavanaugh, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Jeremy R. Sheets, Notice of Suspension and Initiation of Debarment Proceeding, DA 11–1733, 26 FCC Rcd 14408 (Inv. & Hearings Div., Enf. Bur. 2011) (Attachment 1).

[3] 76 Fed. Reg. 68760 (Nov. 7, 2011).

[4] Notice of Suspension, 26 FCC Rcd at 14409.

[5] Id.

[6] Id.

[7] Id.

[8] See United States v. Jeremy R. Sheets, Criminal Case No. 1:10–cr–380, Judgment (W.D. Mi. 2011).

[9] Id. A condition of your supervised release includes forfeiting all monetary claims pending under contract with other E–Rate school applicants. Telephone Conversation with Jason Turner, Lead Counsel, Dep't of Justice, Antitrust Division (Aug. 10, 2011).

[10] Supra note 5.

[11] 47 CFR 54.8(c).

[12] Id. § 54.8(e)(3), (4). Any opposition had to be filed no later than November 17, 2011.

[13] Id. § 54.8(e)(5), (g).

[14] 47 CFR § 54.8(a)(1), (5), (d).

FEDERAL COMMUNICATIONS COMMISSION

[CG Docket No. 12–39; DA 12–220]

Termination of Dormant Proceedings

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Commission, via the Consumer and Governmental Affairs Bureau (CGB), seeks comment on whether certain docketed Commission proceedings should be terminated as dormant. The Commission's procedural rules, which were revised to streamline and improve the agency's docket management practices, delegate authority to the Chief, CGB to periodically review all open dockets and, in consultation with the responsible Bureaus or Offices, to identify those dockets that appear to be candidates for termination.

DATES: Comments are due on or before April 5, 2012, and reply comments are due on or before April 20, 2012.

ADDRESSES: Interested parties may submit comments, identified by [CG Docket No. 12–39], by any of the following methods:

▪ *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the Commission's Electronic Comment Filing System (ECFS) at *http://fjallfoss.fcc.gov/ecfs2/.* Filers should follow the instructions provided on the Web site for submitting comments. In completing the transmittal screen, ECFS filers should include their full name, U.S. Postal Service mailing

address, and the applicable docket or rulemaking number, which in this instance is CG Docket No. 12–39.

▪ *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

▪ All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street SW., Room TW–A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.

▪ Commercial overnight mail (other than U.S. Postal Service Express mail and Priority mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Dorothy Stifflemire, Consumer and Governmental Affairs Bureau at (202) 418–7349 or by email at *Dorothy.Stifflemire@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Termination of Certain Proceedings as Dormant,* document DA 12–220, released on February 15, 2012 in CG Docket No. 12–39.

The full text of document DA 12–220 and copies of any subsequently filed documents in this matter will be available for public inspection and copying via ECFS, and during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. Copies may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160, fax: (202) 488–5563, or Internet: *www.bcpiweb.com.* Document DA 12–220 can also be downloaded in Word or Portable Document Format (PDF) at: *http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0216/DA-12-220A1.doc.* The spreadsheet associated with document DA 12–220 listing the proceedings proposed for termination for dormancy is available in Excel or Portable Document Format at *http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0215/DA-12-220A2.xls.*

Pursuant to 47 CFR 1.415 and 1.419, interested parties may file comments and reply comments on or before the respective dates indicated in the **DATES** section of this document.

Pursuant to 47 CFR 1.1200 *et seq.,* this matter shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b).

In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY).

Synopsis: On February 4, 2011, the Commission released document FCC 11–16, *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization, Report and Order,* 76 FR 24383, May 2, 2011, which revised portions of its Part 1—Practice and Procedure and Part 0—Organizational rules.

The revised rules, in part, delegate authority to the Chief, CGB to periodically review all open dockets and, in consultation with the responsible Bureaus or Offices, to identify those dockets that appear to be candidates for termination. These candidates include dockets in which no further action is required or contemplated, as well as those in which no pleadings or other documents have been filed for several years. However, the Commission specified that proceedings in which petitions addressing the merits are pending should not be terminated absent the parties' consent. The termination of a dormant proceeding also includes dismissal as moot of any pending petition, motion, or other request for relief that is procedural in nature or otherwise does not address the merits of the proceeding.

Prior to the termination of any particular proceeding, the Commission was directed to issue a Public Notice identifying the dockets under consideration for termination and affording interested parties an opportunity to comment. Thus, CGB has identified the dockets for possible termination in document DA 12–220. *http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0215/DA-12-220A2.xls*

Federal Communications Commission.

Kris Monteith,

Acting Chief, Consumer and Governmental Affairs Bureau.

[FR Doc. 2012–5410 Filed 3–5–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the

notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than March 21, 2012.

A. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice President) 1000 Peachtree Street, NE., Atlanta, Georgia 30309:

1. *Renny B. Eadie and Robert M. Eadie,* both of Lake City, Florida; to collectively acquire additional voting shares of PSB BancGroup, Inc., and thereby indirectly acquire additional voting shares of Peoples State Bank, both in Lake City, Florida.

B. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *Mission-Heights Capital, Ltd., and Mission-Heights, LLC, both in Houston, Texas, general partner; and Charles Robert Miller, Jr.,* Odem, Texas, individually; to acquire voting shares of Odem Bancshares, Inc., and thereby indirectly acquire voting shares of First State Bank of Odem, both in Odem, Texas.

Board of Governors of the Federal Reserve System, March 1, 2012.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2012–5349 Filed 3–5–12; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

[File No. 111 0170]

Fresenius Medical Care AG & Co. KGaA; Analysis of Agreement Containing Consent Orders To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before March 29, 2012.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Fresenius Liberty, File No. 111 0170'' on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/freseniuslibertyconsent,* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Lisa De Marchi Sleigh (202–326–2535), FTC, Bureau of Competition, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for February 28, 2012), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm.* A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before March 29, 2012. Write ''Fresenius Liberty, File No. 111 0170'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/freseniuslibertyconsent* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''Fresenius Liberty, File No. 111 0170'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before March 29, 2012. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

Analysis of Agreement Containing Consent Order To Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an Agreement Containing Consent Orders (''Consent Agreement'') from Fresenius Medical Care AG & Co. KGaA (''Fresenius''). The purpose of the Consent Agreement is to remedy the anticompetitive effects resulting from Fresenius's purchase of Liberty Dialysis Holdings, Inc. (''Liberty''). Under the terms of the Consent Agreement, Fresenius is required to divest 60 dialysis clinics and terminate one management contract in 43 geographic markets across the United States.

The Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement or make it final.

Pursuant to an agreement dated August 1, 2011, Fresenius proposes to acquire Liberty for approximately $2.1 billion. The Commission's complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by substantially lessening competition in 43 markets for the provision of outpatient dialysis services.

The Parties

Headquartered in Bad Homburg, Germany, Fresenius is the largest provider of outpatient dialysis services in the United States. Fresenius operates more than 1,800 outpatient dialysis clinics in all 50 states and the District of Columbia treating approximately 131,000 patients. In 2010, Fresenius's revenues were approximately $8 billion.

Liberty, headquartered in Mercer Island, Washington, is a privately held company and the third-largest provider of outpatient dialysis services in the United States. Liberty operates 260 dialysis centers, providing dialysis services to approximately 19,000 patients in 32 states and the District of Columbia.

Outpatient Dialysis Services

Outpatient dialysis services is the relevant product market in which to assess the effects of the proposed transaction. For patients suffering from End Stage Renal Disease (''ESRD''), dialysis treatments are a life-sustaining therapy that replaces the function of the kidneys by removing toxins and excess fluid from the blood. Most ESRD patients receive dialysis treatment three times per week in sessions lasting between three and five hours. Kidney transplantation is the only alternative to dialysis for ESRD patients. However, the wait-time for donor kidneys—during which ESRD patients must receive dialysis treatments—can exceed five years. Additionally, many ESRD patients are not viable transplant candidates. As a result, ESRD patients have no alternative to dialysis treatments. ESRD patients who are not hospitalized must obtain dialysis treatments from outpatient dialysis clinics.

Dialysis services are provided in local geographic markets limited by the distance ESRD patients are able to travel to receive treatments. ESRD patients are often very ill and suffer from multiple health problems, making travel further than 30 miles or 30 minutes very difficult. As a result, competition among dialysis clinics occurs at a local level, corresponding to metropolitan areas or subsets thereof. The exact contours of each market vary depending on traffic patterns, local geography, and the patient's proximity to the nearest center.

Entry into the outpatient dialysis services markets identified in the Commission's Complaint is not likely to occur in a timely manner at a level sufficient to deter or counteract the likely anticompetitive effects of the proposed transaction. The primary barrier to entry is the difficulty associated with locating nephrologists with established patient pools to serve as medical directors. By law, each dialysis clinic must have a nephrologist medical director. As a practical matter, medical directors are also essential to the success of a clinic because they are the primary source of referrals. The lack of available nephrologists with an established referral stream is a significant barrier to entry into each of the relevant markets. Beyond that, the attractiveness of entry is diminished where certain attributes, including a rapidly growing ESRD population, a favorable regulatory environment, average or below nursing and labor costs, and a low penetration of managed care are not present, as is the case in many of the geographic markets identified in the Commission's complaint.

Each of the geographic markets identified in the Complaint is highly concentrated. The proposed acquisition represents a merger-to-monopoly in 17 markets and would cause the number of providers to drop from three to two in 24 other markets. Additionally, in the remaining two markets identified in the Complaint, concentration is already very high and would increase significantly. In these two markets, the fourth market participant is small and does not meaningfully impact competition. Further, the evidence shows that health insurance companies and other private payors who pay for dialysis services used by their members benefit from direct competition between Fresenius and Liberty when negotiating rates charged by dialysis providers. The high post-acquisition concentration levels, along with the elimination of Fresenius's and Liberty's head-to-head competition in these markets suggest the proposed combination likely would result in higher prices and diminished service and quality for outpatient dialysis services in many geographic markets.

The Consent Agreement

The Consent Agreement remedies the proposed acquisition's anticompetitive effects in 43 markets where both Fresenius and Liberty operate dialysis clinics by requiring Fresenius to divest 54 outpatient dialysis clinics to Dialysis Newco, Inc. (d/b/a DSI Renal) (''New DSI''); divest one outpatient dialysis clinic to Alaska Investment Partners LLC (''AIP''), and five outpatient dialysis clinics to Dallas Renal Group (''DRG''). The Consent Agreement also requires Fresenius to terminate one management services agreement pursuant to which it manages an outpatient dialysis clinic on behalf of a third-party owner. As with the divestitures, termination of this management services agreement will ensure that this clinic remains a viable independent competitor.

As part of these divestitures, Fresenius is required to obtain the agreement of the medical directors affiliated with the divested clinics to continue providing physician services after the transfer of ownership to the

buyers. Similarly, the Consent Agreement requires Fresenius to obtain the consent of all lessors necessary to assign the leases for the real property associated with the divested clinics to the buyers. These provisions ensure that each buyer will have the assets necessary to operate the divested clinics in a competitive manner.

The Consent Agreement contains several additional provisions designed to ensure that the divestitures are successful. First, the Consent Agreement provides each buyer with the opportunity to interview and hire employees affiliated with the divested clinics and prevents Fresenius from offering these employees incentives to decline any buyer's offer of employment. This will ensure that each buyer has access to patient care and supervisory staff who are familiar with the clinics' patients and the local physicians. Second, the Consent Agreement prevents Fresenius from contracting with the medical directors (or their practice groups) affiliated with the divested clinics for three years. This provides each buyer with sufficient time to build goodwill and a working relationship with its medical directors before Fresenius can attempt to capitalize on its prior relationships in soliciting their services. Third, to ensure continuity of patient care and records as each buyer implements its quality care, billing, and supply systems, the Consent Agreement allows Fresenius to provide transition services for a period of 12 months. Firewalls and confidentiality agreements have been established to ensure that competitively sensitive information is not exchanged. Fourth, the Consent Agreement requires Fresenius to provide each buyer with a license to use Fresenius's policies, procedures, and medical protocols, as well as the option to obtain Fresenius's medical protocols, which will further enhance the buyer's ability to continue to care for patients in the clinics that will be divested. Finally, the Consent Agreement requires Fresenius to provide notice to the Commission prior to any acquisitions of dialysis clinics in the markets addressed by the Consent Agreement in order to ensure that subsequent acquisitions do not adversely impact competition in the markets at issue or undermine the remedial goals of the proposed order.

The Commission is satisfied that New DSI is a qualified acquirer of the majority of the divested assets. New DSI is currently a significant operator of dialysis clinics, having been formed to acquire the divested assets resulting from the 2011 DaVita/DSI investigation. The company was formed by Frazier Healthcare, a firm with a dedicated focus on healthcare, and New Enterprise Associates, the world's largest venture capital firm with over $10.5 billion under management.

Similarly, the Commission is satisfied that AIP is a qualified acquirer of divested assets in Alaska. AIP is a limited liability company wholly-owned by Dr. Mary Dittrich, the divested clinic's medical director, and Dr. William Dittrich. AIP has received financial support from Crystal Cascades LLC, an investment fund that manages $100 million.

Finally, the Commission is satisfied that DRG is a qualified acquirer of divested assets in the Dallas, Texas area. DRG is an integrated care provider in Dallas, Texas with nine nephrologists on staff and whose nephrologists currently serve as the medical directors of these divested assets. DRG holds the majority ownership interest in the five Liberty clinics in Dallas that would be divested, and has a strong reputation in the Dallas area.

The Commission has appointed Richard Shermer of R. Shermer & Co. as an Interim Monitor to oversee the transition service agreements, and the implementation of, and compliance with, the Consent Agreement. Mr. Shermer assists client companies undergoing ownership transitions, and has specific experience with transitions of outpatient dialysis clinics.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order or the Order to Maintain Assets, or to modify their terms in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2012–5331 Filed 3–5–12; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION

[File No. 111 0207]

Carpenter Technology Corporation and Latrobe Specialty Metals, Inc.; Analysis of Proposed Agreement Containing Consent Orders To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before March 29, 2012.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Carpenter Latrobe, File No. 111 0207'' on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/carpenterlatrobeconsent,* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Scott Reiter (202–326–2886), FTC, Bureau of Competition, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for February 29, 2012), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm.* A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before March 29, 2012. Write ''Carpenter Latrobe, File No. 111 0207'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission

Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/carpenterlatrobeconsent* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''Carpenter Latrobe, File No. 111 0207'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before March 29, 2012. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

Analysis of Agreement Containing Consent Order To Aid Public Comment

I. Introduction

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an Agreement Containing Consent Orders (''Consent Agreement'') with Carpenter Technology Corporation (''Carpenter''), Latrobe Specialty Metals, Inc. (''Latrobe''), and HHEP–Latrobe, L.P., which is designed to remedy the anticompetitive effects of Carpenter's proposed acquisition of Latrobe.

Pursuant to an Agreement and Plan of Merger dated June 20, 2011, Carpenter intends to acquire all of Latrobe's voting securities for approximately $410 million. Carpenter and Latrobe compete in the sale of specialty alloys used in the aerospace, energy, and other industries. The proposed acquisition would result in a merger to monopoly in the market for two of these specialty alloys: (1) MP159 and (2) MP35N used in aerospace applications (''Aerospace MP35N,'' and collectively, the ''MP Alloys''). The Commission's Complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the markets for each of the MP Alloys.

The proposed Consent Agreement remedies the alleged violations by replacing the lost competition in the relevant markets that would result from the acquisition. Under the terms of the Consent Agreement, Carpenter is required to divest assets related to the manufacture and sale of the MP Alloys to Eramet S.A. (''Eramet''). The Consent Agreement requires Carpenter to provide Eramet with all of the relevant equipment, licenses, and technical information necessary for Eramet to replace Latrobe as a competitor in the markets for the MP alloys. In addition, the Consent Agreement requires Carpenter to contract manufacture the MP Alloys for Eramet at cost until Eramet is able to produce and commercially sell these products on its own.

The proposed Consent Agreement has been placed on the public record for thirty days, and comments from interested persons have been requested. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make final the accompanying Decision and Order.

II. The Products and Structure of the Markets

The MP Alloys have unique physical characteristics that make them well suited for use in aerospace applications, and especially in aerospace engine fasteners. Purchasers of the MP Alloys are generally willing to consider overseas suppliers, although to avoid the cost of dual inventories for commercial and military customers, they typically require that suppliers be located in countries approved by Congress to supply materials for military purposes. For these reasons, the relevant markets in which to analyze the competitive effects of the proposed acquisition are the markets for MP159 and Aerospace MP35N manufactured in the United States and in foreign countries approved to supply materials for military purposes under the Defense Federal Acquisition Regulation System (''DFARS''). In these markets, Carpenter and Latrobe are the only options for U.S. consumers, and the proposed transaction would create a monopoly in both relevant markets.

III. Entry

Entry or expansion by other specialty alloy manufacturers is not likely to avert the anticompetitive impact of Carpenter's acquisition of Latrobe. The time and cost required to obtain the physical assets, expertise, and qualifications necessary to produce the MP Alloys are substantial, and far outweigh the potential profits from entry into these small markets.

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

IV. Effects of the Acquisition

The proposed acquisition likely would result in significant anticompetitive harm in the highly-concentrated relevant markets for each of the MP Alloys. Carpenter and Latrobe are the only competitors in these highly-concentrated markets. The acquisition will eliminate actual, direct, and substantial competition between Carpenter and Latrobe, and likely result in higher prices for both of the MP Alloys.

V. The Consent Agreement

The proposed Consent Agreement remedies the competitive concerns raised by the transaction by requiring the parties to divest assets related to the manufacture of the MP Alloys to Eramet. The terms required by the Consent Agreement will enable Eramet to effectively replace the competition in the MP Alloys markets lost as a result of the proposed acquisition.

Eramet is a global supplier of specialty alloys with an established sales and marketing network in the United States that will allow it to be immediately competitive in the relevant MP Alloys markets. Eramet is based in France, which is an approved foreign source country for U.S. military operations under DFARS. The proposed Consent Agreement requires Carpenter to provide Eramet with product licenses and the manufacturing technology necessary to manufacture the MP Alloys. This includes technical assistance from current Latrobe company designees, and confidential business information directly related to the manufacture of the MP Alloys. In addition, the Consent Agreement requires Carpenter to contract manufacture the MP Alloys for Eramet at cost until Eramet is able to produce and commercially sell these products on its own. The Commission has appointed James R. Bucci, who has over 35 years of experience in the specialty alloy industry, as the interim monitor to oversee the divestiture.

If after the public comment period the Commission determines that Eramet is not an acceptable acquirer of the assets to be divested, or that the manner of the divestitures is not acceptable, Carpenter must unwind the divestiture and divest the assets within 180 days of the date the Order becomes final to another Commission-approved acquirer. If Carpenter fails to divest the assets within the 180 days, the Commission may appoint a trustee to divest the relevant assets.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2012–5333 Filed 3–5–12; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0154; Docket 2012–0076; Sequence 11]

Federal Acquisition Regulation; Information Collection; Davis Bacon Act—Price Adjustment (Actual Method)

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning the Davis-Bacon Act price adjustment (actual method).

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before May 7, 2012.

ADDRESSES: Submit comments identified by Information Collection 9000–0154, Davis Bacon Act—Price Adjustment (Actual Method), by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by inputting ''Information Collection 9000–0154, Davis Bacon Act—Price Adjustment (Actual Method)'' under the heading ''Enter Keyword or ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''Information Collection 9000–0154, Davis Bacon Act—Price Adjustment (Actual Method).'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0154, Davis Bacon Act—Price Adjustment (Actual Method)'' on your attached document.

- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. Attn: Hada Flowers/IC 9000–0154, Davis Bacon Act—Price Adjustment (Actual Method).

Instructions: Please submit comments only and cite Information Collection 9000–0154, Davis Bacon Act—Price Adjustment (Actual Method), in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Loeb, Procurement Analyst, Federal Acquisition Policy Division, GSA, (202) 501–0650, or via email *Edward.loeb@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

Government contracting officers may include FAR clause 52.222–32, Davis-Bacon Act—Price Adjustment (Actual Method) in fixed-price solicitations and contracts, subject to the Davis-Bacon Act under certain conditions. The conditions are that the solicitation or contract contains option provisions to extend the term of the contract and the contracting officer determines that the most appropriate method to adjust the contract price at option exercise is to use a computation method based on the actual increase or decrease from a new or revised Department of Labor Davis-Bacon Act wage determination.

The clause requires that a contractor submit at the exercise of each option to extend the term of the contract, a statement of the amount claimed for incorporation of the most current wage determination by the Department of

Labor, and any relevant supporting data, including payroll records, that the contracting officer may reasonably require. The information is used by Government contracting officers to establish the contract price adjustment for the construction requirements of a contract, generally if the contract requirements are predominantly services subject to the Service Contract Act.

B. Annual Reporting Burden

Respondents: 842.
Responses per Respondent: 1.
Annual Responses: 842.
Hours per Response: 40.
Total Burden Hours: 33,680.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 9000–0154, Davis-Bacon Act—Price Adjustment (Actual Method), in all correspondence.

Dated: February 28, 2012

Laura Auletta,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2012–5322 Filed 3–5–12; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0163; Docket 2011–0076; Sequence 6]

Information Collection; Small Business Size Representation

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request for approval of a previously approved information collection requirement regarding small business size representation.

DATES: Submit comments on or before: May 7, 2012.

ADDRESSES: Submit comments identified by Information Collection 9000–0163, Small Business Size Representation, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by inputting ''Information Collection 9000–0163, Small Business Size Representation'' under the heading ''Enter Keyword or ID'' and selecting ''Search''. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 9000–0163, Small Business Size Representation''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0163, Small Business Size Representation'' on your attached document.

- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. Attn: Hada Flowers/IC 9000–0163, Small Business Size Representation.

Instructions: Please submit comments only and cite Information Collection 9000–0163, Small Business Size Representation, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Karlos Morgan, Procurement Analyst, Office of Governmentwide Acquisition Policy, GSA (202) 501–0044 or *karlos.morgan@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

Federal Acquisition Regulation (FAR) 19.301 and the FAR clause at 52.219–28, Post-Award Small Business Program Representation implement the Small Business Administration (SBA) Final Rule (71 FR 66434), Small Business Size Regulations; Size for Purposes of Governmentwide Acquisition Contracts, Multiple Award Schedule Contracts and Other Long-Term Contracts; 8(a) Business Development/Small Disadvantaged Business; Business Status Determinations. FAR 19.301 and the FAR clause at 52.219–28, requires that contractors represent size status by updating their representations and certifications at the prime contract level in the Online Representations and Certifications Application (ORCA), and notify the contracting office that it has made the required representation.

The purpose of implementing small business rerepresentation in the FAR is to ensure that small business size status is accurately represented and reported over the life of long-term contracts. The FAR also provides for provisions designed to ensure more accurate reporting of size status for contracts that are novated, merged or acquired by another business. This information is used by the SBA, Congress, Federal agencies and the general public for various reasons such as determining if agencies are meeting statutory goals, set-aside determinations, and market research.

B. Annual Reporting Burden

Respondents: 10,000.
Responses per Respondent: 1.
Hours per Response: 0.5.
Total Burden Hours: 5,000.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 9000–0163, Small Business Size Rerepresentation, in all correspondence.

Dated: February 28, 2012.

Laura Auletta,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2012–5323 Filed 3–5–12; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Pandemic Influenza Vaccines—Amendment

ACTION: Notice of Amendment to the March 1, 2010 Republished Declaration under the Public Readiness and Emergency Preparedness Act.

SUMMARY: Amendment to declaration issued on March 1, 2010 (75 FR 10268) pursuant to section 319F–3 of the Public Health Service Act (42 U.S.C. 247d–6d) to extend the effective time period, reformat the declaration, modify or clarify terms of the declaration and republish the declaration in its entirety, as amended.

DATES: The amendment of the republished declaration issued on March 1, 2010 is effective as of February 29, 2012.

FOR FURTHER INFORMATION CONTACT: Nicole Lurie, MD, MSPH, Assistant

Secretary for Preparedness and Response, Office of the Secretary, Department of Health and Human Services, 200 Independence Avenue SW., Washington, DC 20201, Telephone (202) 205–2882 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The Public Readiness and Emergency Preparedness Act (''PREP Act'') authorizes the Secretary of Health and Human Services (''the Secretary'') to issue a declaration to provide liability immunity to certain individuals and entities (''Covered Persons'') against any claim of loss caused by, arising out of, relating to, or resulting from the administration or use of medical countermeasures (''Covered Countermeasures''), except for claims that meet the PREP Act's definition of willful misconduct. Using this authority, the Secretary issued a declaration for pandemic influenza vaccines, which has been amended a number of times. The original pandemic influenza vaccine declaration was published on January 26, 2007,[1] and was amended on November 21, 2007,[2] October 17, 2008,[3] June 15, 2009,[4] September 28, 2009[5] and March 1, 2010.[6] The March 1, 2010 amendment is effective through February 28, 2012. The original declaration and its amendments, as well as additional information about the PREP Act and the Secretary's declarations for other medical countermeasures, can be found here: *http://www.phe.gov/Preparedness/legal/prepact/Pages/default.aspx.*

The major actions taken by this pandemic influenza vaccine declaration are the following: (1) Changing the format to make the declaration easier for readers to follow; (2) clarifying that liability immunity is provided not only to vaccines and adjuvants, but also to vaccine components and constituent materials used as part of a covered vaccine; (3) explicitly extending liability immunity to devices and their constituent components used in the administration of vaccines, e.g., needles (which provides for uniform coverage for devices, regardless of whether they are manufactured or packaged with the vaccine or combined later for administration by a healthcare provider); (4) clarifying that liability immunity extends to recommended activities related to any Federal agreements including e.g., clinical trials agreements by adding the term ''other Federal agreements'' to the clause describing the types of federal agreements for which immunity is in effect; (5) narrowing the definition of ''administration'' to cover ''slip and fall'' claims only to the extent they are directly tied to the operation of a countermeasure program; and (6) extending the time period for which liability immunity is in effect for the Covered Countermeasures to December 31, 2015. Other modifications and clarifications are also made, as more fully explained below.

The declaration is republished in full. We explain both the substantive and format changes in this supplementary section.

The PREP Act was enacted on December 30, 2005 as Public Law 109–148, Division C, section 2, 119 Stat 2818. It amended the Public Health Service (''PHS'') Act, adding section 319F–3, which addresses liability immunity, and section 319F–4, which creates a compensation program. These sections are codified in the U.S. Code as 42 U.S.C. 247d-6d and 42 U.S.C. 247d–6e, respectively. Unless otherwise noted, all statutory citations below are to the U.S. Code.

Section I, Determination of Public Health Emergency or Credible Risk of Future Public Health Emergency

Before issuing a declaration under the PREP Act, the Secretary is required to determine that a disease or other health condition or threat to health constitutes a public health emergency or that there is a credible risk that the disease, condition, or threat may in the future constitute such an emergency.[7] This determination is separate and apart from a declaration issued by the Secretary under section 319 of the PHS Act, 42 U.S.C. 247d, that a disease or disorder presents a public health emergency or that a public health emergency, including significant outbreaks of infectious diseases or bioterrorist attacks, otherwise exists, or other declarations or determinations made under other authorities of the Secretary. In previous PREP Act declarations (''declaration'' or ''declarations''), this determination appeared in the declarations' introduction as the conclusion to the ''whereas'' clauses. The determination is now stated in the first section of the declaration. This change was made to improve readability and is not intended to have any substantive legal effect.

In addition, we made a substantive change to the determination. The determination made in the ''whereas'' clauses in the March 1, 2010 declaration stated that the Secretary ''determined there is a credible risk that the spread of pandemic influenza A viruses and those with pandemic potential and resulting disease does or could constitute a public health emergency.'' The Secretary is amending this determination: (1) To substitute ''may in the future'' for ''could'' in order to be consistent with the language used in the PREP Act[8]; and (2) to remove the words ''the spread of'' and ''does or'' to clarify that the 2009 H1N1 Influenza virus and resulting disease are not currently causing a public health emergency. As discussed further in section VI of this supplementary information section, we also changed ''and those'' to ''and influenza A viruses with'' for clarity. We also specified that the viruses could potentially cause an influenza pandemic . Thus, in this amended declaration, the Secretary determines ''that there is a credible risk that pandemic influenza A viruses and influenza A viruses with pandemic potential could cause an influenza pandemic with resulting disease that may in the future constitute a public health emergency.''

Section II, Factors Considered

In deciding whether and under what circumstances to issue a declaration with respect to a Covered Countermeasure, the Secretary must consider the desirability of encouraging the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of the countermeasure.[9] We previously stated these considerations in the introductory ''whereas'' clauses to the declaration. The declaration now states these considerations in section II. We made this change to improve readability and do not intend that it have any substantive legal effect.

Section III, Recommended Activities

The Secretary must recommend the activities for which the PREP Act's liability immunity is in effect. These activities may include, under conditions as the Secretary may specify, the manufacture, testing, development, distribution, administration, or use of one or more Covered Countermeasures

[1] 72 FR 4710 (2007).
[2] 72 FR 67731 (2007).
[3] 73 FR 61871 (2008).
[4] 74 FR 30294 (2009).
[5] 74 FR 51153 (2009).
[6] 75 FR 10268 (2010).
[7] 42 U.S.C. 247d–6d(b)(1).
[8] See 42 U.S.C. 247d–6d(b)(1).
[9] 42 U.S.C. 247d–6d(b)(6).

(''Recommended Activities'').[10] In previous declarations, we included the Recommended Activities in the introductory ''whereas'' clauses to the declaration. The declaration now states them in section III. We made this change to improve readability and do not intend that it have any substantive legal effect.

Section IV, Liability Immunity

The Secretary must also state that liability protections available under the PREP Act are in effect with respect to the Recommended Activities.[11] These liability protections provide that, ''[s]ubject to other provisions of [the PREP Act], a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or use by an individual of a covered countermeasure if a declaration * * * has been issued with respect to such countermeasure.'' [12] In previous declarations, we included this statement in section I of the declaration, entitled ''Covered Countermeasures.'' The declaration now makes the statement that liability immunity is in effect for Recommended Activities in a separate section IV. We made this change to improve readability and do not intend that it have any substantive legal effect.

Section V, Covered Persons

The PREP Act's liability immunity applies to ''Covered Persons'' with respect to administration or use of a Covered Countermeasure. The term ''Covered Persons'' has a specific meaning, and is defined in the PREP Act to include manufacturers, distributors, program planners, and qualified persons, and their officials, agents, and employees, and the United States.[13] The PREP Act further defines the terms ''manufacturer,'' ''distributor,'' ''program planner,'' and ''qualified person'' as described below.[14]

A *manufacturer* includes a contractor or subcontractor of a manufacturer; a supplier or licenser of any product, intellectual property, service, research tool or component or other article used in the design, development, clinical testing, investigation or manufacturing of a Covered Countermeasure; and any or all of the parents, subsidiaries, affiliates, successors, and assigns of a manufacturer; [15]

A *distributor* means a person or entity engaged in the distribution of drug, biologics, or devices, including but not limited to: manufacturers; repackers; common carriers; contract carriers; air carriers; own-label distributors; private-label distributors; jobbers; brokers; warehouses and wholesale drug warehouses; independent wholesale drug traders; and retail pharmacies; [16]

A *program planner* means a State or local government, including an Indian Tribe; a person employed by the State or local government; or other person who supervises or administers a program with respect to the administration, dispensing, distribution, provision, or use of a Covered Countermeasure, including a person who establishes requirements, provides policy guidance, or supplies technical or scientific advice or assistance or provides a facility to administer or use a Covered Countermeasure in accordance with the Secretary's declaration; [17] Under this definition, a private sector employer or community group or other ''person'' can be a program planner when it carries out the described activities.

A *qualified person* means a licensed health professional or other individual who is authorized to prescribe, administer, or dispense Covered Countermeasures under the law of the State in which the countermeasure was prescribed, administered, or dispensed; or a person within a category of persons identified as qualified in the Secretary's declaration.[18] Under this definition, the Secretary can describe in the declaration other qualified persons, such as volunteers, who are Covered Persons. Section V describes other qualified persons covered by this declaration.

The PREP Act also defines the word ''person'' as used in the Act: a *person* includes an individual, partnership, corporation, association, entity, or public or private corporation, including a Federal, State, or local government agency or department; [19]

The provisions regarding Covered Persons previously appeared as a definition in section X, ''Definitions'' and as section VI, ''Other Qualified Persons.'' We combined these two provisions into a new section V, ''Covered Persons'' and added ''to perform an activity'' to the description of ''Other Qualified Persons'' for clarity. We made these changes to improve readability and clarity and do not intend them to have any substantive legal effect.

Section VI, Covered Countermeasures

As noted above, section III describes the Secretary's Recommended Activities for which liability immunity is in effect. This section identifies the countermeasures for which the Secretary has recommended such activities. The PREP Act states that a ''Covered Countermeasure'' must be: a ''qualified pandemic or epidemic product,'' or a ''security countermeasure,'' as described immediately below; or a drug, biological product or device authorized for emergency use in accordance with section 564 of the Federal Food, Drug, and Cosmetic Act (FD&C Act).[20]

A *qualified pandemic or epidemic product* means a drug or device, as defined in the FD&C Act or a biological product, as defined in the PHS Act [21], that is: Manufactured, used, designed, developed, modified, licensed or procured to diagnose, mitigate, prevent, treat, or cure a pandemic or epidemic or limit the harm such a pandemic or epidemic might otherwise cause; or manufactured, used, designed, developed, modified, licensed, or procured to diagnose, mitigate, prevent, treat, or cure a serious or life-threatening disease or condition caused by such a drug, biological product or device.[22]

A *security countermeasure* is a drug or device, as defined in the FD&C Act or a biological product, as defined in the PHS Act [23] that: The Secretary determines to be a priority to diagnose, mitigate, prevent or treat harm from any biological, chemical, radiological, or nuclear agent identified as a material threat by the Secretary of Homeland Security, or to diagnose, mitigate, prevent, or treat harm from a condition that may result in adverse health consequences or death and may be caused by administering a drug, biological product, or device against such an agent; and is determined by the Secretary of Health and Human Services to be a necessary countermeasure to protect public health.[24]

To be a Covered Countermeasure, qualified pandemic or epidemic products and security countermeasures also must be approved or cleared under the FD&C Act; [25] licensed under the PHS Act; [26] or authorized for emergency use under the FD&C Act.[27] In addition, a qualified pandemic or epidemic product may be a Covered Countermeasure when it is exempted under the FD&C Act for use as an investigational drug or device [28] that is the object of research for

[10] 42 U.S.C. 247d–6d(b)(1).
[11] 42 U.S.C. 247d–6d(b)(1).
[12] 42 U.S.C. 247d–6d(a)(1).
[13] 42 U.S.C. 247d–6d (i)(2).
[14] 42 U.S.C. 247d–6d(i).
[15] 42 U.S.C. 247d–6d(i)(4).
[16] 42 U.S.C. 247d–6d(i)(3).
[17] 42 U.S.C. 247d–6d(i)(6).
[18] 42 U.S.C. 247d–6d(i)(8).
[19] 42 U.S.C. 247d–6d(i)(5).
[20] 42 U.S.C. 247d–6d(i)(1). Section 564 of the FD&C Act may be found at 21 U.S.C. 360bbb–3.
[21] 21 U.S.C. 321(g)(1), (h); 42 U.S.C. 262(i)
[22] 42 U.S.C. 247d–6d(i)(1)(A), (i)(7).
[23] 21 U.S.C. 321(g)(1), (h);42 U.S.C. 262(i).
[24] 42 U.S.C. 247d–6d(i)(1)(B),(c)(1)(B).
[25] 21 U.S.C. 301 et seq.
[26] 42 U.S.C. 262.
[27] 21 U.S.C. 360bbb–3.
[28] 21 U.S.C. 355(i), 360j(g).

possible use for diagnosis, mitigation, prevention, treatment, cure or limit harm of a pandemic or epidemic or serious or life-threatening condition caused by such a drug or device. A security countermeasure also may be a Covered Countermeasure if it may reasonably be determined to qualify for approval or licensing within eight years after the Department's determination that procurement of the countermeasure is appropriate.

Provisions regarding Covered Countermeasures previously appeared in section I of the declaration, ''Covered Countermeasures,'' and included not only a description of the Covered Countermeasure but also additional conditions characterizing countermeasures. We have simplified this section so that it now only identifies the Covered Countermeasures. We have relocated the other conditions previously included in the ''Covered Countermeasure'' section to a new section, ''Limitations on Distribution,'' to improve readability. We do not intend for this change to have any substantive legal effect.

We have also revised the definition of the Covered Countermeasure. Previously, the declaration included in section X, ''Definitions,'' a definition of the term ''Pandemic influenza A viruses and those with pandemic potential.'' In this declaration, the Secretary defines the Covered Countermeasures as ''vaccines against pandemic influenza A viruses and influenza A viruses with pandemic potential.'' We replaced the phrase ''and those'' with ''and influenza A'' before ''viruses with pandemic potential'' to clarify that the declaration covers vaccines only for influenza A viruses that have pandemic potential, not all influenza viruses that have pandemic potential. This change is made throughout the declaration wherever the phrase is used. We also changed ''and any associated adjuvants'' to ''and all components and constituent materials of these vaccines'' to clarify the Secretary's intent that all components and constituent materials, such as preservatives, diluents, antibiotics as well as adjuvants are covered as part of the vaccine. This change does not negatively affect the Secretary's view that the manufacturer of an adjuvant used in a vaccine qualifying as a covered countermeasure would qualify as a manufacturer under this declaration and would be afforded the liability immunity provided by the PREP Act. We also added ''and all devices and their constituent components used in the administration of these vaccines'' to clarify that coverage extends to these devices when used in the administration of these vaccines. Devices such as needles, syringes, and aerosols, and their components and constituent materials are an integral part of the administration of the vaccine. They are covered regardless of whether they are manufactured or packaged with the vaccine, or combined later for administration by a healthcare provider. Finally, we added a statement referencing the statutory definitions of Covered Countermeasures to indicate that certain statutory requirements must also be met. These statutory requirements are discussed in the first two paragraphs of this section of the preamble.

Finally, we moved language previously included in section VIII, ''Category of Disease, Health Condition, or Threat'' and modified previous section VI, ''Covered Countermeasures,'' to provide that vaccines (including any components and constituent materials and devices used to administer vaccines) covered under the National Vaccine Injury Compensation Program are not covered countermeasures under this declaration. This language was moved from previous section X to section VI to clarify the Secretary's determination concerning coverage of vaccines under this declaration in the event that a strain of influenza meeting the requirements set forth in section VIII is included in vaccines covered by the National Vaccine Injury Compensation Program. In such circumstances, such vaccines (those covered by the National Vaccine Injury Compensation Program) would be automatically excluded from this declaration. However, to the extent that the same strain of influenza is included in other vaccines that are not covered by the National Vaccine Injury Compensation Program, such vaccines could still qualify as covered countermeasures under this declaration (assuming they meet other requirements set forth in this declaration, including the description of the disease, health condition, or threat set forth in section VIII). Currently, the only types of influenza vaccines covered by the National Vaccine Injury Compensation Program are trivalent influenza vaccines. Thus, such vaccines are not covered by this declaration. This modification is meant to clarify that potentially one formulation of influenza vaccines (e.g., monovalent or quadrivalent vaccines) could qualify as covered countermeasures under this declaration (if such vaccines were not covered under the National Vaccine Injury Compensation Program) and, at the same time, another influenza vaccine containing the exact same strain of influenza virus (e.g., a trivalent influenza vaccine) could be covered by the National Vaccine Injury Compensation Program (and excluded from coverage under this declaration).

Section VII, Limitations on Distribution

The Secretary may specify that liability immunity is in effect only to Covered Countermeasures obtained through a particular means of distribution.[29] These limitations on distribution previously appeared in section I, ''Covered Countermeasures,'' and section X, ''Definitions.'' We now state the limitations in a separate section and combine them with relevant definitions for improved readability. The declaration states that liability immunity is afforded to Covered Persons for Recommended Activities related to:

(a) Present or future Federal contracts, cooperative agreements, grants, other transactions, interagency agreements, or memoranda of understanding or other Federal agreements; or

(b) Activities authorized in accordance with the public health and medical response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute or dispense the pandemic countermeasures following a declaration of an emergency.

For governmental program planners only, liability immunity is afforded only to the extent they obtain Covered Countermeasures through voluntary means, such as (1) donation; (2) commercial sale; (3) deployment of Covered Countermeasures from Federal stockpiles; or (4) deployment of donated, purchased, or otherwise voluntarily obtained Covered Countermeasures from State, local, or private stockpiles.

In regard to (a), we added the phrase ''other transactions'', which may be used for some Covered Countermeasure activities,[30] and the phrase ''or other Federal agreements'' to clarify that the provision is intended to cover all types of Federal agreements. We changed the conjunction ''and'' to ''or'' between (a) and (b) to clarify that immunity is available under either of these circumstances; the activities do not have to both relate to a Federal award or agreement and be used in a public health and medical response in order for immunity to apply. The conjunction ''and'' used in previous declarations was a drafting error; the Secretary's intent in those previous declarations has been the meaning conferred by the term

[29] 42 U.S.C. 247d–6d(a)(5), (b)(2)(E).

[30] See, e.g., 42 U.S.C. 247d–7d(c)(5).

''or''. Provisions (a) and (b) are intended to afford immunity to Federal government supported activities that precede a public health emergency and to activities in accordance with all Authorities Having Jurisdiction during a declared public health emergency.

In regard to (b), the meaning of the terms ''Authority Having Jurisdiction'' and ''Declaration of an Emergency'' are unchanged.

Finally, we slightly modified the last limitation by deleting extraneous statutory references and other language and by replacing the final sentence with the word ''only'' after ''planners'' to improve readability. We do not intend for the changes to this provision to alter its substantive legal effect. As stated in the ''whereas'' clauses of the March 1, 2010 declaration, this limitation on distribution is intended to deter program planners that are government entities from seizing privately held stockpiles of Covered Countermeasures. It does not apply to any other Covered Persons, including other program planners who are not government entities.

Section VIII, Category of Disease, Health Condition, or Threat

The Secretary must identify, for each Covered Countermeasure, the categories of diseases, health conditions, or threats to health for which the Secretary recommends the administration or use of the countermeasure.[31] This information previously appeared in section II, ''Category of Disease,'' and in section X, ''Definitions.'' These provisions now are combined into a single section to improve readability. In addition, we replaced the description of the influenza A virus as it previously appeared in section II with the term ''pandemic influenza A viruses and influenza A viruses with pandemic potential'' and then followed that term with the definition that previously appeared in section X. We made these changes to remove redundancy and improve consistency and do not intend for it to alter the substantive legal effect. Finally, we removed the phrase ''except those included in seasonal influenza vaccines and/or covered under the National Vaccine Injury Compensation Program'' from this section and instead included similar language in section VI, for clarity as described above.

Section IX, Administration of Covered Countermeasures

The PREP Act does not explicitly define the term ''administration'' but does assign the Secretary the responsibility to provide relevant conditions in the declaration. This definition previously appeared in section X, ''Definitions.'' We have moved it to a separate section to improve readability. The Secretary has also narrowed the definition of ''administration'' that was previously provided in the declaration. The declaration previously defined the term ''administration'' to include physical provision of a Covered Countermeasure, as well as management and operation of systems and locations at which Covered Countermeasures may be provided to recipients:

> Administration of a Covered Countermeasure: As used in section 319F–3(a)(2)(B) of the Act includes, but is not limited to, public and private delivery, distribution, and dispensing activities relating to physical administration of the countermeasures to recipients, management and operation of delivery systems, and management and operation of distribution and dispensing locations.

The definition has been revised as follows:

> Administration of a Covered Countermeasure: As used in section 319F–3(a)(2)(B) of the Act, means physical provision of the countermeasures to recipients, or activities and decisions directly relating to public and private delivery, distribution and dispensing of the countermeasures to recipients; management and operation of countermeasure programs; or management and operation of locations for purpose of distributing and dispensing countermeasures.

As clarified, the definition of ''administration'' extends only to physical provision of a countermeasure to a recipient, such as vaccination or handing drugs to patients, and to activities related to management and operation of programs and locations for providing countermeasures to recipients, such as decisions and actions involving security and queuing, but only insofar as those activities directly relate to the countermeasure activities. Claims for which Covered Persons are provided immunity under the Act are losses caused by, arising out of, relating to, or resulting from the administration to or use by an individual of a Covered Countermeasure consistent with the terms of a declaration issued under the Act.[32] Under the Secretary's definition, these liability claims are precluded if the claims allege an injury caused by physical provision of a countermeasure to a recipient, or if the claims are directly due to conditions of delivery, distribution, dispensing, or management and operation of countermeasure programs at distribution and dispensing sites.

Thus, it is the Secretary's interpretation that, when a declaration is in effect, the Act precludes, for example, liability claims alleging negligence by a manufacturer in creating a vaccine, or negligence by a health care provider in prescribing the wrong dose, absent willful misconduct. Likewise, the Act precludes a liability claim relating to the management and operation of a countermeasure distribution program or site, such as a slip-and-fall injury or vehicle collision by a recipient receiving a countermeasure at a retail store serving as an administration or dispensing location that alleges, for example, lax security or chaotic crowd control. However, a liability claim alleging an injury occurring at the site that was not directly related to the countermeasure activities is not covered, such as a slip and fall with no direct connection to the countermeasure's administration or use. In each case, whether immunity is applicable will depend on the particular facts and circumstances.

Section X, Population

The Secretary must identify, for each Covered Countermeasure specified in a declaration, the population or populations of individuals for which liability immunity is in effect with respect to administration or use of the countermeasure.[33] This section explains which individuals should use the countermeasure or to whom the countermeasure should be administered—in short, those who should be vaccinated or take a drug or other countermeasure. These provisions previously appeared in section IV, ''Population,'' and section X, ''Definitions,'' stating that the population included any person who used or was administered a Covered Countermeasure: In a clinical trial conducted or supported by the Federal Government; in a pre-pandemic phase, or in a pandemic phase. We have amended the declaration to provide that the population includes any individual who uses or who is administered a Covered Countermeasure in accordance with the declaration. We believe this broad statement accurately encompasses all of the previously listed populations and ensures that no populations that use or are administered the Covered Countermeasures in accordance with the terms of the declaration are omitted, including those who use or are administered the Covered Countermeasures in a post pandemic

[31] 42 U.S.C. 247d–6d(b)(2)(A).

[32] 42 U.S.C. 247d–6d(a).

[33] 42 U.S.C. 247d–6d(b)(2)(C).

phase during the disposition period, discussed below in section XII. We deleted definitions of ''pre-pandemic phase'' and ''pandemic phase'' as those descriptions and distinctions did not prove to be useful or necessary in practice. These definitions presumed the first outbreak would be outside of the United States, which will not necessarily be the case.

In addition, the PREP Act specifies that liability immunity is afforded: (1) To manufacturers and distributors without regard to whether the countermeasure is used by or administered to this population; and (2) to program planners and qualified persons when the countermeasure is either used by or administered to this population or the program planner or qualified person reasonably could have believed the recipient was in this population.[34] We included these statutory conditions in the declaration for clarity.

Section XI, Geographic Area

The Secretary must identify, for each Covered Countermeasure specified in the declaration, the geographic area or areas for which liability immunity is in effect with respect to administration or use of the countermeasure, including, as appropriate, whether the declaration applies only to individuals physically present in the area or, in addition, applies to individuals who have a described connection to the area.[35] This section previously appeared in section V, ''Geographic Area.''

In addition, the PREP Act specifies that liability immunity is afforded: (1) To manufacturers and distributors without regard to whether the countermeasure is used by or administered to individuals in the geographic areas; and (2) to program planners and qualified persons when the countermeasure is either used or administered in the geographic areas or the program planner or qualified person reasonably could have believed the countermeasure was used or administered in the areas.[36] We included these statutory conditions in the declaration for clarity.

Section XII, Effective Time Period

The Secretary must identify, for each Covered Countermeasure, the period or periods during which liability immunity is in effect, designated by dates, milestones, or other description of events, including factors specified in the PREP Act.[37] This section previously appeared as section III, ''Effective Time Period.''

The declaration is amended to clarify when liability takes effect for different distribution methods, and to extend the period for which liability immunity is in effect. Rather than referring to the September 28, 2009 declaration as defining when the effective period commenced, we have incorporated language from that declaration. We also clarified that for any Covered Countermeasure that becomes covered under the National Vaccine Injury Compensation Program after the declaration is issued, liability immunity expires under the PREP Act immediately upon such coverage. We made these changes for clarity and do not intend them to have legal effect.

Section XIII, Additional Time Period of Coverage

The Secretary must specify a date after the ending date of the effective period of the declaration that is reasonable for manufacturers to arrange for disposition of the Covered Countermeasure, including return of the product to the manufacturer, and for other Covered Persons to take appropriate actions to limit administration or use of the Covered Countermeasure.[38] In addition, the PREP Act specifies that for Covered Countermeasures that are subject to a declaration at the time they are obtained for the Strategic National Stockpile under 42 U.S.C. 247d–6b(a), the effective period of the declaration extends through the time the countermeasure is used or administered pursuant to a distribution or release from the Stockpile. Liability immunity under the provisions of the PREP Act and the conditions of the declaration continues during these additional time periods. Thus, liability immunity is afforded during the ''Effective Time Period,'' described under XII of the declaration, plus the ''Additional Time Period'' described under section XIII of the declaration. The provision for additional time periods previously appeared as section VII, ''Additional Time Periods of Coverage After Expiration of the Declaration''. The provision is amended to clarify the statutory provision that extended coverage applies to any products obtained for the Strategic National Stockpile during the effective period of the declaration. We included the statutory provision for clarity.

Section XIV, Countermeasures Injury Compensation Program

Section 319F–4 of the PREP Act authorizes a Countermeasures Injury Compensation Program (CICP) to provide benefits to eligible individuals who sustain a serious physical injury or die as a direct result of the administration or use of a Covered Countermeasure.[39] Compensation under the CICP for an injury directly caused by a Covered Countermeasure is based on the requirements set forth in this declaration, the administrative rules for the Program,[40] and the statute.[41] To show direct causation between a Covered Countermeasure and a serious physical injury, the statute requires ''compelling, reliable, valid, medical and scientific evidence.''[42] The administrative rules for the Program further explain the necessary requirements for eligibility under the CICP. Please note that, by statute, requirements for compensation under the CICP may not always align with the requirements for liability immunity provided under the PREP Act. This section previously appeared as section VIII, ''Compensation Fund.'' We have added language to explain the type of injury and standard of evidence needed to be considered for compensation under the CICP. We included this information for clarity.

Section XV, Amendments

The Secretary may amend any portion of a declaration through publication in the **Federal Register**.[43] This section previously appeared in section IX, ''Amendments.'' The section has been updated to reflect that this declaration amends the prior March 1, 2010 declaration and that the declaration incorporates all prior amendments.

Deleted Sections

The prior declaration contained a definitions section. These definitions have been incorporated into the relevant sections of the declaration as noted above, and modified or deleted where indicated above.

An appendix previously appeared in the declaration that listed Federal government contracts for research, development, and procurement of Covered Countermeasures. We deleted this appendix to clarify that liability immunity under the provisions of the PREP Act and terms of the declaration is not limited to the contracts listed in

[34] 42 U.S.C. 247d–6d(a)(4).

[35] 42 U.S.C. 247d–6d(b)(2)(D).

[36] 42 U.S.C. 247d–6d(a)(4).

[37] 42 U.S.C. 246d–6d(b)(2)(B), (b)(6).

[38] 42 U.S.C. 247d–6d(b)(3).

[39] 42 U.S.C. 247d–6e.

[40] 42 CFR Part 110.

[41] 42 U.S.C.247d–6e.

[42] 42 U.S.C.247d–6e(b)(4).

[43] 42 U.S.C. 247d–6d(b)(4).

the appendix. Coverage is available for any award or agreement that meets the description provided in section I of the declaration. In addition, deleting the appendix relieves the Department of the need to periodically update the appendix.

We made these deletions for clarity and do not intend them to have legal effect.

Republished Declaration

Declaration, as Amended, for Public Readiness and Emergency Preparedness Act Coverage for Vaccines Against Pandemic Influenza A Viruses and Influenza A Viruses With Pandemic Potential

This declaration amends and republishes the March 1, 2010 Republished Declaration, as Amended, for coverage under the Public Readiness and Emergency Preparedness (''PREP'') Act for Pandemic Influenza Vaccines, 42 U.S.C. 247d–6d, 247d–6e. To the extent any term of the March 1, 2010 Republished Declaration is inconsistent with any provision of this Republished Declaration, the terms of this Republished Declaration are controlling.

I. Determination of Public Health Emergency or Credible Risk of Future Public Health Emergency

42 U.S.C. 247d–6d(b)(1)

I have determined that there is a credible risk that pandemic influenza A viruses and influenza A viruses with pandemic potential could cause an influenza pandemic with resulting disease that may in the future constitute a public health emergency.

II. Factors Considered

42 U.S.C. 247d–6d(b)(6)

I have considered the desirability of encouraging the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of the Covered Countermeasures.

III. Recommended Activities

42 U.S.C. 247d–6d(b)(1)

I recommend, under the conditions stated in this declaration, the manufacture, testing, development, distribution, administration, or use of the Covered Countermeasures.

IV. Liability Immunity

42 U.S.C. 247d–6d(a), 247d–6d(b)(1)

Liability immunity as prescribed in the PREP Act and conditions stated in this declaration is in effect for the Recommended Activities described in section III.

V. Covered Persons

42 U.S.C. 247d–6d(i)(2),(3),(4),(6),(8)(A) and (B)

Covered Persons who are afforded liability immunity under this declaration are ''manufacturers,'' ''distributors,'' ''program planners,'' ''qualified persons,'' and their officials, agents, and employees, as those terms are defined in the PREP Act, and the United States.

In addition, I have determined that the following additional persons are qualified persons:

(a) Any person authorized in accordance with the public health and medical emergency response of the Authority Having Jurisdiction, as described in section VII below, to prescribe, administer, deliver, distribute or dispense the Covered Countermeasures, and their officials, agents, employees, contractors and volunteers, following a declaration of an emergency;

(b) Any person authorized to prescribe, administer, or dispense the Covered Countermeasures or who is otherwise authorized to perform an activity under an Emergency Use Authorization in accordance with section 564 of the Federal Food, Drug, and Cosmetic Act (FD&C Act).

VI. Covered Countermeasures

42 U.S.C. 247d–6b(c)(1)(B), 42 U.S.C. 247d–6d(i)(1) and (7)

Covered Countermeasures are vaccines against pandemic influenza A viruses and influenza A viruses with pandemic potential, all components and constituent materials of these vaccines, and all devices and their constituent components used in the administration of these vaccines, except that influenza A vaccines and their associated components, constituent materials and devices covered under the National Vaccine Injury Compensation Program are not Covered Countermeasures.

Covered Countermeasures must be ''qualified pandemic or epidemic products,'' or ''security countermeasures,'' or drugs, biological products, or devices authorized for emergency use, as those terms are defined in the PREP Act, the FD&C Act, and the Public Health Service Act.

VII. Limitations on Distribution

42 U.S.C. 247d–6d(a)(5) and (b)(2)(E)

I have determined that liability immunity is afforded to Covered Persons only for Recommended Activities involving Covered Countermeasures that are related to:

(a) Present or future Federal contracts, cooperative agreements, grants, other transactions, interagency agreements, memoranda of understanding, or other Federal agreements;

or

(b) Activities authorized in accordance with the public health and medical response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute or dispense the Covered Countermeasures following a declaration of an emergency.

i. The Authority Having Jurisdiction means the public agency or its delegate that has legal responsibility and authority for responding to an incident, based on political or geographical (e.g., city, county, Tribal, State, or Federal boundary lines) or functional (e.g., law enforcement, public health) range or sphere of authority.

ii. A declaration of emergency means any declaration by any authorized local, regional, State, or Federal official of an emergency specific to events that indicate an immediate need to administer and use the Covered Countermeasures, with the exception of a Federal declaration in support of an emergency use authorization under section 564 of the FD&C Act unless such declaration specifies otherwise;

I have also determined that for governmental program planners only, liability immunity is afforded only to the extent such program planners obtain Covered Countermeasures through voluntary means, such as (1) donation; (2) commercial sale; (3) deployment of Covered Countermeasures from Federal stockpiles; or (4) deployment of donated, purchased, or otherwise voluntarily obtained Covered Countermeasures from State, local, or private stockpiles.

VIII. Category of Disease, Health Condition, or Threat

42 U.S.C. 247d–6d(b)(2)(A)

The category of disease, health condition, or threat for which I recommend the administration or use of the Covered Countermeasures is the threat of or actual human influenza that results from the infection of humans following exposure to pandemic influenza A viruses or influenza A viruses with pandemic potential.

(a) Pandemic influenza A viruses and influenza A viruses with pandemic potential mean: animal and/or human influenza A viruses that are circulating in wild birds and/or domestic animals that cause or have significant potential to cause sporadic or ongoing human infections, or historically have caused pandemics in humans, or have mutated to cause pandemics in humans, and for which the majority of the population is immunologically naïve.

(b)

IX. Administration of Covered Countermeasures

42 U.S.C. 247d–6d(a)(2)(B)

Administration of the Covered Countermeasure means physical provision of the countermeasures to recipients, or activities and decisions directly relating to public and private delivery, distribution and dispensing of the countermeasures to recipients, management and operation of countermeasure programs, or management and operation of locations for purpose of distributing and dispensing countermeasures.

X. Population

42 U.S.C. 247d–6d(a)(4), 247d–6d(b)(2)(C)

The populations of individuals include any individual who uses or is administered the Covered Countermeasures in accordance with this declaration.

Liability immunity is afforded to manufacturers and distributors without regard to whether the countermeasure is used by or administered to this population; liability immunity is afforded to program planners and qualified persons when the countermeasure is used by or administered to this population or the program planner or qualified person reasonably could have believed the recipient was in this population.

XI. Geographic Area

42 U.S.C. 247d–6d(a)(4), 247d–6d(b)(2)(D)

Liability immunity is afforded for the administration or use of a Covered Countermeasure without geographic limitation.

Liability immunity is afforded to manufacturers and distributors without regard to whether the countermeasure is used by or administered in these geographic areas; liability immunity is afforded to program planners and qualified persons when the countermeasure is used by or administered in these geographic areas, or the program planner or qualified person reasonably could have believed the recipient was in these geographic areas.

XII. Effective Time Period

42 U.S.C. 247d–6d(b)(2)(B)

For any Covered Countermeasure subsequently covered under the National Vaccine Injury Compensation Program, liability immunity expires immediately upon such coverage.

Liability immunity began June 15, 2009 for Covered Countermeasures against the 2009 H1N1 pandemic influenza and is provided through December 31, 2015 or until the Covered Countermeasure is covered under the National Vaccine Injury Compensation Program, whichever occurs first.

Liability immunity for countermeasures against other pandemic influenza A viruses and influenza A viruses with pandemic potential for means of distribution other than those in accordance with the public health and medical response of the Authority Having Jurisdiction begins on December 1, 2006 and lasts through December 31, 2015 or until the Covered Countermeasure is covered under the National Vaccine Injury Compensation Program, whichever occurs first.

Liability immunity for Covered Countermeasures against other pandemic influenza A viruses or influenza A viruses with pandemic potential administered or used in accordance with the public health and medical response of the Authority Having Jurisdiction begins with a declaration and lasts through: (1) The final day that the emergency declaration is in effect, (2) December 31, 2015, or (3) until the Covered Countermeasure is covered under the National Vaccine Injury Compensation Program, whichever occurs first.

XIII. Additional Time Period of Coverage

42 U.S.C. 247d–6d(b)(3)(B) and (C)

I have determined that an additional twelve (12) months of liability protection is reasonable to allow for the manufacturer(s) to arrange for disposition of the Covered Countermeasure, including return of the Covered Countermeasures to the manufacturer, and for Covered Persons to take such other actions as are appropriate to limit the administration or use of the Covered Countermeasures.

Covered Countermeasures obtained for the Strategic National Stockpile (SNS) during the effective period of this declaration are covered through the date of administration or use pursuant to a distribution or release from the SNS.

XIV. Countermeasures Injury Compensation Program

42 U.S.C 247d–6e

The PREP Act authorizes a Countermeasures Injury Compensation Program (CICP) to provide benefits to certain individuals who sustain a serious physical covered injury as the direct result of the administration or use of the Covered Countermeasures and benefits to survivors or estates of individuals who die as a direct result of the administration or use of the Covered Countermeasures. The causal connection between the countermeasure and the serious physical injury must be supported by compelling, reliable, valid, medical and scientific evidence in order for the individual to be considered for compensation. The CICP is administered by the Health Resources and Services Administration (HRSA), within the Department of Health and Human Services. Information about the CICP is available at the toll free number 1–888–275–4772 or at *http://www.hrsa.gov/countermeasurescomp/default.htm.*

XV. Amendments

42 U.S.C. 247d–6d(b)(4)

The Declaration for the Use of the Public Readiness and Emergency Preparedness Act for H5N1 was first published on January 26, 2007. That declaration provided liability immunity for vaccines against H5N1 pandemic influenza under the terms and conditions stated in the declaration. The declaration was amended on November 30, 2007 to add H7 and H9 vaccines; amended on October 17, 2008 to add H2 and H6 vaccines; amended on June 15, 2009 to add 2009 H1N1 vaccines and republished in its entirety; amended on September 28, 2009 to provide targeted liability protections for pandemic countermeasures to enhance distribution and to add provisions consistent with other declarations and republished in its entirety; and amended on March 1, 2010 to revise the Covered Countermeasures and extend the effective date and republished in its entirety. This declaration incorporates all amendments prior to the date of its publication in the **Federal Register**.

Any further amendments to this declaration will be published in the **Federal Register**.

Authority: 42 U.S.C. 247d–6d.

Dated: February 28, 2012.

Kathleen Sebelius,

Secretary.

[FR Doc. 2012–5312 Filed 3–5–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration on Aging

Agency Information Collection Activities; Proposed Collection; Comment Request; Annual Reporting Requirements for the Older American Act Title VI Grant Program

AGENCY: Administration on Aging, HHS.

ACTION: Notice.

SUMMARY: The Administration on Aging (AoA) is announcing that the proposed collection of information listed below has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written or electronic comments on the collection of information by April 5, 2012.

ADDRESSES: Submit electronic comments on the collection of information to: *Cynthia.LaCounte@aoa.hhs.gov*. Submit written comments on the collection of information to Cynthia LaCounte, Administration on Aging, Washington, DC 20201 or by fax at 202–357–3560.

FOR FURTHER INFORMATION CONTACT: Margaret Graves at (202) 357–0148 or *Cynthia.LaCounte@aoa.hhs.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C 3507, AoA has submitted the following proposed collection of information to OMB for review and clearance.

Describe Collection of Information

AoA estimates the burden of this collection of information as follows: Annual submission of the Program Performance Reports are due 90 days after the end of the budget period and final project period.

Respondents: Federally Recognized Tribes, Tribal and Native Hawaiian Organizations receiving grants under Title VI, Part A, Grants for Native Americans; Title VI, Part B, Native Hawaiian Program and Title VI, Part C, Native American Caregiver Support Program.

Estimated Number of Responses: 256.

Total Estimated Burden Hours: 640.

Dated: February 28, 2012.

Kathy Greenlee,

Assistant Secretary for Aging.

[FR Doc. 2012–5437 Filed 3–5–12; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10136, CMS–10116, CMS–10426 and CMS–10406]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services.

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) 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 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.

1. *Type of Information Collection Request:* Reinstatement of a previously approved collection; *Title of Information Collection:* Physician Group Practice Transition Demonstration (PGP–TD) Performance Assessment Tool (''PAT''); *Use:* The Physician Group Practice (PGP) Demonstration was mandated by section 412 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 and is the precursor to the Medicare Shared Savings Program. Section 1899(k) of the Social Security Act, as added by section 10307(k) of the Affordable Care Act (as amended by section 10307 of the Health Care and Education Reconciliation Act of 2010), states ''the Secretary may enter into an agreement with an ACO under the Demonstration under section 1866A, subject to rebasing and other modifications deemed appropriate by the Secretary.'' The Demonstration extension is entitled the PGP Transition Demonstration (PGP–TD).

We are seeking reinstatement of the collection of information as it was erroneously discontinued. Only a portion of the information collection requirements previously approved under 0938–0941 should have been discontinued. The collection of information is strictly voluntary in nature and was developed in conjunction with the industry and Demonstration participants. Only organizations that voluntarily respond and elect to participate in the Demonstration will be reporting the measures. Moreover, CMS will not be using this information to regulate or sanction but rather to provide financial incentives for improving the quality of care. The collection of information to be used under this extension is being used to test quality data collection systems and determine incentive payment levels to participating physician group practices participating in the PGP–TD. In addition, this data will be used to evaluate the effectiveness of these payment models and provide insight into the most appropriate way for the agency to collect clinical information. *Form Number:* CMS–10136 (OCN: 0938–0941); *Frequency:* Yearly; *Affected Public:* Private Sector—Business or other for-profits and not-for-profit institutions. *Number of Respondents:* 10. *Number of Responses:* 10. *Total Annual Hours:* 790. (For policy questions regarding this collection contact Heather Grimsley at 410–786–1048. For all other issues call 410–786–1326.)

2. *Type of Information Collection Request:* Extension of a currently approved collection;

Title of Information Collection: Conditions for Payment of Power Mobility Devices, including Power Wheelchairs and Power-Operated Vehicles; *Use:* CMS is renewing our request for approval for the collection requirements associated with the final rule, CMS–3017–F (71 FR 17021), which was published on April 5, 2006 and became effective on June 5, 2006. The regulation CMS–3017–F finalized provisions set forth in the interim final regulation (70 FR 50940) published on August 26, 2005. This final rule conforms our regulations to section 302(a)(2)(E)(iv) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. This rule defines the term power mobility devices (PMDs) as power wheelchairs and power operated vehicles (POVs or scooters). It sets forth revised conditions for Medicare payment of PMDs and defines who may prescribe PMDs. This rule also requires a face-to-face examination of the beneficiary by the physician or treating practitioner, a written prescription, and receipt of pertinent parts of the medical record by the supplier within 45 days after the face-to-face examination that the durable medical equipment (DME)

suppliers maintain in their records and make available to CMS and its agents upon request. Finally, this rule discusses CMS' policy on documentation that may be requested by CMS and its agents to support a Medicare claim for payment. *Form Number:* CMS–10116 (OCN: 0938–0971); *Frequency:* Yearly; *Affected Public:* Private Sector—Business or other for-profits. *Number of Respondents:* 90,521. *Number of Responses:* 173,810. *Total Annual Hours:* 34,762. (For policy questions regarding this collection contact Susan Miller at 410–786–2118. For all other issues call 410–786–1326.)

3. *Type of Information Collection Request:* New collection; *Title of Information Collection:* End Stage Renal Disease (ESRD) System Access Request Form; *Use:* Within CMS, the Office of Clinical Standards and Quality is developing a new suite of systems to support the End Stage Renal Disease (ESRD) program. Due to the sensitivity of the data being collected and reported, CMS must ensure that only authorized personnel have access to data. Personnel are given access to the ESRD systems through the creation of user IDs and passwords within the QualityNet Identity Management System (QIMS); however, once within the system, the system determines the rights and privileges the personnel has over the data within the system.

The sole purpose the End Stage Renal Disease System (ESRD) System Access Request Form is to identify the individual's data access rights once within the ESRD system. This function and the associated data collection is currently being accomplished under ''Part B'' of the QualityNet Identity Management System Account Form (CMS–10267; OCN: 0938–1050). Once the ESRD System Access Form is approved, the QualityNet Identity Management System (QIMS) Account Form will be revised to remove Part B from the QIMS data collection. *Form Number:* CMS–10426 (OCN: 0938–New); *Frequency:* Yearly; *Affected Public:* Private Sector—Business or other for-profits. *Number of Respondents:* 25,000. *Number of Responses:* 25,000. *Total Annual Hours:* 6,250. (For policy questions regarding this collection contact Michelle Tucker at 410–786–0736. For all other issues call 410–786–1326.)

4. *Type of Information Collection Request:* New collection; *Title of Information Collection:* Probable Fraud Measurement Pilot; *Use:* The Centers for Medicare & Medicaid Services (CMS) is seeking Office of Management and Budget (OMB) approval of the collections required for a probable fraud measurement pilot. The probable fraud measurement pilot would establish a baseline estimate of probable fraud in payments for home health care services in the fee-for-service Medicare program. CMS and its agents will collect information from home health agencies, the referring physicians and Medicare beneficiaries selected in a national random sample of home health claims. The pilot will rely on the information collected along with a summary of the service history of the HHA, the referring provider, and the beneficiary to estimate the percentage of total payments that are associated with probable fraud and the percentage of all claims that are associated with probable fraud for Medicare fee-for-service home health. *Form Number:* CMS–10406 (OCN: 0938–New); *Frequency:* Yearly; *Affected Public:* Individual and Private Sector—Business or other for-profits. *Number of Respondents:* 6,000. *Number of Responses:* 6,000. *Total Annual Hours:* 10,500. (For policy questions regarding this collection contact Kelly Gent at 410–786–0918. For all other issues call 410–786–1326.)

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 E-mail 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 May 7, 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 _____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: March 1, 2012.

Martique Jones,

Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2012–5439 Filed 3–5–12; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Tribal Consultation Meetings

AGENCY: Office of Head Start (OHS), Administration for Children and Families, HHS.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the Improving Head Start for School Readiness Act of 2007, Public Law 110–134, notice is hereby given of one-day Tribal Consultation Sessions to be held between the Department of Health and Human Services, Administration for Children and Families, Office of Head Start leadership and the leadership of Tribal Governments operating Head Start (including Early Head Start) programs. The purpose of these Consultation Sessions is to discuss ways to better meet the needs of American Indian and Alaska Native children and their families, taking into consideration funding allocations, distribution formulas, and other issues affecting the delivery of Head Start services in their geographic locations [42 U.S.C. 9835, Section 640(l)(4)].

DATES: March 22 and April 3, 2012.

ADDRESSES: 2012 Office of Head Start Tribal Consultation Sessions will be held at the following locations: Thursday, March 22, 2012—Phoenix, Arizona—Sheraton Crescent Hotel, 2620 West Dunlap Avenue Phoenix, AZ 85021; Tuesday, April 3, 2012—Billings, Montana—Holiday Inn Grand Montana 5500 Midland Road, Billings, MT 59101.

FOR FURTHER INFORMATION CONTACT: Camille Loya, Acting Regional Program Manager Region XI, email *Camille.Loya@acf.hhs.gov* or phone (202) 401–5964. Additional information and online meeting registration is available at *http://www.headstartresourcecenter.org.*

SUPPLEMENTARY INFORMATION: The Department of Health and Human Services (HHS) announces Office of Head Start (OHS) Tribal Consultations with leaders of Tribal Governments operating Head Start (including Early Head Start) programs for each of the nine geographic regions of Head Start

where American Indian and Alaska Native (AI/AN) programs are located. We are convening the OHS Tribal Consultations in conjunction with other Tribal Leader events in order to minimize the financial and travel burden for participants. The sessions in Phoenix, Arizona, and Billings, Montana, are being held in conjunction with the HHS 2012 Regional Tribal Consultation Sessions. We will schedule additional consultations around the country for later in the year.

The agenda for the scheduled OHS Tribal Consultations will be organized around the statutory purposes of Head Start Tribal Consultations related to meeting the needs of AI/AN children and families, taking into consideration funding allocations, distribution formulas, and other issues affecting the delivery of Head Start services in their geographic locations. In addition, OHS will share actions taken and in progress to address the issues and concerns raised in 2011 OHS Tribal Consultations.

Tribal leaders and designated representatives interested in submitting written testimony or proposing specific agenda topics for these Consultation Sessions should contact Camille Loya at *Camille.Loya@acf.hhs.gov.* Proposals must be submitted at least three days in advance of the session and should include a brief description of the topic area, along with the name and contact information of the suggested presenter.

The Consultation Sessions will be conducted with elected or appointed leaders of Tribal Governments and their designated representatives [42 U.S.C.9835, Section 640(l)(4)(A)]. Designees must have a letter from the Tribal Government authorizing them to represent the tribe. The letter should be submitted at least three days in advance of the Consultation Session to Camille Loya at (202) 205–9721 (fax). Other representatives of tribal organizations and Native nonprofit organizations are welcome to attend as observers.

A detailed report of each Consultation Session will be prepared and made available within 90 days of the Consultation Session to all Tribal Governments receiving funds for Head Start and Early Head Start programs. Tribes wishing to submit written testimony for the report should send testimony to Camille Loya at *Camille.Loya@acf.hhs.gov* either prior to the Consultation Session or within 30 days after the meeting.

Oral testimony and comments from the Consultation Sessions will be summarized in each report without attribution, along with topics of concern and recommendations. Hotel and logistical information for all Consultation Sessions has been sent to tribal leaders via email and posted on the Head Start Resource Center Web site at *http://www.headstartresourcecenter.org.*

Dated: February 28, 2012.

Yvette Sanchez Fuentes,

Director, Office of Head Start.

[FR Doc. 2012–5438 Filed 3–5–12; 8:45 am]

BILLING CODE 4184–40–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0169]

Report on the Performance of Drug and Biologics Firms in Conducting Postmarketing Requirements and Commitments; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: Under the Food and Drug Administration Modernization Act of 1997 (Modernization Act), the Food and Drug Administration (FDA) is required to report annually in the **Federal Register** on the status of postmarketing requirements and commitments required of, or agreed upon by, holders of approved drug and biological products. This notice is the Agency's report on the status of the studies and clinical trials that applicants have agreed to, or are required to, conduct.

FOR FURTHER INFORMATION CONTACT: Meg Pease-Fye, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 4156, Silver Spring, MD 20993–0002, 301–796–0700; or Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Modernization Act

Section 130(a) of the Modernization Act (Pub. L. 105–115) amended the Federal Food, Drug, and Cosmetic Act (the FD&C Act) by adding a new provision requiring reports of certain postmarketing studies, including clinical trials, for human drug and biological products (section 506B of the FD&C Act (21 U.S.C. 356b)). Section 506B of the FD&C Act provides FDA with additional authority to monitor the progress of a postmarketing study or clinical trial that an applicant has been required to, or has agreed to, conduct by requiring the applicant to submit a report annually providing information on the status of the postmarketing study/clinical trial. This report must also include reasons, if any, for failure to complete the study/clinical trial. These studies and clinical trials are intended to further define the safety, efficacy, or optimal use of a product, and therefore play a vital role in fully characterizing the product.

Under the Modernization Act, commitments to conduct postmarketing studies or clinical trials included both studies/clinical trials that applicants agreed to conduct, as well as studies/clinical trials that applicants were required to conduct under FDA regulations.[1]

B. The Food and Drug Administration Amendments Act of 2007

On September 27, 2007, the President signed Public Law 110–85, the Food and Drug Administration Amendments Act of 2007 (FDAAA). Section 901, in Title IX of FDAAA, created a new section 505(o) of the FD&C Act authorizing FDA to require certain studies and clinical trials for human drug and biological products approved under section 505 of the FD&C Act or section 351 of the Public Health Service Act. Under FDAAA, FDA has been given additional authority to require applicants to conduct and report on postmarketing studies and clinical trials to assess a known serious risk, assess signals of serious risk, or identify an unexpected serious risk related to the use of a product. This new authority became effective on March 25, 2008. FDA may now take enforcement action against applicants who fail to conduct studies and clinical trials required under FDAAA, as well as studies and clinical trials required under FDA regulations (see sections 505(o)(1), 502(z), and 303(f)(4) of the FD&C Act (21 U.S.C. 355(o)(1), 352(z), and 333(f)(4))).

Although regulations implementing the Modernization Act postmarketing authorities use the term ''postmarketing commitment'' to refer to both required

[1] Before passage of the Food and Drug Administration Amendments Act of 2007 (FDAAA), FDA could require postmarketing studies and clinical trials under the following circumstances: To verify adn describe clinical benefit for a human drug approved in accordance with the accelerated approval provisions in section 506(b)(2)(A) of the FD&C Act (21 CFR 314.510 and 601.41); for a drug approved on the basis of animal efficacy data because human efficacy trials are not ethical or feasible (21 CFR 314.610(b)(1) and 601.91(b)(1)): and for marketed drugs that not adequately labeled for children under section 505B of the FD&C Act (Pediatric Research Equity Act (21 U.S.C. 355c; Pub. L. 108–155)).

studies and studies applicants agree to conduct, in light of the new authorities enacted in FDAAA, FDA has decided it is important to distinguish between enforceable postmarketing requirements and unenforceable postmarketing commitments. Therefore, in this notice and report, FDA refers to studies/clinical trials that an applicant is required to conduct as ''postmarketing requirements'' (PMRs) and studies/clinical trials that an applicant agrees to but is not required to conduct as ''postmarketing commitments'' (PMCs). Both are addressed in this notice and report.

C. FDA's Implementing Regulations

On October 30, 2000 (65 FR 64607), FDA published a final rule implementing section 130 of the Modernization Act. This rule modified the annual report requirements for new drug applications (NDAs) and abbreviated new drug applications (ANDAs) by revising § 314.81(b)(2)(vii) (21 CFR 314.81(b)(2)(vii)). The rule also created a new annual reporting requirement for biologics license applications (BLAs) by establishing § 601.70 (21 CFR 601.70). The rule described the content and format of the annual progress report, and clarified the scope of the reporting requirement and the timing for submission of the annual progress reports. The rule became effective on April 30, 2001. The regulations apply only to human drug and biological products approved under NDAs, ANDAs, and BLAs. They do not apply to animal drugs or to biological products regulated under the medical device authorities.

The reporting requirements under §§ 314.81(b)(2)(vii) and 601.70 apply to PMRs and PMCs made on or before the enactment of the Modernization Act (November 21, 1997), as well as those made after that date. Therefore, studies and clinical trials required under FDAAA are covered by the reporting requirements in these regulations.

Sections 314.81(b)(2)(vii) and 601.70 require applicants of approved drug and biological products to submit annually a report on the status of each clinical safety, clinical efficacy, clinical pharmacology, and nonclinical toxicology study/clinical trial either required by FDA or that they have committed to conduct, either at the time of approval or after approval of their NDA, ANDA, or BLA. The status of PMCs concerning chemistry, manufacturing, and production controls and the status of other studies/clinical trials conducted on an applicant's own initiative are not required to be reported under §§ 314.81(b)(2)(vii) and 601.70 and are not addressed in this report. It should be noted, however, that applicants are required to report to FDA on these commitments made for NDAs and ANDAs under § 314.81(b)(2)(viii). Furthermore, section 505(o)(3)(E) of the FD&C Act, as amended by FDAAA, requires that applicants report periodically on the status of each required study/clinical trial and each study/clinical trial ''otherwise undertaken * * * to investigate a safety issue * * *.''

According to the regulations, once a PMR has been required, or a PMC has been agreed upon, an applicant must report on the progress of the PMR/PMC on the anniversary of the product's approval until the PMR/PMC is completed or terminated and FDA determines that the PMR/PMC has been fulfilled or that the PMR/PMC is either no longer feasible or would no longer provide useful information. The annual progress report must include a description of the PMR/PMC, a schedule for completing the PMR/PMC, and a characterization of the current status of the PMR/PMC. The report must also provide an explanation of the PMR/PMC status by describing briefly the progress of the PMR/PMC. A PMR/PMC schedule is expected to include the actual or projected dates for the following: (1) Submission of the final protocol to FDA, (2) completion of the study/clinical trial, and (3) submission of the final report to FDA. The status of the PMR/PMC must be described in the annual report according to the following definitions:

- *Pending:* The study/clinical trial has not been initiated (i.e., no subjects have been enrolled or animals dosed), but does not meet the criteria for delayed (i.e., the original projected date for initiation of subject accrual or initiation of animal dosing has not passed);
- *Ongoing:* The study/clinical trial is proceeding according to or ahead of the original schedule;
- *Delayed:* The study/clinical trial is behind the original schedule;
- *Terminated:* The study/clinical trial was ended before completion, but a final report has not been submitted to FDA; or
- *Submitted:* The study/clinical trial has been completed or terminated, and a final report has been submitted to FDA.

Databases containing information on PMRs/PMCs are maintained at the Center for Drug Evaluation and Research (CDER) and the Center for Biologics Evaluation and Research (CBER).

II. Summary of Information From Postmarketing Status Reports

This report, published to fulfill the annual reporting requirement under the Modernization Act, summarizes the status of PMRs and PMCs as of September 30, 2011. If a requirement or commitment did not have a schedule, or a postmarketing progress report was not received in the previous 12 months, the PMR/PMC is categorized according to the most recent information available to the Agency.[2]

Information in this report covers any PMR/PMC that was made, in writing, at the time of approval or after approval of an application or a supplement to an application, including PMRs required under FDAAA (section 505(o)(3) of the FD&C Act), PMRs required under FDA regulations (e.g., PMRs required to demonstrate clinical benefit of a product following accelerated approval (see footnote 1 of this document)), and PMCs agreed to by the applicant.

Information summarized in this report includes the following: (1) The number of applicants with open (uncompleted) PMRs/PMCs, (2) the number of open PMRs/PMCs, (3) the status of open PMRs/PMCs as reported in § 314.81(b)(2)(vii) or § 601.70 annual reports, (4) the status of concluded PMRs/PMCs as determined by FDA, and (5) the number of applications with open PMRs/PMCs for which applicants did not submit an annual report within 60 days of the anniversary date of U.S. approval.

Additional information about PMRs/PMCs submitted by applicants to CDER and CBER is provided on FDA's Web site at *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Post-marketingPhaseIVCommitments/default.htm.*'' Neither the Web site nor this notice include information about PMCs concerning chemistry, manufacturing, and controls. It is FDA policy not to post information on the Web site until it has been reviewed for accuracy. Numbers published in this notice cannot be compared with the numbers resulting from searches of the Web site because this notice incorporates totals for all PMRs/PMCs in FDA databases, including PMRs/PMCs undergoing review for accuracy. In addition, the report in this notice will be updated annually while the Web site is updated quarterly (i.e., in January, April, July, and October).

[2] Although the data included in this report do not include a summary of reports that applicants have failed to file by their due date, the Agency notes that it may take appropriate regulatory action in the event reports are not filed on a timely basis.

Many applicants have more than one approved product and for many products there is more than one PMR or PMC. Specifically, there were 175 unique applicants with 198 NDAs/ANDAs that had open PMRs/PMCs. There were 72 unique applicants with 99 BLAs that had open PMRs/PMCs.

Annual status reports are required to be submitted for each open PMR/PMC within 60 days of the anniversary date of U.S. approval of the original application. In fiscal year 2011 (FY11), 21 percent (43/208) of NDA/ANDA and 41 percent (41/99) of BLA annual status reports were not submitted within 60 days of the anniversary date of U.S. approval of the original application. Of the annual status reports due but not submitted on time, 100 percent of the NDA/ANDA and 56 percent (23/41) of the BLA reports were submitted before the close of FY11 (September 30, 2011).

Most PMRs are progressing on schedule (87 percent for NDAs/ANDAs; 88 percent for BLAs). Most PMCs are also progressing on schedule (80 percent for NDAs/ANDAs; 75 percent for BLAs). Most of the PMCs that are currently listed in the database were developed before the postmarketing requirements section of FDAAA took effect.[3]

III. About This Report

This report provides six separate summary tables. The tables in this document distinguish between PMRs and PMCs and between on-schedule and off-schedule PMRs and PMCs according to the original schedule milestones. On-schedule PMRs/PMCs are categorized as pending, ongoing, or submitted. Off-schedule PMRs/PMCs that have missed one of the original milestone dates are categorized as delayed or terminated. The tables include data as of September 30, 2011.

Table 1 of this document provides an overall summary of the data on all PMRs and PMCs. Tables 2 and 3 of this document provide detail on PMRs. Table 2 of this document provides additional detail on the status of on-schedule PMRs.

Table 1 of this document shows that most PMRs (87 percent for NDAs/ANDAs and 88 percent for BLAs) and most PMCs (80 percent for NDAs/ANDAs and 75 percent for BLAs) are on schedule. Overall, of the PMRs that are pending (*i.e.* , have not been initiated), 92 percent were created within the past 3 years. Table 2 of this document shows that 49 percent of pending PMRs for drug and biological products are in response to the Pediatric Research and Equity Act (PREA), under which FDA requires sponsors to study new drugs, when appropriate, for pediatric populations. Under section 505B(a)(3) of the FD&C Act, the initiation of these studies generally is deferred until required safety information from other studies has first been submitted and reviewed. PMRs for products approved under the animal efficacy rule (21 CFR 314.600 for drugs; 21 CFR 601.90 for biological products) can be conducted only when the product is used for its indication as a counterterrorism measure. In the absence of a public health emergency, these studies/clinical trials will remain pending indefinitely. The next largest category of pending PMRs for drug and biological products (49 percent) comprises those studies/clinical trials required by FDA under FDAAA, which became effective on March 25, 2008.

Table 3 of this document provides additional detail on the status of off-schedule PMRs. The majority of off-schedule PMRs (which account for 13 percent of the total for NDAs/ANDAs and 12 percent for BLAs) are delayed according to the original schedule milestones (98 percent (83/85) for NDAs/ANDAs; 95 percent (20/21) for BLAs). In certain situations, the original schedules may have been adjusted for unanticipated delays in the progress of the study/clinical trial (*e.g.* , difficulties with subject enrollment in a trial for a marketed drug or need for additional time to analyze results). In this report, study/clinical trial status reflects the status in relation to the original study/clinical trial schedule regardless of whether FDA has acknowledged that additional time may be required to complete the study/clinical trial.

Tables 4 and 5 of this document provide additional detail on the status of PMCs. Table 4 of this document provides additional detail on the status of on-schedule PMCs. Pending PMCs comprise 48 percent (141/295) of the on-schedule NDA/ANDA PMCs and 39 percent (81/209) of the on-schedule BLA PMCs.

Table 5 of this document provides additional details on the status of off-schedule PMCs. The majority of off-schedule PMCs (which account for 20 percent for NDAs/ANDAs and 25 percent for BLAs) are delayed according to the original schedule milestones (93 percent (69/74) for NDAs/ANDAs; 97 percent (69/71) for BLAs). As noted previously in this document, this report reflects the original due dates for study/clinical trial results and does not reflect discussions between the Agency and the sponsor regarding studies/clinical trials that may require more time for completion.

Table 6 of this document provides details about PMRs and PMCs that were concluded in the previous year. The majority of concluded PMRs and PMCs were fulfilled (70 percent of NDA/ANDA PMRs and 84 percent of BLA PMRs; 85 percent of NDA/ANDA PMCs and 80 percent of BLA PMCs).

TABLE 1—SUMMARY OF POSTMARKETING REQUIREMENTS AND COMMITMENTS

[Numbers as of September 30, 2011]

	NDA/ANDA (percent of total PMR or percent of total PMC)	BLA (percent of total PMR or percent of total PMC) [1]
Number of open PMRs	675	176
On-schedule open PMRs (see table 2 of this document)	590 (87%)	155 (88%)
Off-schedule open PMRs (see table 3 of this document)	85 (13%)	21 (12%)
Number of open PMCs	369	280
On-schedule open PMCs (see table 4 of this document)	295 (80%)	209 (75%)

[3] There are existing PMCs established before FDAAA that might meet current FDAAA standards for required safety studies/clinical trials under section 505(o)(3)(B) of the FD&C Act. Under section 505(o)(3)(c) of the FD&C Act, the Agency may convert pre-existing PMCs into PMRs if it becomes aware of new safety information.

TABLE 1—SUMMARY OF POSTMARKETING REQUIREMENTS AND COMMITMENTS—Continued

[Numbers as of September 30, 2011]

	NDA/ANDA (percent of total PMR or percent of total PMC)	BLA (percent of total PMR or percent of total PMC) [1]
Off-schedule open PMCs (see table 5 of this document)	74 (20%)	71 (25%)

[1] On October 1, 2003, FDA completed a consolidation of certain therapeutic products formerly regulated by CBER into CDER. Consequently, CDER now reviews many BLAs. Fiscal year statistics for postmarketing requirements and commitments for BLAs reviewed by CDER are included in BLA totals in this table.

TABLE 2—SUMMARY OF ON-SCHEDULE POSTMARKETING REQUIREMENTS

[Numbers as of September 30, 2011]

On-Schedule open PMRs	NDA/ANDA (percent of Total PMR)	BLA (percent of total PMR) [1]
Pending (by type):		
Accelerated approval	8	1
PREA [2]	238	34
Animal efficacy [3]	1	0
FDAAA safety (since March 25, 2008)	199	72
Total	446 (66%)	107 (61%)
Ongoing:		
Accelerated approval	13	9
PREA [2]	35	5
Animal efficacy [3]	0	0
FDAAA safety (since March 25, 2008)	41	23
Total	89 (13%)	37 (21%)
Submitted:		
Accelerated approval	3	2
PREA [2]	24	4
Animal efficacy [3]	0	0
FDAAA safety (since March 25, 2008)	28	5
Total	55 (8%)	11 (6%)
Combined total	590 (87%)	155 (88%)

[1] See note 1 for table 1 of this document.

[2] Many PREA studies have a pending status. PREA studies are usually deferred because the product is ready for approval in adults. Initiation of these studies also may be deferred until additional safety information from other studies has first been submitted and reviewed.

[3] PMRs for products approved under the animal efficacy rule (21 CFR 314.600 for drugs; 21 CFR 601.90 for biological products) can be conducted only when the product is used for its indication as a counterterrorism measure. In the absence of a public health emergency, these studies/clinical trials will remain pending indefinitely.

TABLE 3—SUMMARY OF OFF-SCHEDULE POSTMARKETING REQUIREMENTS

[Numbers as of September 30, 2011]

Off-Schedule open PMRs	NDA/ANDA (percent of total PMR)	BLA (percent of total PMR) [1]
Delayed:		
Accelerated approval	5	2
PREA	64	12
Animal efficacy	1	0
FDAAA safety (since March 25, 2008)	13	6
Total	83 (12%)	20 (11%)
Terminated	2 (0.3%)	1 (0.6%)
Combined total	85 (13%)	21 (12%)

[1] See note 1 for table 1 of this document.

TABLE 4—SUMMARY OF ON-SCHEDULE POSTMARKETING COMMITMENTS

[Numbers as of September 30, 2011]

On-Schedule open PMCs	NDA/ANDA (percent of total PMC)	BLA (percent of total PMC) [1]
Pending	141 (38%)	81 (29%)
Ongoing	77 (21%)	72 (26%)
Submitted	77 (21%)	56 (20%)
Combined total	295 (80%)	209 (75%)

[1] See note 1 for table 1 of this document.

TABLE 5—SUMMARY OF OFF-SCHEDULE POSTMARKETING COMMITMENTS

[Numbers as of September 30, 2011]

Off-Schedule open PMCs	NDA/ANDA (percent of total PMC)	BLA (percent of total PMC) [1]
Delayed	69 (19%)	69 (25%)
Terminated	5 (1%)	2 (0.7%)
Combined total	74 (20%)	71 (25%)

[1] See note 1 for table 1 of this document.

TABLE 6—SUMMARY OF CONCLUDED POSTMARKETING REQUIREMENTS AND COMMITMENTS

[October 1, 2010 to October 1, 2011]

	NDA/ANDA (percent of total)	BLA (percent of total) [1]
Concluded PMRs:		
Requirement met (fulfilled)	55 (70%)	16 (84%)
Requirement not met (released and new revised requirement issued)	21 (27%)	0 (0%)
Requirement no longer feasible or product withdrawn (released)	3 (4%)	3 (16%)
Total	79	19
Concluded PMCs:		
Commitment met (fulfilled)	109 (85%)	44 (80%)
Commitment not met (released and new revised requirement/commitment issued)	12 (9%)	2 (4%)
Commitment no longer feasible or product withdrawn (released)	7 (5%)	9 (16%)
Total	128	55

[1] See note 1 for table 1 of this document.

Dated: February 28, 2012.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2012–5302 Filed 3–5–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0788]

Pilot Program for Early Feasibility Study Investigational Device Exemption Applications; Termination of Acceptance of Nominations and Extending the Duration of the Program

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the termination of the acceptance of nominations for the Early Feasibility Study Investigational Device Exemption (IDE) Applications pilot program. This program allowed the submission of nominations from sponsors of innovative device technologies to participate in a pilot program for early feasibility study IDE applications. FDA is also announcing that the duration of the pilot program is extended to May 8, 2013, for sponsors that have already been accepted for the program.

DATES: This notice is effective March 6, 2012.

FOR FURTHER INFORMATION CONTACT: Sheila Brown, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1676, Silver Spring, MD 20993–0002, 301–796–5640.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 10, 2011 (76 FR 70150), FDA announced the availability of a draft guidance entitled ''Investigational Device Exemptions (IDE) for Early Feasibility Medical Device Clinical Studies, Including Certain First in Human (FIH) Studies.'' This guidance document is intended to facilitate early feasibility studies of medical devices, using appropriate risk mitigation strategies, under the IDE requirements. Simultaneous with the publication of the draft guidance, FDA also announced an Early Feasibility Study IDE Pilot Program (76 FR 70152, November 10, 2011) intended to collect

information and experience on the application of the draft guidance in order to inform the final guidance document.

FDA began accepting nominations for the pilot program on December 12, 2011. In the **Federal Register** notice announcing the pilot program, FDA stated its intention to limit the pilot program to nine candidates. After review of the nominations received in response to the pilot program notice, FDA accepted nine appropriate candidates for the pilot program.

In the pilot program notice, FDA stated its intention to accept nominations to participate in the pilot program until May 8, 2012. Because FDA has already accepted nine sponsors to participate in the program, FDA will no longer accept nominations to participate in the program and will conduct the pilot program for the nine sponsors that have already been accepted.

In the pilot program notice, FDA also stated that the pilot program will terminate on May 8, 2012. Instead, the pilot program will be extended for the nine accepted sponsors until May 8, 2013.

Dated: February 28, 2012.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2012–5311 Filed 3–5–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, HHS.

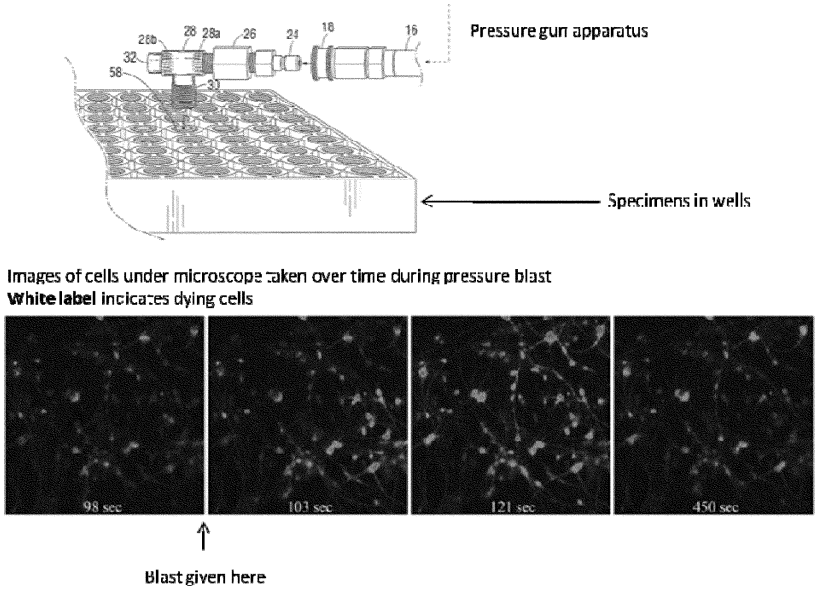
ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301–496–7057; fax: 301–402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Device for Simulating Explosive Blast Trauma

Description of Technology: NIH scientists have developed a novel device to simulate the effects of pressure waves resulting from explosions or blasts on biological tissue. This methodology allows real-time monitoring of tissue damage while it is occurring and can track the secondary effects of pressure damage after tissue insult. This tool is well-adapted for investigating traumatic brain injury and organ damage resulting from explosion pressure waves, such as in military combat.



Potential Commercial Applications:

- Real-time monitoring of tissue damage from primary blast pressure
- Real-time monitoring of tissue damage from secondary effects of blast pressure, such as tissue shearing against surfaces
- Can monitor tissue through both live imaging and assaying cell viability
- Can measure pressure effects on various tissues

Competitive Advantages:

- Allows differentiation of primary and secondary blast pressure effects on tissue damage
- Employs multiple methods to assess cell viability
- Possesses high temporal resolution

Development Stage: Prototype.

Inventors: Rea Ravin, Paul Blank, Alex Steinkamp, Joshua Zimmerberg, Sergey Bezrukov, and Kim Lee Mcafee (all of NICHD).

Intellectual Property: HHS Reference No E–068–2012/0—U.S. Provisional Application No. 61/590,209 filed 24 Jan 2012.

Licensing Contact: Michael A. Shmilovich, Esq.; 301–435–5019; *mish@codon.nih.gov.*

Small-Molecule Inhibitors of Human Galactokinase for the Treatment of Galactosemia and Cancers

Description of Technology: Lactose, found in dairy products and other foods, is comprised of two simple sugars, glucose and galactose. In galactosemia,

where galactose is not properly metabolized, build-up of toxic compounds, such as galactose-1-phosphate, can lead to liver disease, renal failure, cataracts, brain damage, and even death if this disorder is left untreated. Currently, the only treatment for galactosemia is elimination of lactose and galactose from the diet, but in some cases this is not sufficient to avoid long-term complications from the disorder.

This technology describes selective small-molecule inhibitors of human galactokinase, which inhibit the first step in galactose metabolism. These compounds could be used to treat galactosemia by eliminating the build-up of toxic metabolites in brain, liver and other tissues, and could form the basis for the first effective treatment for this disorder.

These inhibitors are also promising candidates for the treatment of certain cancers, such as PTEN/AKT misregulated cancers. The inventors have already shown that the inhibitors are cytotoxic for several cancer cell lines.

Potential Commercial Applications:

- Treatment of galactosemia
- Treatment of certain cancers, such as PTEN/AKT misregulated cancers

Competitive Advantages:

- There is currently no effective treatment for classic galactosemia, where dietary restriction cannot prevent long-term complications in some cases.
- Cancer therapeutics based on these inhibitors are predicted to have minimal side-effects.

Development Stage:

- Early-stage
- In vitro data available

Inventors: Matthew Boxer et al. (NCATS).

Intellectual Property: HHS Reference No. E–240–2011/0 — PCT Application No. PCT/US2011/053021 filed 23 Sep 2011.

Licensing Contact: Tara L. Kirby, Ph.D.; 301–435–4426; *tarak@mail.nih.gov*.

Collaborative Research Opportunity: The National Center for Advancing Translational Sciences is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate or commercialize Small-Molecule Inhibitors of Human Galactokinase for the Treatment of Galactosemia and Cancers. For collaboration opportunities, please contact Lili M. Portilla, MPA at *portilll@mail.nih.gov*.

The Cancer Stem Cell Finder: A Novel Reporter Construct Which Uses Transposition and Green Fluorescent Protein Expression To Identify Cancer Stem Cells

Description of Technology: Scientists at the National Institutes of Health (NIH) have designed a novel reporter construct which can be used to identify, monitor, and allow for the manipulation of cancer stem cells (CSCs). CSCs are a subset of poorly differentiated tumor cells expressed at low frequency within a tumor and are resistant to conventional chemotherapies. CSCs have high metastatic potential and give rise to new tumors that spread cancer throughout the body. These characteristics make CSCs prime targets for developing new therapeutic agents to eradicate cancer.

The reporter construct is a novel expression vector composed of the Sleeping Beauty transposon plasmid and a Nanog promoter linked to green fluorescent protein (GFP). Nanog is a transcription factor that is overexpressed in embryonic stem (ES) cells and tumors that resemble ES cells. When introduced into a population of tumor cells, the Nanog-GFP-Sleeping Beauty transposon construct is able to integrate into tumor cell DNA via transposition. If the transposed cell is a CSC, the Nanog transcription factor overexpressed in that CSC will bind to the Nanog-promoter in the reporter construct to drive GFP expression within the cell. Thus, CSCs can be isolated based on their selective expression of the GFP label. The NIH scientists have utilized their reporter construct to identify small populations of CSCs in mouse and human breast cancer cell models.

Potential Commercial Applications:

- Identify CSCs with high metastatic potential in patients to target with therapeutic intervention
- Screen therapeutic drug candidates to identify their effectiveness against CSCs in comparison to more highly differentiated tumor cells
- Investigate genes, surface proteins, and other markers responsible for CSC ''stem-ness'' to develop CSC diagnostics and identify therapeutic candidates to stop or reverse the properties contributing to the high metastatic potential of these cells
- Identify transcription factors/genes activated in the tumor microenvironment that trigger metastasis

Competitive Advantages:

- The reporter construct is validated to identify CSCs in both human and mouse tumor cell populations
- Researchers and clinicians can monitor the ''stem-ness'' of a tumor cell population to predict the metastatic potential of a tumor
- CSCs are identified in vivo in somatic cells via GFP labeling without utilizing a virus for transfection
- CSCs can be isolated, monitored, and traced via their GFP label in both in vitro and in vivo experimentation
- Facilitates the generation of a large quantity of CSCs for further study

Development Stage:

- Early-stage
- Pre-clinical
- In vitro data available
- In vivo data available (animal)

Inventors: Rachel L. de Kluyver (formerly NCI), Jimmy K. Stauffer (NCI), Thomas J. Sayers (SAIC–Frederick).

Intellectual Property: HHS Reference No. E–215–2011/0 — Research Tool. Patent protection is not being pursued for this technology.

Licensing Contact: Samuel E. Bish, Ph.D.; 301–435–5282; *bishse@mail.nih.gov*

Collaborative Research Opportunity: The Cancer and Inflammation Program, NCI, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate or commercialize Nanog promoter driven GFP constructs for the easy identification and isolation of cancer stem cells. For collaboration opportunities, please contact John Hewes, Ph.D. at *hewesj@mail.nih.gov*.

Genes and Autoantibodies To Diagnose and Treat Sjögren's Syndrome

Description of Technology: Sjögren's syndrome (SS) is a chronic autoimmune disease of unknown etiology that targets salivary and lacrimal glands and may be accompanied by multi-organ systemic manifestations. To date, no specific diagnostic test has been developed for SS and, as a result, SS is often underdiagnosed and undertreated.

In order to further understand the immunopathology of SS and uncover both therapeutic and diagnostic targets, researchers at NIH compared gene expression profiles of salivary glands with severe inflammation to those with mild or no disease. Results from these studies identified target genes that were further characterized in tissues, serum and in cultured cell populations by real time PCR and protein analyses. Among the most highly expressed SS genes were genes associated with myeloid cells, including members of the mammalian chitinase family. In addition to genes, the researchers have also identified autoantibodies that have increase levels in SS patients. The gene expression levels and autoantibodies

identified in the research represent both promising means for diagnosing SS earlier in disease progression as well as therapeutic targets to treat SS.

Potential Commercial Applications:

- Diagnosis of Sjögren's syndrome
- Treatment of Sjögren's syndrome

Competitive Advantages: The genes and autoantibodies identified in this technology may lead to one of the first diagnostic tests for Sjögren's syndrome.

Development Stage:

- Early-stage
- In vitro data available

Inventors: Sharon M. Wahl (NIDCR), et al.

Publications:

1. Greenwell-Wild T, et al. Chitinases in the salivary glands and circulation of patients with Sjögren's syndrome: macrophage harbingers of disease severity. Arthritis Rheum. 2011 Oct;63(10):3103–3115, doi: 10.1002/art.30465. [PMID 21618203]

2. Katsifis GE, et al. Systemic and local interleukin-17 and linked cytokines associated with Sjögren's syndrome immunopathogenesis. Am J Pathol. 2009 Sep;175(3):1167–1177. [PMID 19700754]

3. Moutsopoulos NM, et al. Lack of efficacy of etanercept in Sjögren syndrome correlates with failed suppression of tumour necrosis factor alpha and systemic immune activation. Ann Rheum Dis. 2008 Oct;67(10):1437–1443. [PMID 18198195]

4. Mavragani CP, et al. Augmented interferon-alpha pathway activation in patients with Sjögren's syndrome treated with etanercept. Arthritis Rheum. 2007 Dec;56(12):3995–4004. [PMID 18050196]

5. Katsifis GE, et al. T lymphocytes in Sjögren's syndrome: contributors to and regulators of pathophysiology. Clin Rev Allergy Immunol. 2007 Jun;32(3):252–264. [PMID 17992592]

Intellectual Property:

- HHS Reference No. E–140–2011/0 — U.S. Provisional Application No. 61/476,192 filed 15 April 2011
- HHS Reference No. E–140–2011/1 — U.S. Provisional Application No. 61/556,729 filed 07 November 2011

Licensing Contact: Jaime M. Greene, M.S.; 301–435–5559; *greenejaime@mail.nih.gov*.

Bacterially Expressed Influenza Virus Recombinant HA Proteins for Vaccine and Diagnostic Applications

Description of Technology: Pandemic H1N1 influenza virus is a recently emergent strain of influenza virus that the World Health Organization (WHO) estimates has killed at least 14,711 people worldwide. Avian influenza viruses are emerging health threats with pandemic potential. Due to their global health implications, there has been a massive international effort to produce protective vaccines against these influenza virus strains. Currently, influenza virus vaccines are produced in chicken eggs, a production method that is disadvantaged by lengthy vaccine production times and by inability to meet large-scale, global demands.

The subject technologies are specific recombinant HA proteins from H1N1, H5N1, and other strains of influenza virus produced in bacteria. The HA proteins properly fold, form oligomers, bind fetuin, agglutinate red blood cells and induce strong neutralizing antibody titers in several in vivo animal models. The key advantages of this technology are that expression of these proteins in bacteria reduces the vaccine production time and offers the ease of scalability for global usage, an issue with current production methods. The recombinant HA proteins can also be used for diagnostic applications.

Potential Commercial Applications:

- Vaccines for the prevention of influenza infection
- Diagnostics for influenza virus specific antibodies

Competitive Advantages:

- Novel vaccine candidates
- Rapid production time
- Ease of scalability

Development Stage:

- In vitro data available
- In vivo data available (animal)

Inventors: Hana Golding and Surender Khurana (FDA).

Publication: Khurana S, et al. Recombinant HA1 produced in E. coli forms functional oligomers and generates strain-specific SRID potency antibodies for pandemic influenza vaccines. Vaccine. 2011 Aug 5;29(34):5657–5665. [PMID 21704111].

Intellectual Property: HHS Reference No. E–032–2010/1—PCT Application No. PCT/US2010/055166 filed 02 Nov 2010.

Licensing Contact: Kevin W. Chang, Ph.D.; 301–435–5018; *changke@mail.nih.gov*.

Potent, Easy To Use Targeted Toxins as Anti-Tumor Agents

Description of Technology: The invention discloses synthesis and use of novel derivatives of 2-[2'-(2-aminoethyl)-2-methyl-ethyl]-l,2-dihydro-6-methoxy-3H-dibenz-[de,h]isoquinoline-l,3-dione as targeted anti-tumor agents. The use of targeted toxin conjugates with anti-cancer antibodies, such as herceptin, is increasing. Based on a comparison with the structurally complex toxins, such as DM1, available in the market, these novel toxins are more stable in circulation, thus making the toxin-conjugates more tumor-selective and less toxic. As such, these compounds are superior alternatives to the existing toxins.

The invention describes a potent and easy to synthesize toxin that can be used for generating a variety of prodrugs. These compounds can be attached to a ligand that recognizes a receptor on cancer cells, or to a peptide that is cleaved by tumor-specific proteases. The compounds are topoisomerase inhibitors and are mechanistically different from DM1 that targets tubulin.

The structure of the toxin allows it to be modified with a peptide linker that is stable, but rapidly cleaved in lysosomes after the compound is specifically taken up by cancer cells.

Potential Commercial Applications: The compounds can be used for preparation of a variety of potent anti-cancer agents with low systemic toxicity.

Competitive Advantages:

- Easy to prepare
- Structural features make these compounds more stable in circulation
- Toxin conjugates are more tumor-selective and less toxic

Development Status:

- In vitro data available
- In vivo data available (animal)

Inventors: Nadya Tarasova, et al. (NCI).

Intellectual Property: HHS Reference No. E–160–2006/0—U.S. Patent No. 8,008,316 issued 30 Aug 2011.

Licensing Contact: Jennifer Wong; 301–465–4633; *wongje@mail.nih.gov*.

Dated: February 29, 2012.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 2012–5356 Filed 3–5–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Epidemiology and Genetics of Chronic Disease.

Date: March 28–29, 2012.

Time: 10 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Julia Krushkal, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3148, MSC 7770, Bethesda, MD 20892, 301–435–1782, *krushkalj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Epidermal, Lupus, and Wound Healing.

Date: March 28–29, 2012.

Time: 10 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Baljit S Moonga, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7806, Bethesda, MD 20892, 301–435–1777, *moongabs@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 29, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–5419 Filed 3–5–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; Career Awards (2012/05).

Date: March 26, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Ruixia Zhou, Ph.D., Scientific Review Officer, 6707 Democracy Boulevard, Democracy Two Building, Suite 957, Bethesda, MD 20892, 301–496–4773, *zhour@mail.nih.gov.*

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; Point-of-Care Technologies Research Network (U54).

Date: March 28–29, 2012.

Time: 6 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: John K. Hayes, Ph.D., Scientific Review Officer, 6707 Democracy Boulevard, Room 959, Bethesda, MD 20892, 301–451–3398, *hayesj@mail.nih.gov.*

Dated: February 29, 2012.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–5425 Filed 3–5–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Ruth L. Kirschstein National Research Service Award (NRSA) Institutional Research Training Grants (Parent T32).

Date: March 30, 2012.

Time: 9:30 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Sujata Vijh, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, 301–594–0985, *vijhs@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: February 29, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–5423 Filed 3–5–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Board of Scientific Counselors, NIDCD.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute on Deafness and Other Communication Disorders, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, NIDCD.

Date: March 22, 2012.

Time: 1 p.m. to 2 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, 5 Research Court, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Andrew J. Griffith, Ph.D., MD, Director, Division of Intramural Research, National Institute on Deafness and Other Communication Disorders, 5 Research Court, Room

1A13, Rockville, MD 20850, 301–496–1960, *griffita@nidcd.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the urgent need to meet timing limitations imposed by the intramural research review cycle.

Information is also available on the Institute's/Center's home page: *http://www.nidcd.nih.gov/about/groups/bsc/,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: *February 29, 2012.*

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–5422 Filed 3–5–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Musculoskeletal and Vascular Sciences.

Date: March 19, 2012.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Aftab A Ansari, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4108, MSC 7814, Bethesda, MD 20892, 301–237–9931, *ansaria@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 28, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–5420 Filed 3–5–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Accreditation and Approval of Thionville Surveying Company, Inc., as a Commercial Gauger and Laboratory

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of accreditation and approval of Thionville Surveying Company, Inc., as a commercial gauger and laboratory.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 151.12 and 19 CFR 151.13, Thionville Surveying Company, Inc., 5440 Pepsi St, Harahan, LA 70123, has been approved to gauge and accredited to test petroleum and petroleum products, organic chemicals and vegetable oils for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquires regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *cbp.labhq@dhs.gov.* Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. *http://cbp.gov/linkhandler/cgov/trade/automated/labs_scientific_svcs/commercial_gaugers/gaulist.ctt/gaulist.pdf*

DATES: The accreditation and approval of Thionville Surveying Company, Inc., as commercial gauger and laboratory became effective on June 22, 2011. The next triennial inspection date will be scheduled for June 2014.

FOR FURTHER INFORMATION CONTACT: Jonathan McGrath, Laboratories and Scientific Services, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Suite 1500N, Washington, DC 20229, 202–344–1060.

Dated: February 28, 2012.

Ira S. Reese,

Executive Director, Laboratories and Scientific Services.

[FR Doc. 2012–5351 Filed 3–5–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Approval of VIP Chemical, Inc., As a Commercial Gauger

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of approval of VIP Chemical, Inc., as a commercial gauger.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 151.13, VIP Chemical, Inc., 4026 FM 1694, Robstown, TX 78310, has been approved to gauge petroleum, petroleum products, organic chemicals and vegetable oils for customs purposes, in accordance with the provisions of 19 CFR 151.13. Anyone wishing to employ this entity to conduct gauger services should request and receive written assurances from the entity that it is approved by the U.S. Customs and Border Protection to conduct the specific gauger service requested. Alternatively, inquires regarding the specific gauger service this entity is approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *cbp.labhq@dhs.gov.* Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories.

http://cbp.gov/linkhandler/cgov/trade/automated/labs_scientific_svcs/commercial_gaugers/gaulist.ctt/gaulist.pdf

DATES: The approval of VIP Chemical, Inc., as commercial gauger became effective on June 16, 2011. The next triennial inspection date will be scheduled for June 2014.

FOR FURTHER INFORMATION CONTACT: Jonathan McGrath, Laboratories and Scientific Services, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Suite 1500N, Washington, DC 20229, 202–344–1060.

Dated: February 28, 2012.

Ira S. Reese,

Executive Director, Laboratories and Scientific Services.

[FR Doc. 2012–5353 Filed 3–5–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R6–ES–2012–N041; FXES11130600000D2–123–FF06E00000]

Endangered and Threatened Wildlife and Plants; Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered or threatened species. With some exceptions, the Endangered Species Act of 1973, as amended (Act), prohibits activities with endangered and threatened species unless a Federal permit allows such activity. The Act requires that we invite public comment before issuing these permits.

DATES: To ensure consideration, please send your written comments by April 5, 2012.

ADDRESSES: You may submit comments or requests for copies or more information by any of the following methods. Alternatively, you may use one of the following methods to request hard copies or a CD–ROM of the documents. Please specify the permit you are interested in by number (*e.g.,* Permit No. TE–123456).

- *Email: permitsR6ES@fws.gov.* Please refer to the respective permit number (*e.g.*, Permit No. TE–123456) in the subject line of the message.
- *U.S. Mail:* Ecological Services, U.S. Fish and Wildlife Service, P.O. Box 25486–DFC, Denver, CO 80225.
- *In-Person Drop-off, Viewing, or Pickup:* Call (303) 236–4256 to make an appointment during regular business hours at 134 Union Blvd., Suite 645, Lakewood, CO 80228.

FOR FURTHER INFORMATION CONTACT: Kris Olsen, Permit Coordinator Ecological Services, (303) 236–4256 (phone); *permitsR6ES@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

Background

The Act (16 U.S.C. 1531 *et seq.*) prohibits activities with endangered and threatened species unless a Federal permit allows such activity. Along with our implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR 17, the Act provides for permits, and requires that we invite public comment before issuing these permits.

A permit granted by us under section 10(a)(1)(A) of the Act authorizes you to conduct activities with United States endangered or threatened species for scientific purposes, enhancement of propagation or survival, or interstate commerce (the latter only in the event that it facilitates scientific purposes or enhancement of propagation or survival). Our regulations implementing section 10(a)(1)(A) for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Applications Available for Review and Comment

We invite local, State, and Federal agencies, and the public to comment on the following applications. Please refer to the appropriate permit number (*e.g.,* Permit No. TE–123456) for the application when submitting comments.

Documents and other information the applicants have submitted with these applications are available for review, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552).

Permit Application Number: TE–047250

Applicant: Joe Maurier, Montana Fish, Wildlife, and Parks, Helena, Montana 59620.

Applicant requests renewal of an existing permit to perform the following recovery activities with the following species, in conjunction with surveys and population monitoring activities throughout the range of each species in Montana for the purpose of enhancing the species' survival: take (capture, hold, tag, propagate, and kill) pallid sturgeon (*Scaphirhynchus albus*) and take (capture, hold, tag, and release) black-footed ferret (*Mustela nigripes*).

Permit Application Number: TE–059105

Applicant: Pam Riddle, Bureau of Land Management, Moab Field Office, Moab, Utah 84532.

Applicant requests renewal of an existing permit to take (harass by survey) Southwestern willow flycatcher (*Empidonax traillii extimus*) in conjunction with surveys throughout the range of the species in Utah for the purpose of enhancing the species' survival.

Permit Application Number: TE–161444

Applicant: William Shepherd, California Academy of Sciences, Steinhart Aquarium, San Francisco, California 94118.

Applicant requests renewal of an existing permit to take (display) pallid sturgeon (*Scaphirhynchus albus*) for the purpose of enhancing the species' survival.

Permit Application Number: TE–047290

Applicant: Theodore James Smith, Colorado Parks and Wildlife, Native Aquatic Species Restoration Facility, Alamosa, Colorado 81101.

Applicant requests renewal of an existing permit to take (capture, hold, tag, propagate, and kill) bonytail (*Gila elegans*), Colorado pikeminnow (*Ptychocheilus lucius*), humpback chub (*Gila cypha*), and razorback sucker (*Xyrauchen texanus*) at the Colorado Parks and Wildlife, Native Aquatic Species Restoration Facility for the purpose of enhancing the species' survival.

Permit Application Number: TE–049623

Applicant: Mike Houck, Department of the Army, DPW, Environmental Division, Ft. Riley, Kansas 66442.

Applicant requests renewal of an existing permit to take (capture, survey, electrofish, and display) Topeka shiner (*Notropis topeka*) in Kansas for the purpose of enhancing the species' survival.

Permit Application Number: TE–052204

Applicant: Lee Bender, U.S. Fish and Wildlife Service, Saratoga National Fish Hatchery, Saratoga, Wyoming 82331.

Applicant requests renewal of an existing permit to take (survey, transport, and propagate) Wyoming toad (*Bufo baxteri*) in Wyoming for the purpose of enhancing the species' survival.

Permit Application Number: TE–056079

Applicant: John Hawkins, Colorado State University, Larval Fish Laboratory, Ft. Collins, Colorado 80523.

Applicant requests renewal of an existing permit to take (capture, survey, and electrofish) Colorado pikeminnow (*Ptychocheilus lucius*) in Colorado for the purpose of enhancing the species' survival.

Permit Application Number: TE–07858A

Applicant: Eugene Schupp, Utah State University, Logan, Utah 84322.

Applicant requests renewal of an existing permit to take (remove and reduce to possession, propagate) *Schoenocrambe suffrutescens* (Shrubby reed-mustard) in Utah for the purpose of enhancing the species' survival.

Permit Application Number: TE–064685

Applicant: Steve Haslouer, Kansas Department of Health and Environment, Topeka, Kansas 66612.

Applicant requests renewal of an existing permit to take (capture, survey, and electrofish) Arkansas River shiner (*Notropis girardi*), Neosho madtom (*Noturus placidus*), pallid sturgeon (*Scaphirhynchus albus*), and Topeka shiner (*Notropis topeka*) in Kansas for the purpose of enhancing the species' survival.

Permit Application Number: TE–064685

Applicant: Ron Kagan, Detroit Zoo, Royal Oak, Michigan 48067.

Applicant requests renewal of an existing permit to take (survey, transport, display, and propagate) Wyoming toad (*Bufo baxteri*) for the purpose of enhancing the species' survival.

Permit Application Number: TE–051815

Applicant: Terry Lincoln, Dakota Zoological Society, Bismarck, North Dakota 58502.

Applicant requests renewal of an existing permit to take (display) pallid sturgeon (*Scaphirhynchus albus*) for the purpose of enhancing the species' survival.

National Environmental Policy Act

In compliance with the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), we have made an initial determination that the proposed activities in these permits are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement (516 DM 6 Appendix 1, 1.4C(1)).

Public Availability of Comments

All comments and materials we receive in response to this request will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

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.

Authority

We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*).

Dated: February 17, 2012.

Michael G. Thabault,

Acting Regional Director, Mountain-Prairie Region.

[FR Doc. 2012–5336 Filed 3–5–12; 8:45 am]

BILLING CODE 4310–55–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–814]

Certain Automotive GPS Navigation Systems, Components Thereof, and Products Containing Same; Determination Not To Review Initial Determination Amending Complaint; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's (''ALJ'') initial determination (''ID'') (Order No. 5) granting Complainant's motion for leave to amend the complaint and notice of investigation.

FOR FURTHER INFORMATION CONTACT: Panyin A. Hughes, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–3042. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on November 23, 2011, based on a complaint filed by Beacon Navigation GmbH of Zug, Switzerland (''Beacon''). 76 FR 72443 (Nov. 23, 2011). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain automotive GPS navigation systems, components thereof, and products containing the same by reason of infringement of certain claims of United States Patent Nos. 6,374,180; 6,178,380; 6,029,111; and 5,862,511. The notice of investigation named several respondents including General Motors Company of Detroit, Michigan (''GM'').

On December 2, 2011, Beacon filed a motion for leave to amend the complaint and notice of investigation to terminate GM from the investigation and replace it with General Motors LLC of Detroit, Michigan (''GM LLC'').

On February 9, 2012, the ALJ issued the subject ID, granting the motion. The ALJ found that, pursuant to Commission Rule 210.14(b) (19 CFR 210.14(b)), good cause exists to amend the complaint and notice of investigation. None of the parties petitioned for review of the ID.

The Commission has determined not to review the ID. Accordingly, GM is terminated from the investigation and GM LLC is added as a respondent to the investigation.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

By order of the Commission.

Issued: February 29, 2012.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2012–5313 Filed 3–5–12; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–832]

Certain Ink Application Devices and Components Thereof and Methods of Using the 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 30, 2012, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of MT.Derm GmbH of Berlin, Germany and Nouveau Cosmetique USA Inc. of Orlando, Florida. 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 ink application devices and components thereof and methods of using the same by reason of infringement of certain claims of U.S. Patent No. 6,345,553 (''the '553 patent'') and U.S. Patent No. 6,505,530 (''the '530 patent''). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist orders.

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 28, 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 ink application devices and components thereof and methods of using the same that infringe one or more of claims 1–3, 7–12, and 16–20 of the '530 patent and claims 1–4, 10, 12–14, 21–23, and 26–28 of the '553 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 complainants are:

MT.Derm GmbH, Gustav-Krone-Str. 3, 14167 Berlin, Germany;

Nouveau Cosmetique USA Inc., 189 South Orange Avenue, Suite 1110—The Plaza South Tower, Orlando, FL 32801.

(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:

T–Tech Tattoo Device Inc., 10 Grenoble Drive PH11, North York, Ontario, Canada M3C 1C7;

Yiwu Beyond Tattoo Equipments Co., Ltd., Houzhai Industrial Zone, Yiwu City, Zhejiang Province, China;

Guangzhou Pengcheng Cosmetology Firm, Booth 109, The First Floor, Anhua Beauty Exchange Center, 121 West Guangyuan Road, Yuexiu District, Guangzhou, Guangdong, China.

(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 29, 2012.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2012–5321 Filed 3–5–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–74,336]

Polaris Industries, Including On-site Leased Workers From Westaff, Supply Technologies, Aerotek Securitas Security Services, Volt Workforce Solutions and Select Staffing, Osceola, WI; 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 August 26, 2010, applicable to workers of Polaris Industries, including on-site leased workers from Westaff, Osceola, Wisconsin. The notice was published in the **Federal Register** on September 15, 2010 (75 FR 56143). The notice was amended on December 6, 2010, January 21, 2011 and April 12, 2011 to include

on-site leased workers from Supply Technologies, Aerotek Securitas Security Services and Volt Workforce Solutions. The notices were published in the **Federal Register** on December 13, 2010 (75 FR 77666), February 2, 2011 (76 FR 5833) and April 22, 2011 (76 FR 22729).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in activities related to the production of components for recreational vehicles.

The company reports that workers leased from Select Staffing were employed on-site at the Osceola, Wisconsin location of Polaris Industries. The Department has determined that these workers were sufficiently under the control of Polaris Industries to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Select Staffing working on-site at the Osceola, Wisconsin location of Polaris Industries.

The amended notice applicable to TA–W–74,336 is hereby issued as follows:

All workers of Polaris Industries, including on-site leased workers from Westaff, Supply Technologies, Aerotek, Securitas Security Services, Volt Workforce Solutions and Select Staffing, Osceola, Wisconsin, who became totally or partially separated from employment on or after June 28, 2009 through August 26, 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 22nd day of February 2012.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 2012–5394 Filed 3–5–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–74,325]

Exxonmobil Chemical Company Films Business Division Including on-Site Leased Workers From Manpower, RCG–IT and Genesis Macedon, NY; 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 October 8, 2010, applicable to ExxonMobil Chemical Company, Films Business Division, including on-site leased workers from Manpower, Macedon, New York. The workers provide customer support services. The notice was published in the **Federal Register** on October 25, 2010 (75 FR 65520).

At the request of the New York State agency, the Department reviewed the certification for workers of the subject firm. The company reports that workers leased from RCG–IT and Genesis were employed on-site at the Macedon, New York location of ExxonMobil Chemical Company, Films Business Division. The Department has determined that these workers were sufficiently under the control of ExxonMobil Chemical Company, Films Business Division, Macedon, New York to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from RCG–IT and Genesis working on-site at the Macedon, New York location of ExxonMobil Chemical Company, Films Business Division.

The amended notice applicable to TA–W–74,325 is hereby issued as follows:

All workers of ExxonMobil Chemical Company, Films Business Division, including on-site leased workers from Manpower, RCG–IT and Genesis, Macedon, New York, who became totally or partially separated from employment on or after June 25, 2009, through October 8, 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.

The amended notice applicable to TA–W–75,252A is hereby issued as follows:

All leased workers from The Hamilton-Ryker Group LLC, Securitas Security Services, Take Care Corporation, Conestoga Rovers and Associates, Phillips Engineering, Rockwell Engineering, Excel Logistics, and American Food and Vending, Calhoun Spotting Service, and Job World working on-site at The Goodyear Tire and Rubber Company, North American Tire, Union City, Tennessee (TA–W–75,252A), who became totally or partially separated from employment on or after February 10, 2010, through April 6, 2013, 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 23rd day of February 2012.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–5395 Filed 3–5–12; 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 *February 13, 2012 through February 17, 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
81,186	Liberty Denim, LLC, Her Services	Liberty, SC	February 13, 2010.
81,231	Autodie, LLC, A Subsidiary of Chrysler, LLC	Grand Rapids, MI	March 4, 2012.
81,240	Snokist Growers, ADD Staffing and Ace, Inc.	Yakima, WA	February 13, 2010.

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
81,055	Litton Loan Servicing (Ocwen), A Subsidiary Of Ocwen Financial Corp.	Irving, TX	February 13, 2010.
81,055A	Litton Loan Servicing (Ocwen)	Houston, TX	February 13, 2010.
81,158	Hartford Financial Services Group, Inc., Corporate/Finance/Controllers.	Hartford, CT	February 13, 2010.
81,213	American Express Travel Related Services Company, Inc., The Account Security Group, American Express Company.	Phoenix, AZ	February 13, 2010.

TA–W No.	Subject firm	Location	Impact date
81,215	Apex Tool Group, LLC, Including On Site Leased Workers from Thompson Industrial.	Sumter, SC	January 27, 2012.
81,215A	Leased Workers from Aerotek, Working on Site at Apex Tool Group, LLC, Apex Tool Group-Sumter Division.	Sumter, SC	February 13, 2010.
81,219	Deloitte Recap: Biotech Consulting and BD Software Division, Leased Workers from: Syndicate Bleu, 24Seven talent, Apple One.	San Francisco, CA	February 13, 2010.
81,226	Duro Textiles, LLC, Duro Finishing and Duro Printers Plants, Patriarch Partners.	Fall River, MA	November 10, 2011.
81,226A	LT Staffing and Able Associates, Duro Textiles, LLC.	Fall River, MA	February 13, 2010.
81,252	Littelfuse, Inc., Corporate Resources, Aerotek, Dysis and Tek.	Chicago, IL	February 13, 2010.
81,254	BT North America, Network Operations, Leased workers from Manpower and Tech Mahindra.	Atlanta, GA	February 13, 2010.
81,309	Hanesbrands, Inc., IH Services, Security Forces, Inc. and Workforce Carolina.	Winston-Salem, NC	January 20, 2011.
81,263	Chartis Global Services, Inc., Regional Service Center, Chartis, Inc..	Houston, TX	February 13, 2010.
81,272	Electro Scientific Industries, Inc. (ESI), including on-site workers from ProSource and Express.	Portland, OR	January 24, 2011.
81,275	Cooper Bussmann, LLC, Transportation division, wages reported under Martek, leased workers Adecco, Tops Staffing, Alltek Staffing and Resource Group.	Gibsonia, PA	January 30, 2011.
81,277	GCC RioGrande, Inc., Accounts Payable Department, Subsidiary of GCC of America, Leased Workers: Accountemps.	Tijeras, NM	February 13, 2010.
81,277A	GCC RioGrande, Inc., Accounts Payable Department, Subsidiary of GCC of America. Leased Workers: Accountemps.	Pueblo, CO	February 13, 2010.
	Hartford Financial Services Group, Inc., Corporate/EIT/Consumer.	Simsbury, CT	February 7, 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
81,067	Johnson Controls, Inc., Valley Staffing	Hudson, WI	February 13, 2010.
81,117	Sykes Enterprises, Incorporated, Their Homes In Colorado.	Sterling, CO	February 13, 2010.

The following certifications have been issued. The requirements of Section 222(c) (downstream producer for 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
80,482	Weather Shield, Inc.	Park Falls, WI	September 10, 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
81,300	Daxin Pacific, Inc.	Seattle, WA	

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
80,454	TMI Forest Products, Crane Creek Division, Including On Site Leased Workers: Express Professional Employment.	Morton, WA	
81,303	K&T Switching Services, Inc. Including Wages Reported Through Complete Personnel Logistics, Inc., Leased Workers: Kelly Services, Prodriver, Adecco, Transforce.	Dearborn, MI	

I hereby certify that the aforementioned determinations were issued during the period of *February 13, 2012 through February 17, 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 23, 2012.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–5397 Filed 3–5–12; 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

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 16, 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 16, 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 23rd day of February 2012.

Michael Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

APPENDIX

[25 TAA petitions instituted between 2/13/12 and 2/17/12]

TA–W No.	Subject firm (petitioners)	Location	Date of institution	Date of petition
81323	UBS Financial Services Inc. (Workers)	Nashville, TN	02/13/12	02/10/12
81324	CBS Fashion Inc. (Workers)	New York, NY	02/13/12	02/10/12
81325	Sykes Enterprise (Workers)	Chavies, KY	02/14/12	02/13/12
81326	European Touch (Company)	Milwaukee, WI	02/14/12	02/06/12
81327	Diversified Machine Inc. (Company)	Howell, MI	02/14/12	02/08/12
81328	Wellpoint, Inc. (Company)	Denver, CO	02/14/12	02/13/12
81329	Somerset Foundry & Machine Company (Union)	Somerset, PA	02/15/12	02/14/12
81330	TE Connectivity/Tyco Electronics (Workers)	Wilsonville, OR	02/15/12	02/10/12
81331	PerkinElmer Health Sciences (State/One-Stop)	Branford, CT	02/15/12	02/14/12
81332	American Apparel, Inc. (Workers)	Fort Deposit, AL	02/15/12	02/14/12
81333	Air Products and Chemicals Inc. (Company)	Fountain Valley, CA	02/15/12	02/14/12
81334	SWM International, Inc. (Company)	Spotswood, NJ	02/15/12	02/14/12
81335	Technicolor (State/One-Stop)	Burbank, CA	02/15/12	02/14/12
81336	Bureau Veritas, Consumer Product Services, Inc. (Workers).	Taunton, MA	02/15/12	02/14/12
81337	Fu Sing Fashion Inc. (Workers)	Brooklyn, NY	02/15/12	02/12/12
81338	GlaxoSmithKline (State/One-Stop)	E. Durham, NY	02/16/12	02/15/12
81339	Asta US (State/One-Stop)	Waynesboro, GA	02/17/12	01/27/12
81340	The Berry Company, LLC (Company)	Dayton, OH	02/17/12	02/14/12
81341	AAA Northern California-Utah Insurance Exchange (State/One-Stop).	Walnut Creek, CA	02/17/12	02/14/12
81342	GrafTech International Holdings Inc. (Union)	Anmoore, WV	02/17/12	02/15/12
81343	Adcom Wire/aka Legette and Platt (Workers)	Nicholasville, KY	02/17/12	02/16/12
81344	Agility Marketing, formerly known as Telatron Marketing Group Inc. (Workers).	Erie, PA	02/17/12	12/28/11
81345	Rain Bird Corporation (Company)	Azusa, CA	02/17/12	02/16/12
81346	Epicor Software Corporation (Activant Solutions) (State/One-Stop).	Irvine, CA	02/17/12	02/16/12

APPENDIX—Continued

[25 TAA petitions instituted between 2/13/12 and 2/17/12]

TA–W No.	Subject firm (petitioners)	Location	Date of institution	Date of petition
81347	SenoRX (State/One-Stop)	Irvine, CA	02/17/12	02/16/12

[FR Doc. 2012–5398 Filed 3–5–12; 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–80,160; Pension Systems Corp., Sherman Oaks, CA

I hereby certify that the aforementioned negative determinations on reconsideration were issued on *February 16 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 21, 2012.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–5389 Filed 3–5–12; 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–80,152; CompOne Services, LTD, Ithaca, New York

I hereby certify that the aforementioned negative determinations on reconsideration were issued on *February 21 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 24, 2012.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–5387 Filed 3–5–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

2002 Reopened—Previously Denied Determinations; Notice of Revised Denied 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 revised 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 reconsidered. The reconsideration investigation revealed that the following workers groups have met the certification criteria under the provisions of TAAEA.

After careful review of the additional facts obtained, the following revised determinations on reconsideration have been issued.

TA–W–80,291; RR Donnelley & Sons, Inc., Seattle, WA: February 13, 2010

I hereby certify that the aforementioned revised determinations on reconsideration were issued on *February 16, 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 21, 2012.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–5388 Filed 3–5–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

MGM Transport, et al.; Amended Notice of Revised Determination on Reconsideration

TA–W–80,420
MGM Transport, 2550 Hickory Blvd., A Subsidiary Of Cf Holding Co. Inc., Lenoir, NC
TA–W–80,420H
MGM Transport, 501 North County Road, a Subsidiary of CF Holding Co. Inc., Secaucus, NJ

In accordance with Section 223 of the Trade Act of 1074, 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 MGM Transport, 2550 Hickory Road, a subsidiary of CF Holding Co., Inc., Lenoir, North Carolina (TA–W–80,420), MGM Transport, 900 VC Drive, a subsidiary of CF Holding Co., Inc., Martinsville, Virginia (TA–W–80,420A), MGM Transport, 1264 Jackson Lake Road, a subsidiary of CF Holding Co., Inc., High Point, North Carolina (TA–W–80,420B), Caldwell Freight Lines, Inc., 1264 Jackson Lake Road, a subsidiary of CF Holding Co., Inc., High Point, North Carolina (TA–W–80,420C), Caldwell Freight Lines, Inc., 900 VC Drive, a subsidiary of CF Holding Co., Inc., Martinsville, Virginia (TA–W–80,420D), Caldwell Freight Lines, Inc., 385 Stafford Blvd., a subsidiary of CF Holding Co., Inc., Pontotoc, Mississippi (TA–W–80,420E), Caldwell Freight Lines, Inc., 2550 Hickory Blvd., a subsidiary of CF Holding Co., Inc., Lenoir, North Carolina (TA–W–80,420F), and Caldwell Freight Lines, Inc., 1459 Robinwood Road, a subsidiary of CF Holding Co., Inc., Newton, North Carolina (TA–W–80,420G). The worker group, except for TA–W–80,420, TA–W–80,420B and TA–W–80,420E, also consists of on-site leased workers from Prime Choice Services. The workers' firm is engaged in activities related to the supply of transportation services. The revised notice was published in the **Federal Register** on December 29, 2011 (76 FR 81991).

New information provided by the company revealed that workers of the Secaucus, New Jersey location of MGM Transport, a subsidiary of CF Holding Co., Inc. supplied transportation services to a certified Trade Adjustment Assistance firm. The loss of business by the subject firm with the TAA-certified firm contributed importantly to worker separations at the Secaucus, New Jersey location.

Accordingly, the Department is amending this revised determination to include workers of the Secaucus, New Jersey location of MGM Transport, a subsidiary of CF Holding Co., Inc.

The intent of the Department's revised determination is to include all workers of the subject firm who were adversely affected as secondary certified workers.

The amended notice applicable to TA–W–80,420 is hereby issued as follows:

All workers of MGM Transport, 2550 Hickory Road, a subsidiary of CF Holding Co., Inc., Lenoir, North Carolina (TA–W–80,420), MGM Transport, 900 VC Drive, a subsidiary of CF Holding Co., Inc., Martinsville, Virginia, including on-site leased workers from Prime Choice Services (TA–W–80,420A), MGM Transport, 1264 Jackson Lake Road, a subsidiary of CF Holding Co., Inc., High Point, North Carolina (TA–W–80,420B), Caldwell Freight Lines, Inc., 1264 Jackson Lake Road, a subsidiary of CF Holding Co., Inc., High Point, North Carolina, including on-site leased workers from Prime Choice Services (TA–W–80,420C), Caldwell Freight Lines, Inc., 900 VC Drive, a subsidiary of CF Holding Co., Inc., Martinsville, Virginia, including on-site leased workers from Prime Choice Services (TA–W–80,420D), Caldwell Freight Lines, Inc., 385 Stafford Blvd., a subsidiary of CF Holding Co., Inc., Pontotoc, Mississippi (TA–W–80,420E), Caldwell Freight Lines, Inc., 2550 Hickory Blvd., a subsidiary of CF Holding Co., Inc., Lenoir, North Carolina, including on-site leased workers from Prime Choice Services (TA–W–80,420F), Caldwell Freight Lines, Inc., 1459 Robinwood Road, a subsidiary of CF Holding Co., Inc., Newton, North Carolina, including on-site leased workers from Prime Choice Services (TA–W–80,420G), and MGM Transport, 501 North County Road, a subsidiary of CF Holding Co., Inc., Secaucus, New Jersey (TA–W–80,420H), who became totally or partially separated from employment on or after September 7, 2010, through December 15, 2013, and all workers in the group threatened with total or partial separation from employment on December 20, 2011 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 in Washington, DC, this 21st day of February 2012.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–5396 Filed 3–5–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2012–0004]

The Cadmium in Construction Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning its proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Cadmium in Construction Standard (29 CFR 1926.1127).

DATES: Comments must be submitted (postmarked, sent, or received) by May 7, 2012.

ADDRESSES:

Electronically: 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.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, OSHA Docket No. OSHA–2012–0004, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and OSHA docket number (OSHA–2012–0004) for the Information Collection Request (ICR). All comments, including any

personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov*. For further information on submitting comments see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including notice) are listed in the *http://www.regulations.gov* index; however, some information (e.g., copyrighted material) is not publicly available to read or download from the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Theda Kenney or Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3468, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The information collection requirements specified in the Cadmium in Construction Standard protect workers from the adverse health effects that may result from their exposure to cadmium. The major information collection requirements of the Standard include: conducting worker exposure monitoring, notifying workers of their cadmium exposures, implementing a written compliance program, implementing medical surveillance of workers, providing examining physicians with specific information, ensuring that workers receive a copy of their medical surveillance results, maintaining workers' exposure monitoring and medical surveillance records for specific periods, and providing access to these records by OSHA, the National Institute for Occupational Safety and Health, the worker who is the subject of the records, the worker's representative, and other designated parties.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend its approval of the information collection requirements contained in the Cadmium in Construction Standard (29 CFR 1926.1127). The Agency is proposing to retain its previous estimate of 37,231 burden hours; however, it is proposing to increase the currently approved operation and maintenance costs from $1,775,457 to $1,930,703, a total increase of $155,246. The increase is due to the Agency increasing the cost to perform medical surveillance and exposure monitoring.

Type of Review: Extension of a currently approved collection.

Title: Cadmium in Construction Standard (29 CFR 1926.1127).

OMB Number: 1218–0186.

Affected Public: Business or other for-profits; Federal Government; State, Local or Tribal Government.

Number of Respondents: 10,000.

Frequency of Response: On occasion; Quarterly; Semi-annually; Annually.

Total Responses: 261,889.

Average Time per Response: Varies from two minutes (.03 hour) for a secretary to compile and maintain training records to 1.5 hours to administer worker medical examinations.

Estimated Total Burden Hours: 37,231.

Estimated Cost (Operation and Maintenance): $1,930,703.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2012–0004). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (e.g., copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://*

www.regulations.gov Web site to submit comments and access the docket is available at the Web site's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available through the Web site and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on March 1, 2012.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2012–5414 Filed 3–5–12; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2012–0005]

The Cadmium in General Industry Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning its proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Cadmium in General Industry Standard (29 CFR 1910.1027).

DATES: Comments must be submitted (postmarked, sent, or received) by May 7, 2012.

ADDRESSES:

Electronically: 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.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, OSHA Docket No. OSHA–2012–0005, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and OSHA docket number (OSHA–2012–0005) for the Information Collection Request (ICR). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download from the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Theda Kenney or Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3468, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The information collection requirements specified in the Cadmium in General Industry Standard protect workers from the adverse health effects that may result from their exposure to cadmium. The major information collection requirements of the Standard include: Conducting worker exposure monitoring, notifying workers of their cadmium exposures, implementing a written compliance program, implementing medical surveillance of workers, providing examining physicians with specific information, ensuring that workers receive a copy of their medical surveillance results, maintaining workers' exposure monitoring and medical surveillance records for specific periods, and providing access to these records by OSHA, the National Institute for Occupational Safety and Health, the worker who is the subject of the records, the worker's representative, and other designated parties.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting an adjustment decrease in burden hours from 91,033 to 84,307 (a total decrease of 6,726 hours). The adjustment is primarily due to a

reduction in plants and a decrease in covered workers, based on new data.

Type of Review: Extension of a currently approved collection.

Title: Cadmium in General Industry (29 CFR 1910.1027).

OMB Number: 1218–0185.

Affected Public: Business or other for-profits; Federal Government; State, Local or Tribal Government.

Number of Respondents: 49,734.

Frequency of Response: On occasion; Quarterly, Biennially; Semi-annually; Annually.

Total Responses: 236,177.

Average Time per Response: Varies from 5 minutes (.08 hour) to maintain records to 1.5 hours to complete a medical examination.

Estimated Total Burden Hours: 84,307.

Estimated Cost (Operation and Maintenance): $4,799,475.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov*, which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2012–0005). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627). Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (e.g., copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available through the Web site and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on March 1, 2012.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2012–5415 Filed 3–5–12; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Energy Employees Occupational Illness Compensation Program Act of 2000, as Amended

AGENCY: Office of Workers' Compensation Programs, Labor.

ACTION: Notice of revision of listing of covered Department of Energy facilities.

SUMMARY: The Office of Workers' Compensation Programs (OWCP) is publishing a list of Department of Energy (DOE) facilities covered under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA). This notice revises and republishes the listing of DOE facilities that was last published by OWCP on November 24, 2010 (75 FR 71737) to include additional determinations made on this subject through March 6, 2012.

FOR FURTHER INFORMATION CONTACT: Rachel P. Leiton, Director, Division of Energy Employees Occupational Illness Compensation, Office of Workers' Compensation Programs, U.S. Department of Labor, Room C–3321, 200 Constitution Avenue NW., Washington, DC 20210. Telephone: 202–693–0081 (this is not a toll-free number).

ADDRESSES: OWCP welcomes comments regarding this list. Individuals who wish to suggest changes to this list may provide information to OWCP at the following address: U.S. Department of Labor, Office of Workers' Compensation Programs, Division of Energy Employees Occupational Illness Compensation, Room C–3321, 200 Constitution Avenue NW., Washington, DC 20210. You may also suggest changes to this list by email at *DEEOIC–Public@dol.gov.* You should include ''DOE facilities list'' in the subject line of any email containing comments on this list.

SUPPLEMENTARY INFORMATION:

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (42 U.S.C. 7384 *et seq.*), was originally enacted on October 30, 2000, and the primary responsibility for administering EEOICPA was assigned to the Department of Labor (DOL) by Executive Order 13179 (65 FR 77487). In section 2(c)(vii) of that Executive Order, DOE was directed to publish a list in the **Federal Register** of Atomic Weapons Employer (AWE) facilities, DOE facilities, and facilities owned and operated by a Beryllium Vendor (as those terms are defined in sections 7384l(5), 7384l(12) and 7384l(6) of EEOICPA, respectively). Pursuant to this direction, DOE published a list of these three types of facilities covered under EEOICPA on January 17, 2001 (66 FR 4003), and subsequently revised and republished the entire list on June 11, 2001 (66 FR 31218), December 27, 2002 (67 FR 79068), July 21, 2003 (68 FR 43095) and August 23, 2004 (69 FR 51825). In subsequent notices published on November 30, 2005 (70 FR 71815), June 28, 2007 (72 FR 35448), April 9, 2009 (74 FR 16191), August 3, 2010 (75 FR 45608), May 26, 2011 (76 FR 30695) and February 6, 2012 (77 FR 5781), DOE further revised the August 23, 2004 list by formally removing a total of fifteen AWE facilities without republishing the list in its entirety.

Following the amendments to EEOICPA that were enacted as subtitle E of Title XXXI of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Public Law 108–375, 118 Stat. 1811, 2178 (October 28, 2004), OWCP promulgated final regulations governing its expanded responsibilities under EEOICPA on December 29, 2006 (71 FR 78520). One of those regulations, 20 CFR 30.5(x)(2), indicates that OWCP has adopted the list of DOE facilities that was published by DOE on August 23, 2004, and notes that OWCP ''will

periodically update this list as it deems appropriate in its sole discretion by publishing a revised list of covered [DOE] facilities in the **Federal Register**.'' In making these updates, § 30.5(x)(1) specifies that the Director of OWCP is solely responsible for determining if a particular work site under consideration meets the statutory definition of a *Department of Energy facility.* This sole responsibility is derived from the grant of primary authority to DOL to administer the EEOICPA claims process contained in section 2(a)(i) of Executive Order 13179.

II. Purpose

Since OWCP last published a notice listing all DOE facilities covered under EEOICPA in the **Federal Register** on November 24, 2010, the Director of OWCP has made several determinations regarding the status of work sites in connection with claims filed under EEOICPA. Those determinations are briefly described in this Supplementary Information and are memorialized in the two updated lists of DOE facilities published by OWCP today.

The Director has determined that the Dayton Project (Units I and III in Dayton, Ohio and Unit IV in Oakwood, Ohio) meets the definition of a *Department of Energy facility* for the purposes of EEOICPA. Also, based on remediation activities that occurred pursuant to the Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. 7901 *et seq.,* the Director has determined that the following work sites meet the definition of a *Department of Energy facility* during the periods that such remediation activities took place: the Uranium Mills in Monument Valley and Tuba City, Arizona; the Climax Uranium Mill in Grand Junction, the New and Old Uranium Mills in Rifle, the Uranium Mills in Gunnison, Maybell and Naturita, and Uranium Mills No. 1 (East) and No. 2 (West) in Slick Rock, Colorado; the Uranium Mill in Lowman, Idaho; the Uranium Mills in Ambrosia Lake and Shiprock, New Mexico; the Uranium Mill and Disposal Cell in Lakeview, Oregon; Vitro Manufacturing (Canonsburg) in Canonsburg, Pennsylvania; the Uranium Mill in Falls City, Texas; the Uranium Mill in Mexican Hat, Utah; and the Uranium Mills in Converse County (Spook Site) and Riverton, Wyoming.

In addition, OWCP's research has led the Director to clarify or otherwise modify the designation of three work sites that were previously included in OWCP's published lists. The first site, which was previously listed under Utah as the Uranium Mill in Moab, now appears as the Uranium Mill in Moab (Atlas Site) in this listing. The second site, which was previously listed as the Nevada Operations Office, now appears as the Nevada Site Office. These two clarifications do not have any effect on the status of the two work sites in question, and are only intended to more precisely identify those facilities. The third facility, the Weldon Spring Plant, which is a facility with multiple locations in Weldon Spring, Missouri, has been divided into separate facilities and now appears in the lists published today as the following three facilities: The Weldon Spring Plant; the Weldon Spring Raffinate Pits; and the Weldon Spring Quarry. By dividing this third facility into three separate DOE facilities, OWCP will be better able to distinguish between the different operational periods of these locations, and will be able to more reliably obtain employment verification from the many different contractors that performed work at each location.

By updating the two lists found below, OWCP is presenting the public with the most current listing of DOE facilities in order to assist potential claimants and their families. OWCP is continuing its efforts in this area as it adjudicates claims filed under EEOICPA, and further revisions of these lists should be expected. Although DOE maintains a Web site (*http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/findfacility.cfm*) that provides information on AWE facilities, Beryllium Vendor facilities and DOE facilities to the public, the information on that Web site regarding DOE facilities should not be relied upon as it may not be up to date, nor is it binding on OWCP's adjudication of claims filed under EEOICPA. Instead, OWCP is solely authorized to give the public notice of the Director's determinations regarding DOE facilities.

III. Introduction to the Lists

The five complete lists previously published by DOE included all three types of work sites described in Executive Order 13179, *i.e.,* AWE facilities, Beryllium Vendor facilities, and DOE facilities. However, the lists published on June 23, 2009, November 24, 2010 and again today by OWCP only include work sites that meet the definition of a *Department of Energy facility,* because the authority to designate both AWE facilities and Beryllium Vendor facilities has been granted to DOE. However, since some work sites can meet the definition of more than just one type of covered work site during either the same or differing time periods, simply presenting one list of DOE facilities (without also differentiating among them in some easily understood fashion) could lead the reader to wrongly conclude that a listed work site has always been a DOE facility when, in fact, it only had that status during a brief period. To lessen the potential for this type of misunderstanding, OWCP has decided to continue its practice of presenting two separate lists of DOE facilities.

The first list consists exclusively of work sites that have only been DOE facilities for purposes of coverage under EEOICPA, and the second list consists of work sites that have also been at least one other type of covered work site in addition to a DOE facility. To see what other types of covered work sites the DOE facilities appearing in the second list are or have been, readers can refer to the **Federal Register** notices published by DOE on August 23, 2004 (69 FR 51825), November 30, 2005 (70 FR 71815), June 28, 2007 (72 FR 35448), April 9, 2009 (74 FR 16191), August 3, 2010 (75 FR 45608), May 26, 2011 (76 FR 30695) and February 6, 2012 (77 FR 5781). Since covered time periods for a particular DOE facility are statutorily limited to periods during which ''operations'' are or were performed by or on behalf of DOE (or its predecessor agencies) at that DOE facility, *and* when DOE (or its predecessor agencies) either had a proprietary interest in the facility or had entered into a particular type of contract with an entity regarding the facility, the lists below include date ranges during which covered employment at each work site could have been performed. These date ranges, however, do not reflect the exact day and month that a work site either acquired or lost its status as a DOE facility, and are not considered binding on OWCP in its adjudication of individual claims under EEOICPA. Rather, they are presented in this notice for the sole purpose of informing the public of the current results of OWCP's research into the operational histories of these work sites, some of which extend back to the establishment of the Manhattan Engineer District of the U.S. Army Corps of Engineers on August 13, 1942. OWCP's efforts in this area are continuing, and it expects that the date ranges included in this notice will change with the publication of future notices.

DOE facilities appearing on the lists that have undergone environmental remediation at the direction of or directly by DOE are identified by the following symbol—†—after the date range during which such environmental remediation occurred. During those periods, only the work of employees of DOE contractors who actually

performed the remediation is ''covered work'' under EEOICPA.

List 1: Work Sites That Are/Were DOE Facilities Exclusively

Facility name	Location	Dates
Alaska DOE Facilities		
Amchitka Island Nuclear Explosion Site	Amchitka Island	1965–1973; 2001†.
Project Chariot Site	Cape Thompson	1962; 1993†.
California DOE Facilities		
Area IV of the Santa Susanna Field Laboratory	Ventura County	1955–1988; 1988–Present †.
Canoga Complex	Los Angeles County	1955–1960.
De Soto Complex	Los Angeles County	1959–1995; 1998 †.
Downey Facility	Los Angeles County	1948–1955.
High Energy Rate Forging (HERF) Facility	Oxnard	1984–1997.
Laboratory for Energy-Related Health Research, University of California (Davis).	Davis	1958–1989; 1991–Present †.
Laboratory of Biomedical and Environmental Sciences, University of California (Los Angeles).	Los Angeles	1947–Present.
Laboratory of Radiobiology and Environmental Health, University of California (San Francisco).	San Francisco	1951–1999.
Lawrence Berkeley National Laboratory	Berkeley	1942–Present.
Lawrence Livermore National Laboratory	Livermore	1950–Present.
Sandia National Laboratories, Salton Sea Test Base	Imperial County	1946–1961.
Sandia National Laboratories—Livermore	Livermore	1956–Present.
Stanford Linear Accelerator Center, Stanford University	Palo Alto	1962–Present.
Colorado DOE Facilities		
Grand Junction Operations Office	Grand Junction	1943–Present.
Project Rio Blanco Nuclear Explosion Site	Rifle	1973–1976.
Project Rulison Nuclear Explosion Site	Grand Valley	1969–1971; 1972–1978 †.
Rocky Flats Plant	Golden	1951–2006.
Florida DOE Facilities		
Pinellas Plant	Clearwater	1957–1997.
Hawaii DOE Facilities		
Kauai Test Facility, U.S. Navy Pacific Missile Range	Kauai	1962–Present.
Idaho DOE Facilities		
Argonne National Laboratory—West	Scoville	1949–2005.
Idaho National Laboratory	Scoville	1949–Present.
Illinois DOE Facilities		
Argonne National Laboratory—East	Argonne	1946–Present.
Fermi National Accelerator Laboratory	Batavia	1972–Present.
Indiana DOE Facilities		
Dana Heavy Water Plant	Dana	1943–1957.
Iowa DOE Facilities		
Ames Laboratory, Iowa State University	Ames	1942–Present.
Iowa Ordnance Plant (Line 1 and Associated Activities)	Burlington	1947–1974.
Kentucky DOE Facilities		
Paducah Gaseous Diffusion Plant	Paducah	1951–7/28/98; 7/29/98–Present †.
Massachusetts DOE Facilities		
Winchester Engineering and Analytical Center	Winchester	1952–1961.
Minnesota DOE Facilities		
Elk River Reactor	Elk River	1962–1968.

Facility name	Location	Dates
Mississippi DOE Facilities		
Salmon Nuclear Explosion Site	Hattiesburg	1964–1972.
Missouri DOE Facilities		
Kansas City Plant	Kansas City	1949–Present.
Mallinckrodt Chemical Co., Destrehan Street Facility	St. Louis	1942–1962; 1995 †.
St. Louis Airport Storage Site (SLAPS)	St. Louis	1947–1973; 1984–1998.
Weldon Spring Plant	Weldon Spring	1955–1966; 1985–2002 †.
Weldon Spring Quarry	Weldon Spring	1958–1966; 1967–2002 †.
Weldon Spring Raffinate Pits	Weldon Spring	1955–1966; 1966–2002 †.
Nebraska DOE Facilities		
Hallam Sodium Graphite Reactor	Hallam	1960–1971.
Nevada DOE Facilities		
Nevada Site Office	North Las Vegas	1962–Present.
Nevada Test Site	Mercury	1951–Present.
Project Faultless Nuclear Explosion Site	Central Nevada Test Site	1967–1974.
Project Shoal Nuclear Explosion Site	Fallon	1962–1964.
Tonopah Test Range	Tonopah	1956–Present.
Yucca Mountain Site Characterization Project	Yucca Mountain	1987–Present.
New Jersey DOE Facilities		
Middlesex Sampling Plant	Middlesex	1943–1967; 1980–1982 †.
New Brunswick Laboratory	New Brunswick	1948–1977.
Princeton Plasma Physics Laboratory, James Forrestal Campus of Princeton University.	Princeton	1951–Present.
New Mexico DOE Facilities		
Albuquerque Operations Office	Albuquerque	1942–Present.
Chupadera Mesa	White Sands Missile Range	1945.
Hangar 481, Kirtland AFB	Albuquerque	1989–1996.
Kirtland Operations Office, Kirtland AFB	Albuquerque	1964–Present.
Los Alamos Medical Center	Los Alamos	1952–1963.
Los Alamos National Laboratory	Los Alamos	1942–Present.
Lovelace Respiratory Research Institute, Kirtland AFB	Albuquerque	1960–Present.
Project Gasbuggy Nuclear Explosion Site	Farmington	1967–1973; 1978; 1992–Present †.
Project Gnome Nuclear Explosion Site	Carlsbad	1960–1962.
Sandia National Laboratories	Albuquerque	1945–Present.
South Albuquerque Works	Albuquerque	1951–1967.
Trinity Nuclear Explosion Site, Alamogordo Bombing and Gunnery Range	White Sands Missile Range	1945; 1952 †; 1967 †.
Waste Isolation Pilot Plant	Carlsbad	1999–Present.
New York DOE Facilities		
Brookhaven National Laboratory	Upton	1947–Present.
Electro Metallurgical Co.	Niagara Falls	1942–1953.
Environmental Measurements Laboratory	New York	1946–2003.
Lake Ontario Ordnance Works	Niagara County	1944–1997.
Linde Ceramics Plant (Buildings 30, 31, 37 and 38 only)	Tonawanda	1942–1953; 1988–1992 †; 1996 †.
Peek Street Facility (Knolls Atomic Power Laboratory)	Schenectady	1947–1954.
Sacandaga Facility	Glenville	1947–1953.
SAM Laboratories, Columbia University	New York	1942–1947.
Separations Process Research Unit (Knolls Atomic Power Laboratory)	Schenectady	1950–1965; 2007–2011 †.
University of Rochester Atomic Energy Project	Rochester	1943–1986.
Ohio DOE Facilities		
Extrusion Plant (Reactive Metals Inc.)	Ashtabula	1962–Present.
Feed Materials Production Center (FMPC)	Fernald	1951–Present.
Dayton Project (Units I, III and IV only)	Dayton and Oakwood	1943–1950.
Mound Plant	Miamisburg	1947–Present.
Piqua Organic Moderated Reactor	Piqua	1963–1969.
Portsmouth Gaseous Diffusion Plant	Piketon	1952–7/28/98; 7/29/98–Present †.

Facility name	Location	Dates
Oregon DOE Facilities		
Albany Metallurgical Research Center, U.S. Bureau of Mines	Albany	1987–1993 †; 1995–Present.
Pennsylvania DOE Facilities		
Shippingport Atomic Power Plant	Shippingport	1984–1995 †.
Puerto Rico DOE Facilities		
BONUS Reactor Plant	Punta Higuera	1964–1968.
Puerto Rico Nuclear Center	Mayaguez	1957–1976; 1987 †.
South Carolina DOE Facilities		
Savannah River Site	Aiken	1950–Present.
Tennessee DOE Facilities		
Clarksville Modification Center, Ft. Campbell	Clarksville	1949–1967.
Clinton Engineer Works (CEW)	Oak Ridge	1943–1949.
Oak Ridge Gaseous Diffusion Plant (K–25)	Oak Ridge	1943–Present.
Oak Ridge Hospital	Oak Ridge	1943–1959.
Oak Ridge Institute for Science Education	Oak Ridge	1946–Present.
Oak Ridge National Laboratory (X–10)	Oak Ridge	1943–Present.
Office of Scientific and Technical Information (OSTI)	Oak Ridge	1957–Present.
S–50 Oak Ridge Thermal Diffusion Plant	Oak Ridge	1944–1951.
Y–12 Plant	Oak Ridge	1942–Present.
Texas DOE Facilities		
Medina Modification Center	San Antonio	1958–1966.
Pantex Plant	Amarillo	1951–Present.
Virginia DOE Facilities		
Thomas Jefferson National Accelerator Facility	Newport News	1994–Present.
Washington DOE Facilities		
Hanford Engineer Works	Richland	1942–Present.
Pacific Northwest National Laboratory	Richland	1965–Present.
West Virginia DOE Facilities		
Reduction Pilot Plant	Huntington	1951–1963; 1978–1979.
Wisconsin DOE Facilities		
LaCrosse Boiling Water Reactor	LaCrosse	1967–1969.
Territorial DOE Facilities		
Pacific Proving Ground	Bikini and Enewetak Atolls (now part of the Republic of the Marshall Islands), Johnston Island and Christmas Island.	1946–1962.

List 2: Work Sites That Are/Were DOE Facilities (for the Years Identified in the Last Column Only) and Also Another Type of EEOICPA-Covered Facility

Facility name	Location	Dates
Arizona DOE Facilities		
Ore Buying Station at Globe	Globe	1955–1957.
Uranium Mill in Monument Valley	Monument Valley	1989–1990†; 1992–1994 †
Uranium Mill in Tuba City	Tuba City	1985–1986†; 1988–1990 †

Facility name	Location	Dates
California DOE Facilities		
General Atomics (Torrey Pines Mesa and Sorrento West)	La Jolla	1996–1999†
General Electric Vallecitos	Pleasanton	1998–2010†
Colorado DOE Facilities		
Climax Uranium Mill in Grand Junction	Grand Junction	1988–1994 †.
Green Sludge Plant in Uravan	Uravan	1943–1945.
New Uranium Mill in Rifle	Rifle	1988–1989†; 1992–1996 †.
Old Uranium Mill in Rifle	Rifle	1988–1989 †; 1992–1996 †.
Uranium Mill in Durango	Durango	1948–1953; 1986–1991 †.
Uranium Mill in Gunnison	Gunnison	1991–1995 †.
Uranium Mill in Maybell	Maybell	1995–1998 †.
Uranium Mill in Naturita	Naturita	1994†; 1996–1998 †.
Uranium Mill No. 1 in Slick Rock (East)	Slick Rock	1995–1996 †.
Uranium Mill No. 2 in Slick Rock (West)	Slick Rock	1995–1996 †.
Connecticut DOE Facilities		
Connecticut Aircraft Nuclear Engine Laboratory (CANEL)	Middletown	1958–1966.
Seymour Specialty Wire	Seymour	1992–1993 †.
Idaho DOE Facilities		
Uranium Mill in Lowman	Lowman	1992†; 1994–Present †.
Illinois DOE Facilities		
General Steel Industries (South Plant)	Granite City	1993 †.
Metallurgical Laboratory, University of Chicago (Eckhart Hall, Jones Laboratory and Ryerson Hall only).	Chicago	1982–1984†; 1987 †.
National Guard Armory (Washington Park Armory)	Chicago	1987 †.
Massachusetts DOE Facilities		
Chapman Valve Manufacturing Co.	Indian Orchard	1995 †.
Hood Building	Cambridge	1946–1963
Ventron Corporation	Beverly	1986; 1996–1997 †.
Michigan DOE Facilities		
Bridgeport Brass Co.	Adrian	1976 †; 1995 †.
Missouri DOE Facilities		
Latty Avenue Properties	Hazelwood	1984–1986 †.
New Jersey DOE Facilities		
Du Pont Deepwater Works	Deepwater	1996 †.
Kellex/Pierpont	Jersey City	1979–1980 †.
Middlesex Municipal Landfill	Middlesex	1984 †; 1986 †.
Rare Earths/W.R. Grace	Wayne	1985–1987 †.
New Mexico DOE Facilities		
Ore Buying Station at Grants	Grants	1956–1958.
Ore Buying Station at Shiprock	Shiprock	1952–1954.
Uranium Mill in Ambrosia Lake	Ambrosia Lake	1987–1989 †; 1992–1995 †.
Uranium Mill in Shiprock	Shiprock	1984–1986 †.
New York DOE Facilities		
Baker and Williams Warehouses (Pier 38)	New York	1991–1993 †.
Colonie Interim Storage Site (National Lead Co.)	Colonie	1984–1998 †.
West Valley Demonstration Project	West Valley	1980–Present.
Ohio DOE Facilities		
Alba Craft	Oxford	1994–1995 †.
Associated Aircraft Tool and Manufacturing Co.	Fairfield	1994–1995 †.
B & T Metals	Columbus	1996 †.
Baker Brothers	Toledo	1995 †.
Battelle Laboratories—King Avenue	Columbus	1986–2000 †.

Facility name	Location	Dates
Battelle Laboratories—West Jefferson	Columbus	1986–Present †.
Beryllium Production Plant (Brush Luckey Plant)	Luckey	1949–1961; 1992–Present †.
General Electric Co. (Ohio)	Cincinnati/Evendale	1961–1970
Herring-Hall Marvin Safe Co.	Hamilton	1994–1995 †.
Oregon DOE Facilities		
Uranium Mill and Disposal Cell in Lakeview	Lakeview	1986–1989 †.
Pennsylvania DOE Facilities		
Aliquippa Forge	Aliquippa	1988 †; 1993–1994 †.
C.H. Schnorr & Company	Springdale	1994 †.
Vitro Manufacturing (Canonsburg)	Canonsburg	1983–1985 †; 1996 †.
South Dakota DOE Facilities		
Ore Buying Station at Edgemont	Edgemont	1952–1956.
Texas DOE Facilities		
Uranium Mill in Falls City	Falls City	1992–1994 †.
Utah DOE Facilities		
Ore Buying Station at Marysvale	Marysvale	1950–1957.
Ore Buying Station at Moab	Moab	1954–1960.
Ore Buying Station at Monticello	Monticello	1948–1962.
Ore Buying Station at White Canyon	White Canyon	1954–1957.
Uranium Mill in Mexican Hat	Mexican Hat	1987 †; 1992–1995 †.
Uranium Mill in Moab (Atlas Site)	Moab	2001–Present.
Uranium Mill in Monticello	Monticello	1948–1960; 1983–2000 †.
Wyoming DOE Facilities		
Ore Buying Station at Crooks Gap	Crooks Gap	1956–1957.
Ore Buying Station at Riverton	Riverton	1955–1957.
Uranium Mill in Converse County (Spook Site)	Converse County	1989 †.
Uranium Mill in Riverton	Riverton	1988–1990 †.

† Denotes a period of environmental remediation.

Signed at Washington, DC, this 29th day of February, 2012.

Gary A. Steinberg,

Acting Director, Office of Workers' Compensation Programs.

[FR Doc. 2012–5324 Filed 3–5–12; 8:45 am]

BILLING CODE 4510–CR–P

OFFICE OF MANAGEMENT AND BUDGET

Compliance Assistance Resources and Points of Contact Available to Small Businesses

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Notice.

SUMMARY: In accordance with the Small Business Paperwork Relief Act of 2002 (44 U.S.C. 3520), the Office of Management and Budget (OMB) is publishing a ''list of the compliance assistance resources available to small businesses'' and a list of the points of contacts in agencies ''to act as a liaison between the agency and small business concerns'' with respect to the collection of information and the control of paperwork. This information is posted on the following Web site: *http://www.sba.gov/sbpra.*

FOR FURTHER INFORMATION CONTACT: Wendy Liberante, Office of Information and Regulatory Affairs, Office of Management and Budget, at *wliberante@omb.eop.gov,* or telephone: (202) 395–3647. Inquiries may be submitted by facsimile to (202) 395–5167.

SUPPLEMENTARY INFORMATION: The Small Business Paperwork Relief Act of 2002 (Pub. L. 107–198) requires OMB to ''publish in the **Federal Register** and make available on the Internet (in consultation with the Small Business Administration) on an annual basis a list of the compliance assistance resources available to small businesses'' (44 U.S.C. 3504(c)(6)). OMB has, with the active assistance and support of the Small Business Administration (SBA), assembled a list of the compliance assistance resources available to small businesses. This list is available today on the following Web site: *www.sba.gov/sbpra.* There is also a link to this information on the OMB Web site.

In addition, under another provision of this Act, ''each agency shall, with respect to the collection of information and the control of paperwork, establish 1 point of contact in the agency to act as a liaison between the agency and small business concerns'' (44 U.S.C. 3506(i)(1)). These contacts are also available at *www.sba.gov/sbpra.*

OMB and SBA have chosen to implement this statutory responsibility by publishing agency compliance contact information on the SBA.gov Web site. The public is also able to find

agency points of contact for compliance under the specific agency link.

Cass Sunstein,

Administrator, Office of Information and Regulatory Affairs.

[FR Doc. 2012–5196 Filed 3–5–12; 8:45 am]

BILLING CODE 3110–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Arts Advisory Panel Meeting

AGENCY: National Endowment for the Arts, National Foundation on the Arts and Humanities.

ACTION: Notice of meeting.

SUMMARY: Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Arts Advisory Panel to the National Council on the Arts will be held by teleconference at the Nancy Hanks Center, 1100 Pennsylvania Avenue NW., Washington, DC 20506 as follows (ending time is approximate): Media Arts (application review): March 16, 2012. This meeting, from 1 p.m. to 2 p.m. EDT, will be closed.

DATES: March 16, 2012, from 1 p.m. to 2 p.m. EDT.

FOR FURTHER INFORMATION CONTACT: Further information with reference to these meetings can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC 20506, or call 202/682–5691.

SUPPLEMENTARY INFORMATION: The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of February 15, 2012, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of Title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels that are open to the public, and if time allows, may be permitted to participate in the panel's discussions at the discretion of the panel chairman. If you need any accommodations due to a disability, please contact the Office of Accessibility, National Endowment for the Arts, 1100 Pennsylvania Avenue NW., Washington, DC 20506, 202/682–5532, TDY–TDD 202/682–5496, at least seven (7) days prior to the meeting.

Dated: March 2, 2012.

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. 2012–5524 Filed 3–5–12; 8:45 am]

BILLING CODE 7537–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for International Science and Engineering; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for International Science and Engineering (25104).

Date and Time: March 19, 2012, 8:30 a.m.–5 p.m. March 20, 2012, 8:30 a.m.–noon.

Place: National Science Foundation, 4201 Wilson Blvd., Room Stafford II–595, Arlington, VA 22230.

Type of Meeting: Open.

Contact Person: Robert Webber, Office of International Science and Engineering, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230, Telephone: 703–292–7569. If you are attending the meeting and need access to the NSF, please contact the individual listed above so your name may be added to the building access list.

Purpose of Meeting: To provide advice and recommendations concerning support for research, education and related activities involving the U.S. science and engineering community working in a global context, as well as strategic efforts to promote a more effective NSF role in international science and engineering.

Agenda: Review NSF international activities, and discuss and develop recommendations to transform international research and educations partnerships.

Dated: March 1, 2012.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2012–5399 Filed 3–5–12; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0157]

General Electric-Hitachi Global Laser Enrichment, LLC, Proposed Laser-Based Uranium Enrichment Facility, Wilmington, NC

AGENCY: Nuclear Regulatory Commission.

ACTION: Final environmental impact statement; issuance.

SUMMARY: Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC or the Commission) has published the Final Environmental Impact Statement (EIS) for the proposed General Electric-Hitachi Global Laser Enrichment, LLC (GLE) Uranium Enrichment Facility. On June 26, 2009, GLE submitted a license application that proposes the construction, operation, and decommissioning of a laser-based uranium enrichment facility (the ''proposed action''). The GLE proposes to locate the facility on the existing General Electric Company (GE) site near Wilmington, North Carolina (Wilmington Site). This application is for a license to possess and use byproduct material, source material, and special nuclear material at the proposed uranium enrichment facility.

ADDRESSES: Please refer to Docket ID NRC–2009–0157 when contacting the NRC about the availability of information regarding this document. You may access information related to this document using the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov.* and search for Docket ID NRC–2009–0157. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *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.* Additional information regarding accessing materials related to this action is under the Document Availability heading in the **SUPPLEMENTARY INFORMATION** section of this document.
- *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.

FOR FURTHER INFORMATION CONTACT: For information about the Final EIS or the environmental review process, please contact Jennifer A. Davis, telephone: 301–415–3835; email: *Jennifer.Davis@nrc.gov.* Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. For general or technical information associated with the licensing process as it relates to the GLE application, please

contact Tim Johnson, telephone: 301–492–3121; email: *Timothy.Johnson@nrc.gov;* Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

Discussion

The GLE submitted an Environmental Report (ER) in support of the proposed facility on January 30, 2009, and its license application on June 26, 2009. On May 8, 2009, the NRC granted an exemption to authorize GLE to conduct certain preconstruction activities (*e.g.,* site preparation) on the Wilmington Site prior to the NRC's decision on whether to grant or deny a license. The GLE submitted Supplement 1 to its ER on July 22, 2009, *GLE Environmental Report Supplement 1—Early Construction.* Supplement 1 distinguishes between the environmental impacts of preconstruction activities covered by the May 8, 2009, exemption and NRC-licensed construction activities, which cannot be undertaken unless a license is granted. On November 13, 2009, GLE submitted Supplement 2 to its ER, *GLE Environmental Report Supplement 2—Revised Roadway and Entrance.* Supplement 2 provides information describing the environmental impacts associated with developing an entrance and roadway into the Wilmington Site that are different from those proposed in the original ER.

The Final EIS is being issued as part of the NRC's process to decide whether to issue a license to GLE, pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR) parts 30, 40, and 70, to construct and operate the proposed uranium enrichment facility. Specifically, GLE proposes to use a laser-based technology to enrich the uranium-235 isotope found in natural uranium to concentrations up to 8 percent by weight. The enriched uranium would be used to manufacture nuclear fuel for commercial nuclear power reactors. In the Final EIS, the NRC staff assessed the potential environmental impacts from the preconstruction, construction, operation, and decommissioning of the proposed GLE project.

The Final EIS was prepared in compliance with the *National Environmental Policy Act of 1969,* as amended (NEPA), and the NRC's regulations for implementing NEPA in 10 CFR part 51. The NRC staff assessed the impacts of the proposed action on land use, historic and cultural resources, visual and scenic resources, air quality, geology and soils, water resources, ecological resources, noise, transportation, public and occupational health, waste management, socioeconomics, and environmental justice. Additionally, the NRC staff analyzed and compared the benefits and costs of the proposed action. In preparing this Final EIS, the NRC staff also reviewed, considered, evaluated, and addressed the public comments received on the Draft EIS.

In addition to the proposed action, the NRC staff considered a reasonable range of alternatives, including the no-action alternative. Under the no-action alternative, the NRC would deny GLE's request to construct and operate a uranium enrichment facility at the Wilmington Site. The no-action alternative serves as a baseline for comparison of the potential environmental impacts of the proposed action. Other alternatives the NRC staff considered but eliminated from further analysis include: (1) Alternative sites; (2) alternative sources of enriched uranium; and (3) alternative technologies for uranium enrichment. These alternatives, except the gas centrifuge technology, were eliminated from further analysis due to economic, environmental, national security, technological maturity, or other reasons. The environmental impacts of gas centrifuge technology were qualitatively evaluated, relative to those of the proposed laser-based technology.

The Final EIS also discusses alternatives for the disposition of depleted uranium hexafluoride (UF_6) resulting from enrichment operations over the lifetime of the proposed project.

After weighing the impacts of the proposed action and comparing alternatives, the NRC staff, in accordance with 10 CFR 51.91(d), sets forth its recommendation regarding the proposed action. The NRC staff recommends that, unless safety issues mandate otherwise, the proposed license be issued to GLE. In this regard, the NRC staff has concluded that the environmental impacts of the proposed action are generally small, and taken in combination with the proposed GLE environmental monitoring program and proposed mitigation measures discussed in the Final EIS would eliminate or substantially lessen any adverse environmental impacts associated with the proposed action.

Document Availability

One appendix of the Final EIS contains Sensitive Unclassified Non-Safeguards Information (SUNSI) and has been withheld from public inspection in accordance with 10 CFR 2.390, ''Availability of Public Records.'' This appendix contains proprietary business information as well as security-related information. The NRC staff has considered the information in this appendix in forming the conclusions presented in the Final EIS. Procedures for obtaining access to SUNSI were previously published in the NRC's Notice of Hearing and Commission Order related to GLE's license application. *GE–Hitachi Global Laser Enrichment LLC; (GLE Commercial Facility); Notice of Receipt of Application for License; Notice of Consideration of Issuance of License; Notice of Hearing and Commission Order; and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation,* 75 FR 1819 (January 13, 2010).

Documents related to this notice are available on the NRC's GE Laser Enrichment Facility Licensing Web site at *http://www.nrc.gov/materials/fuel-cycle-fac/laser.html.* The Final EIS for the proposed GLE project may also be accessed on the internet at by selecting ''NUREG–1938.''

The GLE's license application, the exemption authorizing certain preconstruction activities, the GLE's Environmental Report, Supplement 1 to the Environmental Report, Supplement 2 to the Environmental Report, and Volumes 1 and 2 of the NRC's Final EIS are available in ADAMS under Accession Numbers ML091871003, ML083510647, ML090910573, ML092100577, ML093240135, ML12047A040, and ML12047A042, respectively.

A copy of the Final EIS will be available at the New Hanover County Library, 201 Chestnut Street, Wilmington, North Carolina, 28401.

For the Nuclear Regulatory Commission.

Dated at Rockville, Maryland, this 28th day of February, 2012.

Christepher McKenney,

Acting Deputy Director, Environmental Protection and Performance Assessment Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. 2012–5362 Filed 3–5–12; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[NRC–2012–0050]

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 27, 2012 to February 22, 2012. The last biweekly notice was published on February 21, 2012 (77 FR 9998).

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–2012–0050. You may submit comments by the following methods:

- *Federal rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0050. 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:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2012–0050 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 ID NRC–2012–0050.
- *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.* Documents may be viewed in ADAMS by performing a search on the document date and docket number.
- *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–2012–0050 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, 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 NRC guidance available on the NRC 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 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 available online 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.*

Nebraska Public Power District, Docket No. 50–298, Cooper Nuclear Station, Nemaha County, Nebraska

Date of amendment request: September 16, 2011.

Description of amendment request: The proposed amendment would revise specific Technical Specification (TS) requirements to support operation with 24-month fuel cycles, in accordance with the guidance in Generic Letter (GL) 91–04, ''Changes in Technical Specification Surveillance Intervals to Accommodate a 24-Month Fuel Cycle,'' dated April 2, 1991. In addition, the amendment would incorporate NRC-approved Technical Specification Task Force (TSTF) change traveler TSTF–493, Revision 4, ''Clarify Application of Setpoint Methodology for LSSS [Limiting Safety System Settings] Functions,'' to be consistent with Option A.

Specifically, to accommodate a 24-month fuel cycle, the amendment would revise certain TS Surveillance Requirement (SR) frequencies that are specified as ''18 months'' to ''24 months''; the TS Allowable Values of two instrument functions would be revised; and, consistent with GL 91–04, testing frequencies would be changed from ''18 months'' to ''24 months'' in TS 5.5.2, ''Systems Integrity Monitoring Program,'' and TS 5.5.7, ''Ventilation Filter Testing Program (VFTP),'' and pressure measurements would be changed from ''18 months'' to ''24 months'' in TS 5.5.13, ''Control Room Envelope Habitability Program.''

The proposed change to adopt TSTF–493, Revision 4, Option A, would revise the TSs by adding surveillance Notes with changes to setpoint values to the instrumentation Functions.

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. Do the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed TS changes involve a change in the surveillance testing intervals and certain TS Allowable Values to facilitate a change in the operating cycle length. The proposed TS changes do not physically impact the plant. The proposed TS changes do not degrade the performance of, or increase the challenges to, any safety systems assumed to function in the accident analysis. The proposed TS changes do not impact the usefulness of the surveillance and testing requirements in evaluating the operability of required systems and components, or the way in which the surveillances are performed. In addition, the frequency of surveillance testing and TS Allowable Values are not considered initiators of any analyzed accident, nor do revisions to the frequency or TS Allowable Values introduce any accident initiators.

Therefore, the proposed change does not involve a significant increase in the probability of an accident previously evaluated.

The consequences of a previously evaluated accident are not significantly increased. The proposed changes to surveillance frequencies do not affect the performance of any equipment credited to mitigate the radiological consequences of an accident. The changes to the TS Allowable Values remain bounded by their associated analytical limits. Evaluation of the proposed TS changes demonstrated that the availability of credited equipment is not significantly affected because of other more frequent testing that is performed, the availability of redundant systems and equipment, and the high reliability of the equipment. Historical review of surveillance test results and associated maintenance records did not find

evidence of failures that would invalidate the above conclusions.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Do the proposed changes create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed TS changes involve a change in the surveillance testing intervals and certain changes to TS Allowable Values to facilitate a change in the operating cycle length. The proposed TS changes do not introduce any failure mechanisms of a different type than those previously evaluated, since there are no physical configuration or design changes being made to the facility.

No new or different equipment is being installed. No installed equipment is being operated in a different manner. As a result, no new failure modes are being introduced. Although certain instrument setpoints and TS Allowable Values are being revised, the way surveillance tests are performed remains unchanged. The TS Allowable Values remain bounded by their associated analytical limits. A historical review of surveillance test results and associated maintenance records indicated there was no evidence of any failures that would invalidate the above conclusions.

Therefore, the proposed change does not create the possibility of a new or different kind of accident, from any previously evaluated.

3. Do the proposed changes involve a significant reduction in a margin of safety?

Response: No.

The proposed TS changes involve a change in the surveillance testing intervals and certain TS Allowable Values to facilitate a change in the operating cycle length. The impact of these changes on system availability is not significant, based on other more frequent testing that is performed, the existence of redundant systems and equipment, and overall system reliability. The revised TS Allowable Values remain bounded by their associated analytical limits. Evaluations have shown there is no evidence of time dependent failures that would impact the availability of the systems. The proposed changes do not significantly impact the condition or performance of structures, systems, and components relied upon for accident mitigation. The proposed changes do not result in any hardware changes or in any changes to the analytical limits assumed in accident analyses. Existing operating margin between plant conditions and actual plant setpoints is not significantly reduced due to these changes. The proposed changes do not significantly impact any safety analysis assumptions or results.

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: Mr. John C. McClure, Nebraska Public Power District, Post Office Box 499, Columbus, NE 68602–0499.

NRC Branch Chief: Michael T. Markley.

Nebraska Public Power District, Docket No. 50–298, Cooper Nuclear Station, Nemaha County, Nebraska

Date of amendment request: September 22, 2011.

Description of amendment request: The amendment would revise the curves in Technical Specification (TS) 3.4.9, ''RCS [Reactor Coolant System] Pressure and Temperature (P/T) Limits,'' to replace the 28 Effective Full Power Years (EFPY) restriction in TS Figures 3.4.9–1, 3.4.9–2, and 3.4.9–3 and the minimum temperature in Surveillance Requirement (SR) 3.4.9.5, SR 3.4.9.6, and SR 3.4.9.7. The amendment would include a set of updated P/T curves for pressure test, core not critical, and core critical conditions for 32 EFPY based on a fluence evaluation performed using NRC-approved fluence methodology. The new curves would show a shift of minimum operating temperature which allows the bolt-up and minimum temperatures specified for SR 3.4.9.5, SR 3.4.9.6, and SR 3.4.9.7 to be changed from 80 degrees Fahrenheit (°F) to 70 °F.

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. Do the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The P/T limits are not derived from Design Basis Accident (DBA) analyses. They are prescribed by American Society of Mechanical Engineers (ASME) Code Section XI, 10 CFR 50 Appendix G and H, and associated guidance documents such as Regulatory Guide 1.99 Revision 2, as restrictions on normal operation to avoid encountering pressure, temperature, and temperature rate of change conditions that might cause undetected flaws to propagate and cause non-ductile failure of the reactor coolant pressure boundary. Thus, they ensure that an accident precursor is not likely. Hence, they are included in the TS as satisfying Criterion 2 of 10 CFR 50.36(c)(2)(ii). The revision of the numerical value of these limits, *i.e.,* new curves, using an NRC-approved methodology, does not change the existing regulatory requirements, upon which the curves are based. Thus, this revision will not increase the probability of any accident previously evaluated.

The proposed change does not alter the design assumptions, conditions, or configuration of the facility or the manner in which the facility is operated or maintained. The proposed changes will not affect any other System, Structure or Component designed for the mitigation of previously analyzed events. The proposed changes do not affect the source term, containment isolation, or radiological release assumptions used in evaluating the radiological consequences of any accident previously evaluated. Thus, the proposed revision of the existing numerical values with the updated figures for the Reactor Coolant System (RCS) P/T limits, which are based upon an NRC-approved methodology for calculating the neutron fluence on the Reactor Pressure Vessel (RPV) and new bolt-up limit, will not increase the consequences of any previously evaluated accident.

Therefore, this proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Do the proposed changes create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes do not involve a physical alteration of the plant (i.e., no new or different type of equipment will be installed) or a change in the processes governing normal plant operation. The proposed changes are consistent with the safety analysis assumptions and current plant operating practice. [Nebraska Public Power District (NPPD)] is only requesting to revise the existing numerical values and update the TS figures for the RCS P/T limits based upon an NRC-approved methodology for calculating the neutron fluence on the RPV, and to reflect a new bolt-up limit. The curves continue to be based upon ASME Code.

Therefore, the proposed change does not create the possibility for a new or different kind of accident from any accident previously evaluated.

3. Do the proposed changes involve a significant reduction in a margin of safety?

Response: No.

The proposed changes do not alter the manner in which Safety Limits, Limiting Safety System Settings or Limiting Conditions for Operation are determined. The setpoints at which protective actions are initiated are not altered by the proposed changes. Sufficient equipment remains available to actuate upon demand for the purpose of mitigating an analyzed event. NPPD is only requesting to revise the existing numerical values and update the TS figures for the RCS P/T limits based upon an NRC-approved methodology for calculating the neutron fluence, Radiation Analysis Modeling Application. The new curves also reflect a new bolt up limit. No changes to the other Limiting Conditions for Operation or SRs of TS 3.4.9 are proposed.

In 10 CFR part 50, Appendix G specifies fracture toughness requirements to provide adequate margins of safety during operation

over the service lifetime. The values of adjusted reference temperature and upper-shelf energy will remain within the limits of Regulatory Guide 1.99 Revision 2 and Appendix G of 10 CFR part 50 for at least 32 EFPY of operation. The safety analysis supporting this change continues to satisfy the ASME Code, 10 CFR part 50 Appendixes G and H requirements, and associated guidance documents such as Regulatory Guide 1.99 Revision 2. Thus, the proposed changes will not significantly reduce any margin of safety that currently exists.

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: Mr. John C. McClure, Nebraska Public Power District, Post Office Box 499, Columbus, NE 68602–0499.

NRC Branch Chief: Michael T. Markley.

Northern States Power Company—Minnesota, Docket No. 50–263, Monticello Nuclear Generating Plant, Wright County, Minnesota

Date of amendment request: February 2, 2012.

Description of amendment request: The licensee proposed to modify certain surveillance requirements (SRs) in the Technical Specifications to provide an alternative means for testing the dual function, three-stage, Target Rock main steam safety/relief valves (S/RVs). The SRs affected are 3.4.3, ''Safety/Relief Valves (S/RVs),'' 3.5.1, ''ECCS [Emergency Core Cooling System]—Operating,'' and 3.6.1.5, ''Low-Low Set (LLS) Valves.'' These S/RVs provide the overpressure protection safety function, and also provide the automatic depressurization and low-low set relief function. This proposed amendment would modify the subject SRs by providing an alternative methodology using a series of overlapping tests to demonstrate the required functioning, in lieu of manually actuating the valves during plant startup.

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 (NSHC) analysis. The NRC staff reviewed the licensee's NSHC analysis and has prepared its own as follows:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Accidents are initiated by malfunctions or failures of plant structures, systems, or components (SSCs). The proposed amendment only affects the manner in which the subject S/RVs are tested, and does not involve any design change to the subject S/RVs or other SSCs. The proposed alternative S/RV testing methodology provides an equivalent level of assurance that the S/RVs are capable of performing their intended safety functions. Since there will be no design change as a result of the proposed amendment, the S/RVs will continue to perform their design safety function, and there will be no increase in the consequences of previously evaluated accidents. In addition, since previously evaluated accidents were not assumed to be initiated by the method of testing of the S/RVs, the proposed amendment will cause no increase in the probability of occurrence of previously evaluated accidents.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed amendment does not affect the design function, operation, or accident performance of the S/RVs, or any plant SSC previously evaluated. The proposed amendment does not involve installation of any new equipment, and the existing installed equipment will not be operated in a new or different manner. The changes to the SRs regarding testing methodology will ensure that the S/RVs remain capable of performing their design safety function. No setpoints will be changed which would alter the dynamic response of plant equipment. Accordingly, no new failure modes are introduced.

Therefore, the propose amendment does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed amendment will not alter any previously used safety analysis methods, scenarios, acceptance criteria, or assumptions. The proposed amendment does not affect the valve setpoint or operational criteria of the S/RVs.

Therefore, the proposed amendment does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on its own analysis, concludes that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the proposed amendment involves no significant hazards consideration.

Attorney for the licensee: Peter M. Glass, Assistant General Counsel, Xcel Energy Services, Inc., 414 Nicollet Mall, Minneapolis, MN 55401.

NRC Branch Chief: Shawn A. Williams, Acting.

Southern Nuclear Operating Company, Inc., Docket Nos. 50–424 and 50–425, Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia

Date of amendment request: January 12, 2012.

Description of amendment request: The proposed amendments would revise technical specification (TS) 5.5.7 ''Reactor Coolant Pump [RCP] Flywheel Inspection Program.'' Specifically, the inspection interval would be changed from ''at least once per 10 years'' to ''at least once per 20 years.'' This change is consistent with 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 published in the **Federal Register** (FR) on October 22, 2003 (68 FR 60422), as part of the Consolidated Line Item Improvement Process.

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 (NSHC). The licensee has stated that the model NSHC as published in the **Federal Register** on June 24, 2003 (68 FR 37590), applies to the current request. The model NSHC is reproduced 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 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 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, 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.

Based upon the reasoning presented above and the previous discussion of the amendment request, the requested change does not involve a significant hazards consideration.

The NRC staff has reviewed the licensee's assessment that the model NSHC applies 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: Mr. Arthur H. Domby, Troutman Sanders, NationsBank Plaza, Suite 5200, 600 Peachtree Street, NE., Atlanta, Georgia 30308–2216.

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.

A 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 available online 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 PDR's Reference staff at 1–800–397–4209, 301–415–4737 or by email to *pdr.resource@nrc.gov.*

Entergy Nuclear Operations, Inc., Docket No. 50–333, James A. FitzPatrick Nuclear Power Plant, Oswego County, New York

Date of application for amendment: July 22, 2011, as supplemented October 19, 2011.

Brief description of amendment: The proposed amendment modifies the Technical Specifications (TS) by relocating specific Surveillance Frequencies to a licensee-controlled program with the adoption of Technical Specification Task Force (TSTF)-425, Revision 3, ''Relocate Surveillance Frequencies to Licensee Control-Risk Informed Technical Specification Task Force (RITSTF) Initiative 5b.''

The existing Bases information describing the basis for the Surveillance Frequency will be relocated to the licensee-controlled Surveillance Frequency Control Program. Additionally, the change adds a new program TS 5.5.15, ''Surveillance Frequency Control Program,'' to TS Section 5.5, ''Programs and Manuals.''

The changes are consistent with NRC approved Industry/TSTF STS change TSTF–425, Revision 3, (Rev. 3) (ADAMS Accession No. ML090850642). The **Federal Register** notice published on July 6, 2009 (74 FR 31996) announced the availability of this TS improvement.

Date of issuance: February 14, 2012.

Effective date: As of the date of issuance, and shall be implemented within 120 days.

Amendment No.: 301.

Renewed Facility Operating License No. DPR–59: The amendment revised the License and the Technical Specifications.

Date of initial notice in **Federal Register:** November 15, 2011 (76 FR 70772).

The supplemental letter dated October 19, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC 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 February 14, 2012.

No significant hazards consideration comments received: No.

Entergy Gulf States Louisiana, LLC, and Entergy Operations, Inc., Docket No. 50–458, River Bend Station, Unit 1, West Feliciana Parish, Louisiana

Date of amendment request: June 10, 2011, as supplemented by letter dated July 27, 2011.

Brief description of amendment: The amendment revised the Technical Specifications (TSs) to add a new limiting condition for operation (LCO) Applicability requirement, LCO 3.0.9, and its associated Bases, relating to the modification of requirements regarding the impact of unavailable barriers, not explicitly addressed in the TSs, but required for operability of supported systems in the TSs. This change is consistent with NRC-approved Technical Specification Task Force (TSTF) Improved Standard Technical Specification Change Traveler, TSTF–427, Revision 2, ''Allowance for Non Technical Specification Barrier Degradation on Supported System OPERABILITY,'' using the consolidated line item improvement process.

Date of issuance: February 8, 2012.

Effective date: As of the date of issuance and shall be implemented 60 days from the date of issuance.

Amendment No.: 173.

Facility Operating License No. NPF–47: The amendment revised the Facility Operating License and Technical Specifications.

Date of initial notice in **Federal Register:** July 26, 2011 (76 FR 44616). The supplemental letter dated July 27, 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 February 8, 2012.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, Docket No. 50–352, Limerick Generating Station, Unit 1, Montgomery County, Pennsylvania

Date of application for amendment: October 12, 2011, as supplemented on January 13, 2012.

Brief description of amendment: The changes revise the Technical Specification (TS) relating to the Safety Limit Minimum Critical Power Ratios (SLMCPRs). The changes result from a cycle-specific analysis performed to support the operation of Limerick Generating Station, Unit 1, in the upcoming Cycle 15. Specifically, the TS changes will revise the SLMCPRs contained in TS 2.1 for two recirculation loop operation and single-recirculation loop operation to reflect the changes in the cycle-specific analysis. The new SLMCPRs are calculated using Nuclear Regulatory Commission-approved methodology described in NEDE 24011–P–A, General Electric Standard Application for Reactor Fuel, Revision 18.

Date of issuance: February 17, 2012.

Effective date: As of the date of issuance and shall be implemented within 30 days of issuance.

Amendment No.: 206.

Facility Operating License No. NPF–39. The amendment revised the license and the Technical Specifications.

Date of initial notice in **Federal Register:** December 6, 2011 (76 FR 76196).

The supplement dated January 13, 2012, clarified the application, did not expand the scope of the application as originally noticed, and did not change the initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated February 17, 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: March 26, 2011.

Brief description of amendment: The amendment revised several Technical Specification (TS) pages to correct formatting errors and typographical errors, including pages within TS 3.1.3, ''Control Rod OPERABILITY,'' TS 3.1.4, ''Control Rod Scram Times,'' TS 3.3.1.1, ''Reactor Protection System (RPS) Instrumentation,'' TS 3.3.5.1, ''Emergency Core Cooling System (ECCS) Instrumentation,'' TS 3.3.6.1, ''Primary Containment Isolation Instrumentation,'' TS 3.3.6.2, ''Secondary Containment Isolation Instrumentation,'' TS 3.3.8.1, ''Loss of Power (LOP) Instrumentation,'' TS 3.3.8.2, ''Reactor Protection System (RPS) Electric Power Monitoring,'' TS 3.5.1, ''ECCS—Operating,'' TS 3.5.2, ''ECCS—Shutdown,'' TS 3.6.1.1, ''Primary Containment,'' TS 3.6.4.3, ''Standby Gas Treatment (SGT) System,'' TS 3.7.4, ''Control Room Emergency Filter (CREF) System,'' TS 3.8.1, ''AC [Alternating Current] Sources—Operating,'' TS 3.8.3, ''Diesel Fuel Oil, Lube Oil, and Starting Air,'' TS 5.2, ''Organization,'' and TS 5.5, ''Programs and Manuals''. In addition, the amendment revised TS 5.5.6, ''Inservice Testing Program,'' to remove an expired one-time exception of the 5-year frequency requirement for setpoint testing of safety valve MSRV–70ARV.

Date of issuance: February 16, 2012.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment No.: 241.

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 67489).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated February 16, 2012.

No significant hazards consideration comments received: No.

South Carolina Electric & Gas Company, South Carolina Public Service Authority, Docket No. 50–395, Virgil C. Summer Nuclear Station, Unit 1, Fairfield County, South Carolina

Date of application for amendment: May 2, 2011.

Brief description of amendment: This license amendment revised the Technical Specifications (TSs) 3.4.6.1, ''RCS [Reactor Coolant System] Leakage Detection Systems,'' to define a new time limit for restoring inoperable RCS leakage detection instrumentation to operable status, establish alternate methods of monitoring RCS leakage when monitors are inoperable, and to reflect the requested changes and more accurately reflect the contents of the facility design bases related to the operability of the RCS leakage detection instrumentation.

Date of issuance: February 22, 2012.

Effective date: As of the date of issuance and shall be implemented within 120 days.

Amendment No.: 186.

Renewed Facility Operating License No. NPF–12: Amendment revises the License and TSs.

Date of initial notice in **Federal Register:** July 12, 2011 (76 FR 40941).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated February 22, 2012.

No significant hazards consideration comments received: No.

South Carolina Electric and Gas Company, South Carolina Public Service Authority, Docket No. 50–395, Virgil C. Summer Nuclear Station, Unit 1, Fairfield County, South Carolina

Date of application for amendment: August 23, 2011.

Brief description of amendment: The amendments revise the facility operating license to delete Section 2.G.1 of the Facility Operating License, which requires reporting of violations of the requirements in Section 2, items C(1), C(3) though (33), E, F, K, and L of the Facility Operating License. The proposed amendment would also delete Section 6.6 of the Technical Specifications (TSs) regarding reportable events. Section 6.6 of the TSs are redundant to requirements that have since been embodied in the regulations and, accordingly, may be deleted from the TS.

Date of issuance: February 22, 2012.

Effective date: This license amendment is effective as of the date of its issuance.

Amendment No.: 185.

Renewed Facility Operating License No. NPF–12: Amendment revises the License and TSs.

Date of initial notice in **Federal Register:** November 15, 2011 (76 FR 70774).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated February 22, 2012.

No significant hazards consideration comments received: No.

For the Nuclear Regulatory Commission.

Dated at Rockville, Maryland, this 24th day of February 2012.

Michele G. Evans,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2012–4958 Filed 3–5–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0549; Docket No. 50–113]

Notice of License Termination for the University of Arizona Research Reactor, License No. R–52

The U.S. Nuclear Regulatory Commission (NRC) is noticing the termination of Facility Operating License No. R–52, for the University of Arizona Research Reactor (UARR).

The NRC has terminated the license of the decommissioned UARR, at the Nuclear Reactor Laboratory (NRL) on the campus of the University of Arizona (U of AZ) in Pima County, Arizona in the city of Tucson, and has released the site for unrestricted use. The licensee requested termination of the license in a letter to the NRC dated December 1, 2011 (ADAMS Accession Number ML11346A300). The NRL Research Reactor provided training for Nuclear Engineering students and various services for researchers in other departments at the U of AZ. The licensee ceased operation of the facility on May 18, 2010, and the reactor fuel was removed by the Department of Energy on December 23, 2010, with the fuel being delivered to the Idaho National Laboratory. The NRL underwent decommissioning activities from May 2011 through September 2011 followed by Final Status Surveys (FSS) to measure Total (Static) Beta activity and to perform radiological scan measurements. Smears were also collected for tritium and beta to assess the final radiological status of the facility.

The licensee submitted a request dated May 21, 2009 (ML091490076), to the NRC to approve its decommissioning plan (DP), dated May 21, 2009 (ML091490074). The NRC requested additional information for its review of the DP by letter dated February 25, 2010 (ML100550614), and the licensee responded to that request on March 26, 2010 (ML100920089). The NRC approved the UARR DP by Amendment No. 20, dated April 15, 2011 (ML110470589).

As required by the DP license amendment, the U of AZ submitted the Final Status Survey (FSS) Plan for the NRL on May 25, 2011 (ML11168A059). Although no NRC approval was required, the NRC reviewed the survey plan and has determined that it was consistent with the guidance in NUREG–1757, ''Consolidated Decommissioning Guidance'' and NUREG–1575, ''Multi-Agency Radiation Survey and Site Investigation Manual.'' The U of AZ submitted a revised FSS Plan on August 18, 2011 (ML11234A164). The NRC reviewed this revision and has determined it also to be acceptable.

The U of AZ submitted the FSS report for the NRL on December 1, 2011 (ML11346A300). That report stated that the survey met the FSS plan and the DP, and demonstrated that the NRL met the requirements for unrestricted release specified in 10 CFR Part 20, Subpart E. The NRC reviewed the FSS report and has determined that the survey was conducted in accordance with the Decommissioning Plan and the FSS Plan. Additionally, the NRC has determined that the survey results in the report comply with the criteria in the NRC-approved decommissioning plan and the release criteria in 10 CFR Part 20, Subpart E for both the UARR and the NRL have been met.

On July 5, 2011, NRC Region IV issued inspection report 050–00113/11–001 for the research reactor at the NRL (ML11187A017). The inspector interviewed licensee staff, observed work in progress, and reviewed selected documents related to the licensee's decommissioning activities. The inspector concluded that the licensee and its contracted work force were conducting decommissioning activities in accordance with the NRC approved decommissioning plan. The inspector also determined that the licensee's final status survey plan was in general agreement with NRC guidance.

At the request of the NRC, the Oak Ridge Institute for Science and Education (ORISE) conducted confirmatory survey activities at the NRL during the week of September 6, 2011. ORISE submitted a report of their confirmatory survey activities by letter dated November 7, 2011 (ML11319A101). The survey activities were conducted in accordance with an ORISE confirmatory survey plan provided to and approved by the NRC on August 18, 2011 (ML120400169). The confirmatory survey activities included visual inspections/assessments, gamma measurements, alpha plus beta measurements, smear sampling, and soil sampling activities. As a result of the confirmatory survey activities, ORISE noted two issues with licensee's FSS activities performed at the NRL. The first was an area of residual activity above the Co-60 screening level in source pit number 2. Since confirmatory surveys occurred, surface activity in source pit 2 has been remediated to a value below the Co-60 screening level. The second issue identified by ORISE was use of an incorrect surface efficiency. As a result, the licensee's contractor agreed to re-calculate surface activity using the correct surface efficiency value for Co-60. Because the two issues described have been resolved with the licensee, ORISE concluded that the licensee's FSS data adequately and accurately demonstrated that the NRL is below the appropriate screening levels and that ORISE confirmatory survey activities validate the licensee's conclusion that the appropriate guidelines have been met.

Pursuant to 10 CFR 50.82(b)(6), the NRC staff has concluded that UARR at the NRL has been decommissioned in accordance with the approved decommissioning plan and that the

terminal radiation surveys and associated documentation demonstrate that the facilities and site may be released in accordance with the criteria in the NRC-approved decommissioning plan. Further, on the basis of the decommissioning activities carried out by the U of AZ, the NRC's review of the licensee=s final status survey report, the results of NRC inspections conducted at the NRL, and the results of confirmatory surveys, the NRC has concluded that the decommissioning process is complete and the facilities and sites may be released for unrestricted use. Therefore, Facility Operating License No. R–52 is terminated.

For further details with respect to the proposed action, see the licensee's letter dated December 1, 2011. The above referenced documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR) at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically in the NRC Library in the Agencywide Documents Access and Management System (ADAMS) on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who have problems in accessing the documents in ADAMS should call the NRC PDR reference staff at 1–800–397–4209 or 301–415–4737 or email *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 28th day of February 2012.

For the Nuclear Regulatory Commission.

Keith I. McConnell,

Deputy Director, Decommissioning and Uranium Recovery Licensing Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. 2012–5363 Filed 3–5–12; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, March 8, 2012 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Walter, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, March 8, 2012 will be:

Institution and settlement of injunctive actions;
Institution and settlement of administrative proceedings;
A litigation matter;
An adjudicatory matter; and
Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 551–5400.

Dated: March 1, 2012.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2012–5469 Filed 3–2–12; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66488; File No. SR–Phlx–2012–22]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fees and Rebates for Adding and Removing Liquidity in Select Symbols

February 29, 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 16, 2012, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Section I of the Exchange's Fee Schedule titled ''Rebates and Fees for Adding and Removing Liquidity in Select Symbols,'' specifically to amend the Select Symbols[3] and transaction fees for Single contra-side orders.

While changes to the Fee Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on March 1, 2012.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqtrader.com/micro.aspx?id=PHLXfilings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the list of Select Symbols in Section I of the Exchange's Fee Schedule, entitled ''Rebates and Fees for Adding and Removing Liquidity in Select Symbols,'' in order to attract additional order flow to the Exchange.

The Exchange displays a list of Select Symbols in its Fee Schedule at Section I, entitled ''Rebates and Fees for Adding and Removing Liquidity in Select Symbols,'' which are subject to the rebates and fees in that section. The Exchange is proposing to delete the following symbols from the list of Select

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Select Symbols'' refers to the symbols which are subject to the Rebates and Fees for Adding and Removing Liquidity in Section I of the Exchange's Fee Schedule.

Symbols: Ciena Corporation (''CIEN''), Goldman Sachs Group, Inc. (''GS''), Halliburton Company Common Stock (''HAL''), Las Vegas Sands Corp. Common Stock (''LVS''), MGM Resorts International (''MGM''), Micron Technology, Inc. (''MU''), NVidia Corporation (''NVDA''), Qualcomm Incorporated (''QCOM''), Transocean Ltd (Switzerland) Co. (''RIG''), Rambus, Inc. (''RMBS''), Silver Wheaton Corp Common Shares (''SLW''), PowerShares DB USD Index Bull (''UUP''), Visa, Inc. (''V''), Wynn Resorts, Limited (''WYNN''), United States Steel Corporation (''X'') and SPDR S&P Oil & Gas Exploration & Production (''XOP'') (''Deleted Symbols''). These Deleted Symbols would be subject to the rebates and fees in Section II of the Fee Schedule entitled ''Equity Options Fees.'' [4] The Exchange also proposes to add the following symbols to its list of Select Symbols: iShares MSCI Emerging Index Fund (''EEM''), iShares MSCI EAFE Index Fund (''EFA''), iShares MSCI Brazil Index Fund (''EWZ''), iShares Barclays 20 Year Treasury (''TLT''), SPDR Select Sector Fund (''XLI'') and SPDR Select Sector Fund—Energy (''XLE'') (''New Select Symbols''). These New Select Symbols would be subject to the rebates and fees in Section I of the Fee Schedule.

The Exchange also proposes to amend certain of the Single contra-side transaction fees in Section I of the Fee Schedule to raise revenues and allow the Exchange to compete more effectively by subsidizing rebates for Single contra-side transactions. Specifically, the Exchange proposes to increase the Single contra-side Fee for Removing Liquidity for a Directed Participant [5] from $0.35 to $0.36 per contract. The Exchange also proposes to increase the Single contra-side Fee for Removing Liquidity for Market Makers [6] from $0.37 to $0.38 per contract. The Exchange does not propose to amend the Single contra-side transaction Fees for Removing Liquidity for Customers,[7] Firms,[8] Broker-Dealers [9] and Professionals.[10]

The Exchange is also proposing to make a minor amendment to Section I of its Fee Schedule to change the caption of Section I, Part A from ''Single contra-side order'' to ''Single contra-side.'' The Exchange believes that removing the word ''order'' from the title will more accurately reflect the fees and rebates listed in Section I, Part A because Market Makers, for example, trade with both quotes and orders.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [11] in general, and furthers the objectives of Section 6(b)(4) of the Act [12] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members and other persons using its facilities. The Exchange also believes that it is an equitable allocation of reasonable rebates among Exchange members and other persons using its facilities.

The Exchange believes that it is reasonable to remove the Deleted Symbols from its list of Select Symbols to attract additional order flow to the Exchange. The Exchange believes that applying the fees in Section II of the Fee Schedule to the Deleted Symbols, including the opportunity to receive payment for order flow, will attract order flow to the Exchange. Likewise, the Exchange believes that applying the fees and rebates in Section I to the New Select Symbols would attract additional order flow to the Exchange.

The Exchange believes that it is equitable and not unfairly discriminatory to amend its list of Select Symbols in order to remove the Deleted Symbols because the list of Select Symbols would apply uniformly to all categories of participants in the same manner. All market participants who trade the Select Symbols would be subject to the rebates and fees in Section I of the Fee Schedule, which would not include the Deleted Symbols. Also, all market participants would be uniformly subject to the fees in Section II, which would include the Deleted Symbols. Likewise, the Exchange believes that it is equitable and not unfairly discriminatory to amend its list of Select Symbols to add the New Select Symbols because these symbols would apply uniformly to all categories of participants in the same manner. The fees and rebates in Section I would apply uniformly to all market participants transacting the New Select Symbols.

The Exchange believes that increasing the Single contra-side Fees for Removing Liquidity for Directed Participants and Market Makers by $0.01 per contract is reasonable because the Exchange is attempting to further subsidize the rebates it pays for Single contra-side transactions by increasing fees for certain market participants that are also recipients of rebates for Single contra-side transactions. In addition, the Exchange believes that its fees are competitive as compared to other exchanges.[13]

The Exchange believes that increasing the Single contra-side Fees for Removing Liquidity for Directed Participants and Market Makers by $0.01 per contract is equitable and not unfairly discriminatory because both Directed Participants and Market Makers will continue to be assessed the lowest Fees for Removing Liquidity as compared to other market participants. Market Makers [14] have quoting obligations to the market which do not apply to Firms, Professionals and Broker-Dealers. Also, Directed Participants [15] have higher quoting obligations as compared to other Market Makers and therefore are assessed a lower fee as compared to Market Makers.

The Exchange believes that the proposed amendment to the title of Section I, Part A to remove the word ''order'' is reasonable, equitable and not unfairly discriminatory because the amendment would correct the rule text to accurately reflect fees and rebates for Single contra-side transactions by eliminating the characterization of the transactions as orders.

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

[4] Section II includes options overlying equities, ETFs, ETNs, indexes and HOLDRs which are multiply listed.

[5] The term ''Directed Participant'' applies to transactions for the account of a Specialist, Streaming Quote Trader (''SQT'') or Remote Streaming Quote Trader (''RSQT'') resulting from a Customer order that is (1) directed to it by an order flow provider, and (2) executed by it electronically on Phlx XL II.

[6] A ''market maker'' includes Specialists (*see* Rule 1020) and Registered Options Traders (''ROTs'') (Rule 1014(b)(i) and (ii), which includes SQTs (*see* Rule 1014(b)(ii)(A)) and RSQTs (*see* Rule 1014(b)(ii)(B)).

[7] Customers are assessed a $0.39 per contract Fee for Removing Liquidity for Single contra-side transactions.

[8] Firms are assessed a $0.45 per contract Fee for Removing Liquidity for Single contra-side transactions.

[9] Broker-Dealers are assessed a $0.45 per contract Fee for Removing Liquidity for Single contra-side transactions.

[10] Professionals are assessed a $0.45 per contract Fee for Removing Liquidity for Single contra-side transactions.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(4).

[13] Both NASDAQ Options Market LLC (''NOM'') and NYSE Arca, Inc. (''NYSE Arca'') assess a remove fee of $0.45 per contract. *See* NOM's fees at Chapter XV, Section 2 and NYSE Arca's Fee Schedule.

[14] *See* Exchange Rule 1014 titled ''Obligations and Restrictions Applicable to Specialists and Registered Options Traders.''

[15] *See* Exchange Rule 1014 titled ''Obligations and Restrictions Applicable to Specialists and Registered Options Traders.''

necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[16] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–Phlx–2012–22 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–Phlx–2012–22. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of 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 No. SR–Phlx–2012–22 and should be submitted on or before March 27, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–5328 Filed 3–5–12; 8:45 am]

BILLING CODE 8011–01–P

[16] 15 U.S.C. 78s(b)(3)(A)(ii).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66489; File No. SR–NASDAQ–2012–004]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change Relating to the Listing and Trading of Shares of the Emerging Markets Corporate Bond Fund of the WisdomTree Trust

February 29, 2012.

I. Introduction

On January 4, 2012, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade the shares (''Shares'') of the WisdomTree Emerging Markets Corporate Bond Fund (''Fund'') of the WisdomTree Trust (''Trust'') under Nasdaq Rule 5735. The proposed rule change was published for comment in the **Federal Register** on January 24, 2012.[3] The Commission received no comments on the proposal. This order grants approval of the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to list and trade the Shares of the Fund under Nasdaq Rule 5735, which governs the listing and trading of Managed Fund Shares on the Exchange. The Fund will be an actively managed exchange-traded fund. The Shares will be offered by the Trust, which was established as a Delaware statutory trust on December 15, 2005. The Fund is registered with the Commission as an investment company and has filed a registration statement on Form N–1A (''Registration Statement'') with the Commission.[4] WisdomTree Asset Management, Inc. is the investment adviser (''Adviser'') to the Fund,[5] and Western Asset Management Company serves as sub-adviser for the Fund (''Sub-Adviser'').[6] The Bank of New York Mellon is the administrator, custodian, and transfer agent for the Trust, and ALPS Distributors, Inc. serves as the distributor for the Trust.[7] The Exchange states that, while the Adviser is not affiliated with any broker-dealer, the Sub-Adviser is affiliated with multiple broker-dealers and has implemented a ''fire wall'' with respect to such broker-dealers regarding access to information concerning the composition and/or changes to the Fund's portfolio. In addition, Sub-Adviser personnel who make decisions regarding the Fund's portfolio are subject to procedures designed to prevent the use and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 66175 (January 18, 2012), 77 FR 3520 (''Notice'').

[4] *See* Post-Effective Amendment No. 56 to Registration Statement on Form N–1A for the Trust, dated July 1, 2011 (File Nos. 333–132380 and 811–21864).

[5] WisdomTree Investments, Inc. is the parent company of the Adviser.

[6] The Sub-Adviser is responsible for day-to-day management of the Fund and, as such, typically makes all decisions with respect to portfolio holdings. The Adviser has ongoing oversight responsibility.

[7] The Commission has issued an order granting certain exemptive relief to the Trust under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''1940 Act''). *See* Investment Company Act Release No. 28171 (October 27, 2008) (File No. 812–13458). In compliance with Nasdaq Rule 5735(b)(5), which applies to Managed Fund Shares based on an international or global portfolio, the Trust's application for exemptive relief under the 1940 Act states that the Fund will comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with redemption securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933 (15 U.S.C. 77a).

dissemination of material, non-public information regarding the Fund's portfolio.[8]

WisdomTree Emerging Markets Corporate Bond Fund

The Fund seeks to provide a high level of total return consisting of both income and capital appreciation. To achieve its objective, the Fund will invest in debt securities of corporations that are domiciled or economically tied to emerging market countries.[9] Specifically, the Fund intends to achieve its investment objectives through direct and indirect investments in Corporate and Quasi-Sovereign Debt. For these purposes, Corporate and Quasi-Sovereign Debt includes fixed-income securities of emerging market countries, such as bonds, notes, or other debt obligations, including loan participation notes (''LPNs''),[10] as well as other instruments, such as derivative instruments collateralized by Money Market Securities as described below. Quasi-Sovereign Debt, specifically, refers to fixed income securities or debt obligations that are issued by companies or agencies that may receive financial support or backing from the local government (collectively, ''Quasi-Sovereign Institutions'').

Under normal circumstances,[11] the Fund will invest at least 80% of its net assets in Corporate and Quasi-Sovereign Debt that are fixed income securities. Fixed income securities include debt instruments, such as bonds, notes, and other obligations, denominated in U.S. dollars or local currencies. Fixed income securities include Money Market Securities as defined below. Fixed income securities do not include derivatives.

The Fund intends to provide exposure across several geographic regions and countries by investing in Corporate and Quasi-Sovereign Debt from the following regions: Asia, Latin America, Eastern Europe, Africa, and the Middle East. Within these regions, the Fund is likely to invest in countries such as: Argentina, Brazil, Chile, China, Colombia, Hong Kong, India, Indonesia, Israel, Jamaica, Kazakhstan, Malaysia, Mexico, Peru, Philippines, Poland, Qatar, Russia, Singapore, Saudi Arabia, South Africa, South Korea, Taiwan, Thailand, Trinidad & Tobago, Turkey, Ukraine, and the United Arab Emirates. This list may change based on market developments. The Fund's credit exposures are consistently monitored from a risk perspective and may be modified, reduced, or eliminated. The Fund's exposure to any single issuer generally will be limited to 10% of the Fund's assets. The percentage of the Fund's assets in a specific region, country, or issuer will change from time to time. The Fund's exposure to any one country generally will be limited to 30% of the Fund's assets, though this percentage may change in response to economic events and changes to the credit ratings of the Corporate and Quasi-Sovereign Debt of such countries.

The universe of emerging market Corporate and Quasi-Sovereign Debt currently includes securities that are rated ''investment grade'' as well as ''non-investment grade.'' The Fund intends to provide a broad exposure to emerging market Corporate and Quasi-Sovereign Debt and therefore will invest in both investment grade and non-investment grade securities. The Fund expects to have 65% or more of its assets invested in investment grade securities, though this percentage may change in response to economic events and changes to the credit ratings of such issuers. Within the non-investment grade category some issuers and instruments are considered to be of lower credit quality and at higher risk of default. In order to limit its exposure to these more speculative credits, the Fund will not invest more than 15% of its assets in securities rated B or below by Moody's, or equivalently rated by S&P or Fitch. Although the Fund does not intend to invest in unrated securities, it may do so to a limited extent, such as where a rated security becomes unrated, if such security is determined by the Adviser and Sub-Adviser to be of comparable quality. In determining whether a security is of ''comparable quality,'' the Adviser and Sub-Adviser will consider, for example, whether the issuer of the security has issued other rated securities.

The Fund will invest only in corporate bonds that the Adviser or Sub-Adviser deems to be sufficiently liquid.[12] The Fund will only buy performing debt securities and will not buy distressed debt. Generally a corporate bond must have $200 million or more par amount outstanding and significant par value traded to be considered as an eligible investment. Economic and other conditions may

[8] *See* Nasdaq Rule 5735(g). The Exchange further represents that, in the event (a) the Adviser or the Sub-Adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes affiliated with a broker-dealer, it will implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to a portfolio, and will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding such portfolio.

[9] According to the Adviser, while there is no universally accepted definition of what constitutes an ''emerging market,'' in general, emerging market countries are characterized by developing commercial and financial infrastructure with significant potential for economic growth and increased capital market participation by foreign investors. The Adviser and Sub-Adviser look at a variety of commonly-used factors when determining whether a country is an ''emerging'' market. In general, the Adviser and Sub-Adviser consider a country to be an emerging market if:

(1) It is either (a) classified by the World Bank in the lower middle or upper middle income designation for one of the past 5 years (*i.e.,* per capita gross national product of less than U.S. $9,385), (b) has not been a member of the Organisation for Economic Co-operation and Development (''OECD'') for the past five years, or (c) classified by the World Bank as high income and a member in OECD in each of the last five years, but with a currency that has been primarily traded on a non-delivered basis by offshore investors (*e.g.,* Korea and Taiwan); and

(2) the country's debt market is considered relatively accessible by foreign investors in terms of capital flow and settlement considerations.

This definition could be expanded or exceptions made depending on the evolution of market and economic conditions.

[10] The Fund may invest in LPNs with a minimum outstanding principal amount of $200 million that the Adviser or Sub-Adviser deems to be liquid. The Adviser represents that LPNs denominated in U.S. dollars are the predominant form of corporate debt financing in certain emerging markets, particularly in Russia, where they constitute approximately 70% of the corporate debt market (approximately $40 billion outstanding). In aggregate, LPNs represented over 11% of the JP Morgan Emerging Markets Corporate Bond Index as of November 30, 2011. The Exchange states that LPNs are typically eligible for settlement at Eurcoclear, Clearstream, or in the U.S., through The Depository Trust Company. Moreover, intra-day quotations in LPNs are generally available from major broker-dealers and data vendors, such as Bloomberg.

[11] The term ''under normal circumstances'' includes, but is not limited to, the absence of extreme volatility or trading halts in the fixed income markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; 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.

[12] The Adviser represents that the size and liquidity of the global market for corporate bonds of emerging market issuers generally has been increasing in recent years. The aggregate dollar amount of emerging market corporate bonds traded in the first two quarters of 2011 ($490 billion) represented a 36.4% increase compared to the first two quarters of 2010 ($359 billion). This growth is consistent with the 71% increase in volume for calendar year 2010 ($879.45 billion) over 2009. The $514 billion traded in 2009 represented a substantial increase over the amount traded in 2008 ($380 billion). Turnover in emerging market corporate debt in the first two quarters of 2011 was approximately 14.2% of the overall volume of emerging market debt of $3.443 trillion. In 2010, emerging market corporate bonds accounted for 16% of the total $6.765 trillion of emerging market debt trading. This represents a meaningful increase relative to calendar year 2009 where turnover in emerging market corporate debt accounted for 12% of the overall volume of emerging market debt ($4.445 trillion). These figures compared to only a 9% share in 2008. (Source: Emerging Markets Traders Association Press Release(s), December 8, 2010, August 12, 2010, May 20, 2010, March 8, 2010, March 22, 2011, June 17, 2011 and August 22, 2011).

lead to a decrease in the average par amount outstanding of bond issuances. Therefore, although the Fund does not intend to do so, the Fund may invest up to 5% of its net assets in corporate bonds with less than $200 million par amount outstanding if (1) the Adviser or Sub-Adviser deems such security to be sufficiently liquid based on its analysis of the market for such security (for example, broker-dealer quotations or trading history of the security or other securities issued by the issuer), (2) such investment is deemed by the Adviser or Sub-Adviser to be in the best interest of the Fund, and (3) such investment is deemed consistent with the Fund's goal of providing broad exposure to a broad range emerging markets countries and issuers.

The Fund may invest in Corporate and Quasi-Sovereign Debt with effective or final maturities of any length, but the Fund will seek to keep the average effective duration of its portfolio between two and ten years under normal market conditions. Effective duration is an indication of an investment's interest rate risk or how sensitive an investment or a fund is to changes in interest rates. Generally, a fund or instrument with a longer effective duration is more sensitive to interest rate fluctuations, and, therefore, more volatile, than a fund with a shorter effective duration. The Fund's actual portfolio duration may be longer or shorter depending on market conditions.

The Fund intends to invest in Corporate and Quasi-Sovereign Debt of at least 13 non-affiliated issuers and will not concentrate 25% or more of the value of its total assets (taken at market value at the time of each investment) in any one industry, as that term is used in the 1940 Act (except that this restriction does not apply to obligations issued by the U.S. government or their respective agencies and instrumentalities or government-sponsored enterprises).

Money Market Securities

The Fund intends to invest in Money Market Securities in order to help manage cash flows in and out of the Fund, such as in connection with payment of dividends or expenses, and to satisfy margin requirements, to provide collateral, or to otherwise back investments in derivative instruments. Under normal circumstances, the Fund may invest up to 25% of its net assets in Money Market Securities, although it may exceed this amount where the Adviser or Sub-Adviser deems such investment to be necessary or advisable, due to market conditions. For these purposes ''Money Market Securities'' include: Short-term, high quality obligations issued or guaranteed by the U.S. Treasury or the agencies or instrumentalities of the U.S. government; short-term, high quality securities issued or guaranteed by non-U.S. governments, agencies and instrumentalities; repurchase agreements backed by U.S. government securities; money market mutual funds; and deposit and other obligations of U.S. and non-U.S. banks and financial institutions. All Money Market Securities acquired by the Fund will be rated investment grade, except that the Fund may invest in unrated Money Market Securities that are deemed by the Adviser or Sub-Adviser to be of comparable quality to money market securities rated investment grade.

Derivative Instruments and Other Investments

The Fund may use derivative instruments as part of its investment strategy. Examples of derivative instruments include forward currency contracts, interest rate swaps, total return swaps, credit linked notes, and combinations of investments that provide similar exposure to local currency debt, such as investment in U.S. dollar denominated bonds combined with forward currency positions or swaps. If forward currency and swaps positions are not being implemented in combination with U.S. dollar denominated bonds, the Fund's use of forward contracts and swaps will be combined with investments in short-term, high quality U.S. money market instruments and will be designed to provide exposure similar to investments in local currency deposits.

The Fund expects that no more than 20% of the value of the Fund's net assets will be invested in derivative instruments. Such investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. For example, the Fund may engage in swap transactions that provide exposure to corporate debt or interest rates. The Fund also may buy or sell listed currency futures contracts.[13]

With respect to certain kinds of derivative transactions entered into by the Fund that involve obligations to make future payments to third parties, including, but not limited to, futures and forward contracts, swap contracts, the purchase of securities on a when-issued or delayed delivery basis, or reverse repurchase agreements, the Fund, in accordance with applicable federal securities laws, rules, and interpretations thereof, will ''set aside'' liquid assets, or engage in other measures to ''cover'' open positions with respect to such transactions.

The Fund may engage in foreign currency transactions, and may invest directly in foreign currencies in the form of bank and financial institution deposits and certificates of deposit denominated in a specified non-U.S. currency. The Fund may enter into forward currency contracts in order to ''lock in'' the exchange rate between the currency it will deliver and the currency it will receive for the duration of the contract.[14]

The Fund may invest in the securities of other investment companies (including money market funds and ETFs). The Fund may hold up to an aggregate amount of 15% of its net assets in (1) illiquid securities; (2) Rule 144A securities; and (3) loan interests (such as loan participations and assignments, but not including LPNs). The Commission staff has interpreted the term ''illiquid'' in this context to mean a security that cannot be sold or disposed of within seven days in the ordinary course of business at approximately the amount at which a fund has valued such security.

The Fund will not invest in any non-U.S. equity securities. In addition, the Fund intends to qualify each year as a regulated investment company (''RIC'') under Subchapter M of the Internal Revenue Code of 1986, as amended.[15]

[13] The exchange-listed futures contracts in which the Fund may invest may be listed on exchanges in the U.S., London, Hong Kong or Singapore. Each of the United Kingdom's primary financial markets regulator, the Financial Services Authority, Hong Kong's primary financial markets regulator, the Securities and Futures Commission, and Singapore's primary financial markets regulator, the Monetary Authority of Singapore, are signatories to the International Organization of Securities Commissions (''IOSCO'') Multilateral Memorandum of Understanding (''MMOU''), which is a multi-party information sharing arrangement among financial regulators. Both the Commission and the Commodity Futures Trading Commission are signatories to the IOSCO MMOU.

[14] The Fund will invest only in currencies, and instruments that provide exposure to such currencies, which have significant foreign exchange turnover and are included in the Bank for International Settlements Triennial Central Bank Survey, December 2010 (''BIS Survey''). The Fund may invest in currencies, and instruments that provide exposure to such currencies, selected from the top 40 currencies (as measured by percentage share of average daily turnover for the applicable month and year) included in the BIS Survey.

[15] 26 U.S.C. 851. The Fund will invest its assets, and otherwise conduct its operations, in a manner that is intended to satisfy the qualifying income, diversification, and distribution requirements necessary to establish and maintain RIC qualification under Subchapter M. The Subchapter M diversification tests generally require that (1) the Fund invest no more than 25% of its total assets

Continued

Additional information regarding the Shares and the Fund, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, availability of Fund values and other information, and distributions and taxes, among other things, can be found in the Notice and/or Registration Statement, as applicable.[16]

III. Discussion and Commission Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act [17] and the rules and regulations thereunder applicable to a national securities exchange.[18] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[19] which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission notes that the Fund and the Shares must comply with the requirements of Nasdaq Rule 5735 to be listed and traded on the Exchange.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,[20] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Quotation and last-sale information for the Shares will be available on NASDAQ OMX Global Index Data Service (''GIDS''),[21] which contains information for widely followed indexes and ETFs. On each business day, before commencement of trading in Shares in the Regular Market Session [22] on the Exchange, the Trust will disclose on its Web site the identities and quantities of the portfolio of securities and other assets (''Disclosed Portfolio'') held by the Fund that will form the basis for the Fund's calculation of net asset value (''NAV'') at the end of the business day.[23] The NAV of the Fund's Shares generally will be calculated once daily Monday through Friday as of the close of regular trading on the New York Stock Exchange, generally 4 p.m. Eastern time.[24] Moreover, the Intraday Indicative Value, available on GIDS, will be based upon the current value for the components of the Disclosed Portfolio and will be updated and widely disseminated by one or more major market data vendors at least every 15 seconds during the Regular Market Session.[25] In addition, information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Intra-day, executable price quotations on emerging market Corporate and Quasi-Sovereign Debt, as well as derivative instruments, will be available from major broker-dealer firms. Intra-day price information is available through subscription services, such as Bloomberg and Thomson Reuters, which can be accessed by authorized participants and other investors. The Web site for the Fund will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Commission notes that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. In addition, the Exchange will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121. 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 securities and/or the financial instruments comprising the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 5735(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted. The Exchange will consider the suspension of trading in or removal from listing of the Shares if the Intraday Indicative Value is no longer calculated or available or the Disclosed Portfolio is not made available to all market participants at the same time.[26] The Exchange

in securities (other than securities of the U.S. government or other RICs) of any one issuer or two or more issuers that are controlled by the Fund and that are engaged in the same, similar or related trades or businesses, and (2) at least 50% of the Fund's total assets consist of cash and cash items, U.S. government securities, securities of other RICs and other securities, with investments in such other securities limited in respect of any one issuer to an amount not greater than 5% of the value of the Fund's total assets and 10% of the outstanding voting securities of such issuer. In addition to satisfying the above referenced RIC diversification requirements, no portfolio security held by the Fund (other than U.S. government securities and non-U.S. government securities) will represent more than 30% of the weight of the Fund's portfolio and the five highest weighted portfolio securities of the Fund (other than U.S. government securities and/or non-U.S. government securities) will not in the aggregate account for more than 65% of the weight of the Fund's portfolio. For these purposes, the Fund may treat repurchase agreements collateralized by U.S. government securities or non-U.S. government securities as U.S. or non-U.S. government securities, as applicable.

[16] *See supra* notes 3 and 4, and accompanying text, respectively.

[17] 15 U.S.C. 78f.

[18] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[19] 15 U.S.C. 78f(b)(5).

[20] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[21] GIDS is the NASDAQ OMX global index data feed service, offering real-time updates, daily summary messages, and access to widely followed indexes and ETFs. GIDS provides investment professionals with the daily and historical information needed to track or trade NASDAQ OMX indexes, listed ETFs, or third-party partner indexes and ETFs.

[22] *See* Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 7 a.m. to 9:30 a.m.; (2) Regular Market Session from 9:30 a.m. to 4 p.m. or 4:15 p.m.; and (3) Post-Market Session from 4 p.m. or 4:15 p.m. to 8 p.m.).

[23] The Disclosed Portfolio will include, as applicable, the names, quantity, percentage weighting, and market value of fixed income securities and other assets held by the Fund and the characteristics of such assets.

[24] Under accounting procedures to be followed by the Fund, trades made on the prior business day (''T'') will be booked and reflected in NAV on the current business day (''T+1''). Notwithstanding the foregoing, portfolio trades that are executed prior to the opening of the Exchange on any business day may be booked and reflected in NAV on such business day. Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

[25] In addition, during hours when the markets for local debt in the Fund's portfolio are closed, the Intraday Indicative Value will be updated at least every 15 seconds during the Regular Market Session to reflect currency exchange fluctuations.

[26] *See* Nasdaq Rule 5735(d)(2)(C)(ii).

represents that the Sub-Adviser is affiliated with multiple broker-dealers and has implemented a ''fire wall'' with respect to such broker-dealers regarding access to information concerning the composition and/or changes to the Fund's portfolio.[27] Further, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the portfolio.[28] The Exchange states that it prohibits the distribution of material, non-public information by its employees.

The Exchange represents that the Shares are deemed to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including:

(1) The Shares will be subject to Nasdaq Rule 5735, which sets forth the initial and continued listing criteria applicable to Managed Fund Shares.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) Trading of the Shares will be subject to the Financial Industry Regulatory Authority's (''FINRA'') surveillance procedures for derivative products, including Managed Fund Shares.[29] The Exchange's surveillance procedures are adequate to properly monitor the trading of the Shares on Nasdaq during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws.

(4) Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (a) The procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (b) Nasdaq Rule 2310, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (c) how information regarding the Intraday Indicative Value is disseminated; (d) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated Intraday Indicative Value will not be calculated or publicly disseminated; (e) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(5) For initial and/or continued listing, the Fund must be in compliance with Rule 10A–3 under the Act.[30]

(6) The Fund may hold up to an aggregate amount of 15% of its net assets in (a) illiquid securities, (b) Rule 144A securities, and (c) loan interests (such as loan participations and assignments, but not including LPNs).

(7) The Fund will not invest in any non-U.S. registered equity securities.

(8) The Fund expects that no more than 20% of the value of the Fund's net assets will be invested in derivative instruments. Such investments will be consistent with the Fund's investment objective and will not be used to enhance leverage.

(9) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.

This approval order is based on all of the Exchange's representations.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act[31] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[32] that the proposed rule change (SR–NASDAQ–2012–004) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[33]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–5367 Filed 3–5–12; 8:45 am]

BILLING CODE 8011–01–P

[27] *See* Nasdaq Rule 5735(g), *supra* note 8 and accompanying text. The Commission notes that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (''Advisers Act''). As a result, the Adviser and Sub-Adviser and their related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[28] *See* Nasdaq Rule 5735(d)(2)(B)(ii).

[29] The Exchange states that FINRA surveils trading on Nasdaq pursuant to a regulatory services agreement. Nasdaq is responsible for FINRA's performance under this regulatory services agreement.

[30] *See* 17 CFR 240.10A–3.

[31] 15 U.S.C. 78f(b)(5).

[32] 15 U.S.C. 78s(b)(2).

[33] 17 CFR 200.30–3(a)(12).

STATE DEPARTMENT

[Public Notice: 7604]

Foreign Affairs Policy Board Meeting Notice; Closed Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. 10(a)(2), the Department of State announces a meeting of the Foreign Affairs Policy Board to take place on March 19, 2012, at the Department of State, Washington, DC.

The Foreign Affairs Policy Board reviews and assesses: (1) Global threats and opportunities; (2) trends that implicate core national security interests; (3) tools and capacities of the civilian foreign affairs agencies; and (4) priorities and strategic frameworks for U.S. foreign policy. Pursuant to section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App. 10(d), and 5 U.S.C. 552b(c)(1), it has been determined that this meeting will be closed to the public as the Board will be reviewing and discussing matters properly classified in accordance with Executive Order 13526.

For more information, contact Samantha Raddatz at (202) 647–2372. This announcement might appear in the **Federal Register** less than 15 days prior to the advisory committee meeting. The Department of State finds: (1) That there is an exceptional circumstance to hold this meeting with less than a 15-day notice, in that a senior government official must address this committee meeting, and (2) further postponing this meeting to accommodate this official's schedule would result in an unacceptable delay in the work of this advisory committee.

Dated: February 29, 2012.

Dan Kurtz-Phelan,

Designated Federal Officer.

[FR Doc. 2012–5407 Filed 3–5–12; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Additional Guidance on Airfare/Air Tour Price Advertisements; Correction

AGENCY: Office of the Secretary, Department of Transportation.

ACTION: Notice; correction.

SUMMARY: The Department published a notice entitled ''Additional Guidance on Airfare/Air Tour Price Advertisements,'' in the **Federal Register** of February 27, 2012; the notice contained an incorrect address for the Department.

FOR FURTHER INFORMATION CONTACT: Nicholas Lowry, Attorney, Office of Aviation Enforcement and Proceedings (C–70), 1200 New Jersey Ave. SE., Washington, DC 20590, (202) 366–9349.

Correction

In the **Federal Register** of February 27, 2012, in Vol. 38, at 77 FR 11618, on page 11619, in the last paragraph, correct the address of the Office of Aviation Enforcement and Proceedings (C–70) to read: 1200 New Jersey Ave. SE., Washington, DC 20590. An electronic version of this document is available at *http://www.regulations.gov.*

Dated: February 29, 2012.

Samuel Podberesky,

Assistant General Counsel for Aviation Enforcement and Proceedings.

[FR Doc. 2012–5352 Filed 3–5–12; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2012–06]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number involved and must be received on or before March 26, 2012.

ADDRESSES: You may send comments identified by Docket Number FAA–2011–1360 using any of the following methods:

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

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Tyneka Thomas ARM–105, (202) 267–7626, FAA, Office of Rulemaking, 800 Independence Ave. SW., Washington, DC 20591. This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on February 28, 2012.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

PETITION FOR EXEMPTION

Docket No.: FAA–2011–1360
Petitioner: Kenneth Scherado
Section of 14 CFR Affected: 14 CFR § 91.151(a)(1)

Description of Relief Sought: The relief sought would allow one pilot, Mr. Yves Rossy, operation of an experimental category aircraft, N15YR, without meeting the fuel requirements for daytime flight under visual flight rules.

[FR Doc. 2012–5403 Filed 3–5–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2012–07]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number involved and must be received on or before March 26, 2012.

ADDRESSES: You may send comments identified by Docket Number FAA–2012–0075 using any of the following methods:

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

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may

review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Tyneka Thomas ARM–105, (202) 267–7626, FAA, Office of Rulemaking, 800 Independence Ave. SW., Washington, DC 20591. This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on February 29, 2012.

Brenda D. Courtney,

Acting Deputy Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2012–0075.

Petitioner: American Aviation, Inc.

Section of 14 CFR Affected: 14 CFR 119.1(e)(6).

Description of Relief Sought: The relief sought would allow American Aviation, Inc., to conduct parachute operations dropping test flares more than 25-statute-miles from the airport of takeoff.

[FR Doc. 2012–5404 Filed 3–5–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2012–08]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before April 5, 2012.

ADDRESSES: You may send comments identified by Docket Number FAA–2012–0123 using any of the following methods:

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

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Frances Shaver, ARM–207, (202) 267–4059, FAA, Office of Rulemaking, 800 Independence Ave. SW., Washington, DC 20591, or Ted Jones, ASW–111, (817) 222–5329, FAA Southwest Regional Office, 2601 Meacham Blvd., Fort Worth, TX 76137.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on February 29, 2012.

Brenda D. Courtney,

Acting Deputy Director, Office of Rulemaking—Aviation Safety.

PETITION FOR EXEMPTION

Docket No.: FAA–2012–0123

Petitioner: Bell Helicopter Textron Canada Limited

Section of 14 CFR Affected: § 27.1

Description of Relief Sought: The exemption would permit an increase in the maximum gross weight of the Bell 429 from 7,000 pounds to 7,500 pounds to enable the aircraft to carry additional safety related equipment and fuel. The relief would result in an expanded radius of operation for Helicopter Air Ambulance operations, increased capability and availability for public safety operations and improved efficiency and safety for American petroleum and utility industry operations.

[FR Doc. 2012–5406 Filed 3–5–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2009–0271]

Identification of Interstate Motor Vehicles: New York City, Cook County, and New Jersey Tax Identification Requirements; Petition for Reconsideration.

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice; Grant of petition for reconsideration.

SUMMARY: The FMCSA grants a petition for reconsideration submitted by the New York City Department of Finance (DOF) requesting reconsideration of the Agency's previous determination that the credential display requirement of New York City's Commercial Motor Vehicle Tax (CMV Tax) is preempted. Federal law prohibits States and their political subdivisions from requiring motor carriers to display in or on commercial motor vehicles (CMVs) any form of identification other than forms required by the Secretary of Transportation, with certain exceptions. FMCSA has determined that the CMV Tax qualifies for one of the statutory exceptions.

DATES: This decision is effective March 6, 2012.

FOR FURTHER INFORMATION CONTACT: Genevieve D. Sapir, Office of the Chief Counsel, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590, (202) 366–7056; email *Genevieve.Sapir@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

On February 25, 2008, the American Trucking Associations (ATA) petitioned FMCSA to preempt § 11–809 of New York City's Administrative Code, which requires CMVs used principally in New

York City or in connection with a business carried on within New York City to display a stamp evidencing payment of the city's CMV Tax. ATA alleged that New York City's credential display requirement was preempted under 49 U.S.C. 14506(a), which prohibits States from requiring motor carriers to display in or on CMVs any form of identification other than forms required by the Secretary of Transportation. Section 14506(b), however, establishes several exceptions to this prohibition [all statutory references are to title 49, United States Code]:

> (b) Exception.—Notwithstanding subsection (a), a State may continue to require display of credentials that are required—
>
> (1) Under the International Registration Plan under section 31704;
>
> (2) Under the International Fuel Tax Agreement under section 31705 or under an applicable State law if, on October 1, 2006, the State has a form of highway use taxation not subject to collection through the International Fuel Tax Agreement;
>
> (3) Under a State law regarding motor vehicle license plates or other displays that the Secretary determines are appropriate;
>
> (4) In connection with Federal requirements for hazardous materials transportation under section 5103; or
>
> (5) In connection with the Federal vehicle inspection standards under section 31136.

In response to this and other petitions ATA submitted seeking preemption of credential display requirements in New Jersey and Cook County, Illinois, FMCSA published a notice in the **Federal Register** seeking comment on whether the credential display requirements of New York City, the State of New Jersey, and Cook County, Illinois should be preempted (74 FR 53578, Oct. 19, 2009). FMCSA specifically requested comment from the three jurisdictions, but neither New Jersey nor New York City responded with comments. After the close of the comment period, Cook County sent a letter conceding that its ordinance was preempted under § 14506.

On October 20, 2010, FMCSA issued an order preempting all three credential requirements (75 FR 64779). FMCSA's preemption analysis focused solely on whether the exception in § 14506(b)(3) applied. However, in reaching this determination, FMCSA concluded that all of the exceptions at § 14506(b) could apply to political subdivisions of States, including municipalities, if they otherwise meet the statutory criteria (75 FR at 64780–81).

On January 3, 2011, New York City's Department of Finance (DOF) submitted a petition requesting reconsideration of FMCSA's preemption determination. DOF's petition contended that New York City's credential display requirement was based on a form of highway use taxation excepted from preemption under § 14506(b)(2). For the reasons set forth below, FMCSA grants the DOF's petition for reconsideration.

Applicable Law

New York City's CMV Tax has been in effect since 1960. See Administrative Code of the City of New York, Title 11, Chapter 8. Subject to several exemptions, the tax applies to both ''commercial motor vehicle[s]'' and ''motor vehicle[s] for the transportation of passengers'' that operate on a public highway or public street and are ''propelled by any power other than muscular power.'' §§ 11–801(2)–(4); 11–803. The tax applies to a ''commercial motor vehicle'' that is ''used principally in the city or used principally in connection with a business carried on within the city.'' § 11–801(3). According to the DOF Web site, the term ''principally used in the city'' means that 50% or more of a CMV's mileage during a year is within New York City limits. *See http://www.nyc.gov/html/dof/html/business/business_tax_cmvt.shtml.* The tax also applies to a ''motor vehicle for transportation of passengers'' that is ''used regularly, even though not principally, in the city.'' § 11–801(4). The tax rate varies based on the class of the vehicle; for example, the annual tax on a truck is based on maximum gross weight, in accordance with the following classes: 10,000 pounds or less, $40; 10,001–12,500 pounds, $200; 12,501–15,000 pounds, $275; and 15,000 pounds or over, $300, but the annual tax on passenger vehicles is a flat rate of $400. § 11–802.a.1.(C). Subject to certain exceptions, the tax is paid to the Commissioner of Finance on an annual basis. § 11–808. However, the tax on trucks registered in New York with a maximum gross weight not exceeding 10,000 pounds and certain passenger vehicles is collected by the Commissioner of Motor Vehicles when the vehicle registration is renewed. § 11–809.1(a). The Commissioner of Finance is authorized to require that a tax decal or other indicia of payment be affixed to a vehicle. § 11–809(a); New York City Rules, Tit. 19, § 6–09.

Section 14506(a) prohibits the States or their political subdivisions from requiring a motor carrier to display either in or on a CMV any form of identification other than a form required by the Secretary of Transportation. However, § 14506(b)(2) provides that:

> Notwithstanding [§ 14506(a)], a State may continue to require display of credentials that are required—(2) under the International Fuel Tax Agreement * * * *or under an applicable State law if, on October 1, 2006, the State has a form of highway use taxation not subject to collection through the International Fuel Tax Agreement;*

(emphasis added).

FMCSA Decision

To qualify for the statutory exception at 49 U.S.C. 14506(b)(2), the credentials (in this case a decal) required by New York City's CMV tax must be part of a highway use tax that was in effect prior to October 1, 2006. Because the tax has been in effect since 1960, the only question before the Agency is whether it is a highway use tax within the meaning of the statutory exception.

In enacting § 14506(b)(2), Congress did not define a highway use tax. Nor is there any other statutory or regulatory definition of highway use tax applicable to this statutory provision. In the absence of controlling authority, the Agency looks to common usage of the term. In the broadest sense, a highway use tax could mean any type of tax to support highways or any kind of tax on highway business, vehicles, or commerce, or any combination of these. E.M. Cope, *Trends in Highway Taxation in the United States,* 49 American Highways 8, 9 (Oct. 1970). Perhaps a better focused definition is any ''lev[y] that appl[ies] to motor vehicles because of their highway use.'' *Id.*

In the absence of statutory or regulatory guidance, the Agency examines the plain language of New York City's CMV Tax. By definition, the tax is levied for use of a CMV on the public highways or streets of the city. *See* § 11–801 (definitions of ''commercial motor vehicle'' and ''use''). Section 11–802(b) offers alternative interpretations of the tax, both of which characterize it as one based on use of highways:

> To the extent that the tax as imposed by subdivision a of this section may be invalid solely because it is based on the use in the city of the motor vehicles, the tax shall also be deemed to be based on the privilege of using the public highways or streets of the city by such motor vehicle.

Accordingly, on its face, the CMV Tax is for use of the public highways.

Proceeds from highway use taxes are often dedicated, at least in part, to a special fund for highway infrastructure; however the DOF's petition does not state how revenue from the CMV Tax is used. Nonetheless, a highway use tax may be levied without demonstrating that the revenues are earmarked for highway infrastructure. *See, e.g., Mid-States Freight Lines, Inc.* v. *Bates,* 200 Misc. 885, 890 (N.Y. Sup. Ct.), *aff'd,* 279 A.D. 451 (3d Dep't.), *aff'd,* 304 N.Y. 700

(1952). Stated otherwise, a highway use tax need not necessarily be dedicated to highway purposes. As a result, the DOF's failure to demonstrate a connection between the CMV Tax and highway funding is not dispositive.

FMCSA concludes, therefore, that New York City's CMV Tax is a highway use tax within the meaning of 49 U.S.C. 14506(b)(2).

In consideration of the above, FMCSA grants the DOF's petition for reconsideration and reverses its decision preempting New York City's credential display requirement. Today's decision is limited to the new arguments the DOF raised in its petition for reconsideration claiming exception from preemption under § 14506(b)(2). Under this analysis, New York City's credential display requirement in § 11–809 is not preempted and New York City may resume enforcement.

This decision does not affect the Agency's previous determination preempting the credential display requirements in New Jersey and Cook County, Illinois.

Issued on: February 29, 2012.

Anne S. Ferro,

Administrator, Federal Motor Carrier Safety Administration.

[FR Doc. 2012–5319 Filed 3–5–12; 8:45 am]

BILLING CODE; P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2012–0044]

Pipeline Safety: Notice to Operators of Driscopipe® 8000 High Density Polyethylene Pipe of the Potential for Material Degradation

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

ACTION: Notice; Issuance of Advisory Bulletin.

SUMMARY: PHMSA is issuing this advisory bulletin to alert operators using Driscopipe® 8000 High Density Polyethylene Pipe (Drisco8000) of the potential for material degradation. Degradation has been identified on pipe between one-half inch to two inches in diameter that was installed between 1978 and 1999 in desert-like environments in the southwestern United States. However, since root causes of the degradation have not been determined, PHMSA cannot say with certainty that this issue is isolated to these regions, operating environments, pipe sizes, or pipe installation dates. While the manufacturer has attempted to communicate with known or suspected users, PHMSA and the National Association of Pipeline Safety Representatives (NAPSR) have identified several operators currently using Drisco8000 pipe who had not received communications about the issue. PHMSA is issuing this advisory bulletin to all operators of Drisco8000 pipe in an effort to ensure they are aware of the issue, communicating with the manufacturer and their respective regulatory authorities to determine if their systems are susceptible to similar degradation, and taking measures to address it.

ADDRESSES: This document can be viewed on the PHMSA home page at: *http://www.phmsa.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Max Kieba by phone at 202–493–0595 or by email at *max.kieba@dot.gov.* Pipeline operators with potentially affected pipe or anyone with questions specific to actions in a certain state or region are encouraged to communicate with the appropriate pipeline safety authority directly. Operators of pipelines subject to regulation by PHMSA should contact the appropriate PHMSA Regional Office. A list of the PHMSA Regional Offices and their contact information is available at: *http://www.phmsa.dot.gov/pipeline/about/org.* Pipeline operators subject to regulation by a state should contact the appropriate state pipeline safety authority. A list of state pipeline safety authorities and their contact is provided at: *http://www.napsr.org/managers/napsr_state_program_managers2.htm.*

SUPPLEMENTARY INFORMATION:

I. Background

Two operators of natural gas pipeline systems have identified locations of material degradation on Drisco8000 pipe in Arizona and Nevada. The manufacturer of the pipe, Performance Pipe, a division of Chevron Phillips Chemical Company LP, confirmed that the pipe was degraded.

In 1999, a one-inch Copper Tube Size (CTS) Drisco8000 pipe service line in Arizona experienced a gas leak and was found to be degraded. The operator of this pipeline found areas of delaminating and surface cracking on Drisco8000 pipe ranging from one-half inch CTS to two inches Iron Pipe Size pipe at various locations in Arizona beginning in 2004. To better track the instances of the phenomenon, the operator implemented a procedure for reporting, defining the degradation area, and conducting leak surveys on the affected pipe. Chemical contamination was considered a potential source for degradation, but after extensive testing by the manufacturer and various outside laboratories, no indications of chemical source could be verified as a root cause.

In 2007, the operator experienced a gas ignition incident on a one-inch CTS Drisco8000 service line in Arizona. Due to the slit crack nature of the pipe failure, the investigation of this incident included checking for the possibility of nylon contamination in the pipe material. Nylon contamination was ruled out, but degradation of the internal pipe wall was noted. An additional incident occurred elsewhere in Arizona in 2007. As a result of these incidents, the operator implemented a replacement program and follow-up leak survey program. The operator continues its investigation and is working cooperatively with the manufacturer and regulators to determine the root causes and necessary mitigative actions.

A second operator found two cases of degraded Drisco8000 pipe in Arizona in 2006 and reported them to the Arizona Corporation Commission Office of Pipeline Safety. This operator is now looking at other areas of their service territory for potential degraded pipe issues.

The affected pipes in the cases reported thus far have diameters from one-half inch to two inches and have installation dates that range from 1978 to 1999. All reported cases have been on systems operating at or below 60 psig in desert regions in the southwestern United States. In those cases where print line codes are present on the pipe, the codes identify the pipe as being manufactured at a Watsonville, California, pipe plant which closed in 2000. The manufacturer has indicated they do not have any evidence that the condition developed as a result of the manufacturing process.

According to the manufacturer, the degraded pipe is fairly easy to identify when the pipe is exposed. Affected pipe displays delaminating or peeling of the outer diameter or a friable or crumbling appearance on the inner diameter surfaces of the pipe. In addition, an audible cracking sound or noise may be detected when flexing, cutting, or squeezing the pipe.

Once installed and in service, degraded pipe is not easy to identify. The manufacturer is not aware of a current testing protocol that consistently identifies the affected material while it is in service. Existing leak survey technologies have proven to be the most effective tool in locating and identifying degraded pipe.

The areas of degradation are not always consistent in their characteristics. The degradation may not occur along the complete pipe length, but rather may start and stop within a relatively short section of pipe and then reoccur in another area further down the segment. In addition, the operator and manufacturer have observed instances of degradation on only one side of the pipe with the other side having no indication of degradation.

The root cause of the degradation has not been determined. All reported cases have occurred in the southwestern United States where average ambient temperatures are very high, but this may or may not be a contributing factor. The manufacturer does not have evidence that the degraded pipe condition developed from or as a result of the manufacturing process. The manufacturer does not believe the issue to be associated with a particular resin lot. While a review of records has identified some changes in the resin formulation during the time period, the manufacturer does not believe that these changes contributed to the issue. The reporting operators have not identified any other construction or installation practices or conditions that are common to the known occurrences of degraded pipe.

PHMSA has asked the manufacturer to describe the problem and its extent and has requested information related to manufacturing, construction practices, and testing recommendations. Those questions and responses, along with pictures of degraded pipe, are available on the docket associated with this advisory.

The manufacturer is communicating with known customers, regulators, and industry groups as new information becomes available and the operators with known cases of degraded pipe continue to communicate with the appropriate regulatory authorities.

II. Advisory Bulletin (ADB–2012–03)

To: Operators using Driscopipe® 8000 High Density Polyethylene Pipe.

Subject: Potential for Material Degradation of Driscopipe® 8000.

Advisory: PHMSA advises all operators using Driscopipe® 8000 of the potential for material degradation. PHMSA encourages operators to communicate and work with the manufacturer and their respective regulatory authorities to consider and implement any actions that are needed to address the issue as it relates to their systems.

Operators using Drisco8000 pipe who have not already received communications from the manufacturer are encouraged to contact the manufacturer so they can receive future updates and determine whether their systems are susceptible to degradation. For additional information, contact Karen S. Lively, P.E, Technical Manager, Performance Pipe, a division of Chevron Phillips Chemical Company LP, by phone at 972–599–7413 or email at *livelks@cpchem.com.* Operators using Drisco8000 pipe are encouraged to inform the relevant regulatory authority and work together to determine what, if any, actions are needed to monitor and address the issue within their systems.

Due to the uncertainty of the root cause of the material degradation, PHMSA cannot provide specific guidance on how best to address the issue. However, PHMSA urges all operators using Drisco8000 pipe to consider the use of accelerated and more frequent leak surveys in those areas where degraded pipe is known or suspected to exist.

All operators using Drisco8000 pipe are encouraged to work with all stakeholders to determine how to address discovery and repair within their systems, taking the most conservative approach and keeping pipeline integrity and public safety a priority.

Authority: 49 U.S.C. chapter 601 and 49 CFR 1.53.

Issued in Washington, DC on February 29, 2012.

Jeffrey D. Wiese,

Associate Administrator for Pipeline Safety.

[FR Doc. 2012–5424 Filed 3–5–12; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Treasury Inspector General for Tax Administration; Privacy Act of 1974: Computer Matching Program

AGENCY: Treasury Inspector General for Tax Administration, Treasury.

ACTION: Notice.

SUMMARY: Pursuant to 5 U.S.C. 552a, the Privacy Act of 1974, as amended, notice is hereby given of the agreement between the Treasury Inspector General for Tax Administration (TIGTA) and the Internal Revenue Service (IRS) concerning the conduct of TIGTA's computer matching program.

DATES: *Effective Date:* April 5, 2012.

ADDRESSES: Comments or inquiries may be mailed to the Treasury Inspector General for Tax Administration, Attn: Office of Chief Counsel, 1401 H St. NW., Suite 469, Washington, DC 20005, or via electronic mail to *Counsel.Office@tigta.treas.gov.*

FOR FURTHER INFORMATION CONTACT: Office of Chief Counsel, Treasury Inspector General for Tax Administration, (202) 622–4068.

SUPPLEMENTARY INFORMATION: TIGTA's computer matching program assists in the detection and deterrence of fraud, waste, and abuse in the programs and operations of the IRS and related entities as well as protects against attempts to corrupt or interfere with tax administration. TIGTA's computer matching program is also designed to proactively detect and to deter criminal and administrative misconduct by IRS employees. Computer matching is the most feasible method of performing comprehensive analysis of data.

NAME OF SOURCE AGENCY:

Internal Revenue Service.

NAME OF RECIPIENT AGENCY:

Treasury Inspector General for Tax Administration.

BEGINNING AND COMPLETION DATES:

This program of computer matches is expected to commence on March 11, 2012, but not earlier than the fortieth day after copies of the Computer Matching Agreement are provided to the Congress and OMB unless comments dictate otherwise. The program of computer matches is expected to conclude on September 11, 2013.

PURPOSE:

This program is designed to deter and detect fraud, waste, and abuse in Internal Revenue Service programs and operations, to investigate criminal and administrative misconduct by IRS employees, and to protect against attempts to corrupt or threaten the IRS and/or its employees.

Authority: The Inspector General Act of 1978, 5 U.S.C. App. 3, and Treasury Order 115–01.

CATEGORIES OF INDIVIDUALS COVERED:

Current and former employees of the Internal Revenue Service as well as individuals and entities about whom information is maintained in the systems of records listed below.

CATEGORIES OF RECORDS COVERED:

Included in this program of computer matches are records from the following Treasury or Internal Revenue Service systems.

a. Treasury Payroll and Personnel System [Treasury/DO.001]

b. Treasury Child Care Tuition Assistance Records [Treasury/DO.003]

c. Public Transportation Incentive Program Records [Treasury/DO.005]
d. Treasury Financial Management Systems [Treasury/DO.009]
e. Correspondence Files and Correspondence Control Files [Treasury/IRS 00.001]
f. Correspondence Files: Inquiries About Enforcement Activities [Treasury/IRS 00.002]
g. Taxpayer Advocate Service and Customer Feedback and Survey Records System [Treasury/IRS 00.003]
h. Employee Complaint and Allegation Referral Records [Treasury/IRS 00.007]
i. Third Party Contact Records [Treasury/IRS 00.333]
j. Stakeholder Relationship Management and Subject Files, Chief, Communications and Liaison [Treasury/IRS 10.004]
k. SPEC Taxpayer Assistance Reporting System (STARS) [Treasury/IRS 10.007]
l. Volunteer Records [Treasury/IRS 10.555]
m. Annual Listing of Undelivered Refund Checks [Treasury/IRS 22.003]
n. File of Erroneous Refunds [Treasury/IRS 22.011]
o. Foreign Information System (FIS) [Treasury/IRS 22.027]
p. Individual Microfilm Retention Register [Treasury/IRS 22.032]
q. Subsidiary Accounting Files [Treasury/IRS 22.054]
r. Automated Non-Master File (ANMF) [Treasury/IRS 22.060]
s. Information Return Master File (IRMF) [Treasury/IRS 22.061]
t. Electronic Filing Records [Treasury/IRS 22.062]
u. CADE Individual Master File (IMF) [Treasury/IRS 24.030]
v. CADE Business Master File (BMF) [Treasury/IRS 24.046]
w. Audit Under-reporter Case File [Treasury/IRS 24.047]
x. Acquired Property Records [Treasury/IRS 26.001]
y. Lien Files [Treasury/IRS 26.009]
z. Offer in Compromise (OIC) File [Treasury/IRS 26.012]
aa. Trust Fund Recovery Cases/One Hundred Percent Penalty Cases [Treasury/IRS 26.013]
bb. Record 21, Record of Seizure and Sale of Real Property [Treasury/IRS 26.014]
cc. Taxpayer Delinquent Account (TDA) Files [Treasury/IRS 26.019]
dd. Taxpayer Delinquency Investigation (TDI) Files [Treasury/IRS 26.020]
ee. Identification Media Files System for Employees and Other Issued IRS ID [Treasury/IRS 34.013]
ff. Security Clearance Files [Treasury/IRS 34.016]
gg. Personnel Security Investigations, National Background Investigations Center [Treasury/IRS 34.021]
hh. National Background Investigations Center Management Information System [Treasury/IRS 34.022]
ii. IRS Audit Trail and Security Records System [Treasury/IRS 34.037]
jj. General Personnel and Payroll Records [Treasury/IRS 36.003]
kk. Practitioner Disciplinary Records [Treasury/IRS 37.007]
ll. Enrolled Agent and Enrolled Retirement Plan Agent Records [Treasury/IRS 37.009]
mm. Preparer Tax Identification Number Records [Treasury/IRS 37.111]
nn. Examination Administrative File [Treasury/IRS 42.001]
oo. Audit Information Management System (AIMS) [Treasury/IRS 42.008]
pp. Compliance Programs and Projects Files [Treasury/IRS 42.021]
qq. Anti-Money laundering/Bank Secrecy Act (BSA) and Form 8300 Records [Treasury/IRS 42.031]
rr. Appeals Centralized Data System [Treasury/IRS 44.003]
ss. Criminal Investigation Management Information System [Treasury/IRS 46.002]
tt. Automated Information Analysis System [Treasury/IRS 46.050]
uu. Tax Exempt/Government Entities (TE/GE) Case management Records [Treasury/IRS 50.222]
vv. Employee Protection System Records [Treasury/IRS 60.000]
ww. Chief Counsel Management Information System Records [Treasury/IRS 90.001]

Dated: February 27, 2012.

Melissa Hartman,

Deputy Assistant Secretary, Privacy, Transparency, and Records.

[FR Doc. 2012–5435 Filed 3–5–12; 8:45 am]

BILLING CODE 4810–04–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Art Advisory Panel of the Commissioner of Internal Revenue

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of determination of necessity for renewal of the Art Advisory Panel.

SUMMARY: It is in the public interest to continue the existence of the Art Advisory Panel. The current charter of the Art Advisory panel will be renewed for a period of two years.

FOR FURTHER INFORMATION CONTACT: Ruth Vriend, C:AP:P&V:ART, 1099 14th Street NW., Room 4200E, Washington, DC 20005, Telephone No. (202) 435–5739 (not a toll free number).

Pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. (2000), the Commissioner of Internal Revenue announces the renewal of the following advisory committee:

Title. The Art Advisory Panel of the Commissioner of Internal Revenue.

Purpose. The Panel assists the Internal Revenue Service by reviewing and evaluating the acceptability of property appraisals submitted by taxpayers in support of the fair market value claimed on works of art involved in Federal Income, Estate or Gift taxes in accordance with sections 170, 2031, and 2512 of the Internal Revenue Code of 1986.

In order for the Panel to perform this function, Panel records and discussions must include tax return information. Therefore, the Panel meetings will be closed to the public since all portions of the meetings will concern matters that are exempted from disclosure under the provisions of section 552b(c)(3), (4), (6) and (7) of Title 5 of the U.S. Code. This determination, which is in accordance with section 10(d) of the Federal Advisory Committee Act, is necessary to protect the confidentiality of tax returns and return information as required by section 6103 of the Internal Revenue code.

Statement of Public Interest. It is in the public interest to continue the existence of the Art Advisory Panel. The Secretary of Treasury, with the concurrence of the General Services Administration, has also approved renewal of the Panel. The membership of the Panel is balanced between museum directors and curators, art dealers and auction representatives to afford differing points of view in determining fair market value.

Authority for this Panel will expire two years from the date the Charter is approved by the Assistant Secretary for Management and Chief Financial Officer and filed with the appropriate congressional committees unless, prior to the expiration of its Charter, the Panel is renewed.

The Commissioner of Internal Revenue has determined that this document is not a major rule as defined in Executive Order 12291 and that a regulatory impact analysis therefore is not required. Neither does this document constitute a rule subject to

the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

Douglas H. Shulman,

Commissioner of Internal Revenue.

[FR Doc. 2012–5318 Filed 3–5–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Recruitment Notice for the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice.

SUMMARY: Notice of Open Season for Recruitment of IRS Taxpayer Advocacy Panel (TAP) Members.

DATES: March 19, 2012 through April 27, 2012.

FOR FURTHER INFORMATION CONTACT: Shawn Collins at 202–622–1245.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Department of the Treasury and the Internal Revenue Service (IRS) are inviting individuals to help improve the nation's tax agency by applying to be members of the Taxpayer Advocacy Panel (TAP). The mission of the TAP is to listen to taxpayers, identify issues that affect taxpayers, and make suggestions for improving IRS service and customer satisfaction. The TAP serves as an advisory body to the Secretary of the Treasury, the Commissioner of Internal Revenue, and the National Taxpayer Advocate. TAP members will participate in subcommittees that channel their feedback to the IRS through the Panel's parent committee.

The IRS is seeking applicants who have an interest in good government, a personal commitment to volunteer approximately 300 to 500 hours a year, and a desire to help improve IRS customer service. To the extent possible, the TAP Director will ensure that TAP membership is balanced and represents a cross-section of the taxpaying public with at least one member from each state, the District of Columbia, and Puerto Rico. Potential candidates must be U.S. citizens and must pass an IRS tax compliance check and a Federal Bureau of Investigation (FBI) background investigation. Federally-registered lobbyists cannot be members of the TAP.

TAP members are a diverse group of citizens who represent the interests of taxpayers from their respective geographic locations by providing input from a taxpayer's perspective on ways to improve IRS customer service and administration of the Federal tax system, and by identifying grassroots taxpayer issues. Members should have good communications skills and be able to speak to taxpayers about the TAP and TAP activities, while clearly distinguishing between TAP positions and their personal viewpoints.

Interested applicants should visit the TAP Web site at *www.improveirs.org* to complete the on-line application or call the TAP toll-free number, 1–888–912–1227, if they have questions about TAP membership. The opening date for submitting applications is March 19, 2012, and the deadline for submitting applications is April 27, 2012. Interviews may be held. The Department of the Treasury will review the recommended candidates and make final selections. New TAP members will serve a three-year term starting in December 2012. (Note: highly-ranked applicants not selected as members may be placed on a roster of alternates who will be eligible to fill future vacancies that may occur on the Panel.)

Questions regarding the selection of TAP members may be directed to Shawn Collins, Director, Taxpayer Advocacy Panel, Internal Revenue Service, 1111 Constitution Avenue NW., Room 3219, Washington, DC 20224, or 202–622–1245.

Dated: February 29, 2012.

Shawn Collins,

Director, Taxpayer Advocacy Panel.

[FR Doc. 2012–5316 Filed 3–5–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Notice of Intent To Grant an Exclusive License

AGENCY: Department of Veterans Affairs, Office of Research and Development.

ACTION: Notice of Intent.

SUMMARY: Notice is hereby given that the Department of Veterans Affairs, Office of Research and Development, intends to grant to Brain Plasticity, Inc., One Montgomery St., Suite 710, San Francisco, California 94104–4505, USA, an exclusive license to practice the following patent application: PCT/US2011/042031 filed July 8, 2011, entitled ''Computer-Implemented interactive behavioral training technique for the optimization of attention or remediation of disorders of attention.''

DATES: Comments must be received March 21, 2012.

ADDRESSES: Written comments may be submitted through *www.regulations.gov;* by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Call (202) 461–4902 for an appointment (This is not a toll-free number). In addition, during the comment period, comments may be viewed online through the Federal Docket Management System at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Amy E. Centanni, Director of Technology Transfer, Office of Research and Development (10P9TT), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 443–5640 (This is not a toll-free number). Copies of the published patent applications may be obtained from the U.S. Patent and Trademark Office at *www.uspto.gov.*

SUPPLEMENTARY INFORMATION: It is in the public interest to so license these inventions, as Brain Plasticity, Inc., submitted a complete and sufficient application for a license. 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 15 days from the date of this published Notice, the Department of Veterans Affairs Office of Research and Development 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.

Dated: February 24, 2012.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

[FR Doc. 2012–5308 Filed 3–5–12; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Veterans' Rural Health Advisory Committee, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Veterans' Rural Health Advisory Committee will hold a meeting on March 29–30, 2012, at the Conference

Center at the Community Health Development, Inc., 201 South Evans Street, Uvalde, Texas, from 8 a.m. to 4 p.m. each day. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on health care issues affecting enrolled Veterans residing in rural areas. The Committee examines programs and policies that impact the provision of VA health care to enrolled Veterans residing in rural areas, and discusses ways to improve and enhance VA services for these Veterans.

In the morning of March 29, the Committee will hear from its Chairman; the Veterans Integrated Systems Network 17 Director; and the Chief Executive Officer of the Community Health Development, Inc. In the afternoon, the Committee will receive overviews of the San Antonio Healthcare Delivery System and the Texas Veterans Commission. The Committee will also receive briefings on improving access in rural health and hear from the Director of the Office of Rural Health (ORH).

In the morning of March 30, the Committee will hear opening remarks from its Chairman; receive briefings on the South Texas Veterans Health Care Telehealth Program, the Homeless Women Veterans Program, and the ORH National Outreach Tool Kit; and hear from the County Veterans Service Officer. In the afternoon, the Committee will discuss its annual report and fall meeting. Public comments will be received at 3:30 p.m.

Individuals who speak are invited to submit a 1–2 page summary of their comments for inclusion in the official meeting record. Members of the public may also submit written statements for the Committee's review to Ms. Judy Bowie, Designated Federal Officer, ORH (10P1R), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, or email at *rural.health.inquiry@va.gov*. Any member of the public seeking additional information should contact Ms. Bowie at (202) 461–1929.

Dated: March 1, 2012.

By Direction of the Secretary.

Vivian Drake,

Committee Management Officer.

[FR Doc. 2012–5408 Filed 3–5–12; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 77 Tuesday,

No. 44 March 6, 2012

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Chapter 17

Endangered and Threatened Wildlife and Plants; Revised Endangered Status, Revised Critical Habitat Designation, and Taxonomic Revision for *Monardella linoides* ssp. *viminea;* Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2010–0076; 4500030114]

RIN 1018–AX18

Endangered and Threatened Wildlife and Plants; Revised Endangered Status, Revised Critical Habitat Designation, and Taxonomic Revision for *Monardella linoides* ssp. *viminea*

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), recognize the recent change to the taxonomy of the currently endangered plant taxon, *Monardella* linoides ssp. *viminea,* in which the subspecies was split into two distinct full species, *Monardella viminea* (willowy monardella) and *Monardella stoneana* (Jennifer's monardella). Because the original subspecies, *Monardella* linoides ssp. *viminea,* was listed as endangered under the Endangered Species Act of 1973, as amended (Act), we reviewed and updated the threats analysis that we completed for the taxon in 1998, when it was listed as a subspecies. We also reviewed the status of the new species, *Monardella stoneana.* We retain the listing status of *Monardella viminea* as endangered, and we remove protections afforded by the Act from those individuals now recognized as the separate species, *Monardella stoneana,* because the new species does not meet the definition of endangered or threatened under the Act. We also revise designated critical habitat for *Monardella viminea.* In total, approximately 122 acres (50 hectares) in San Diego County, California, fall within the boundaries of the critical habitat designation. We are not designating critical habitat for *Monardella stoneana* because this species does not warrant listing under the Act.

DATES: This rule becomes effective on April 5, 2012.

ADDRESSES: This final rule and the associated final economic analysis are available on the Internet at *http://www.regulations.gov.* Comments and materials received, as well as supporting documentation used in preparing this final rule, are available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone 760–431–9440; facsimile 760–431–5901.

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone 760–431–9440; facsimile 760–431–5901. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

It is our intent to discuss only those topics directly relevant to our recognition of the taxonomic split of *Monardella* linoides ssp. *viminea* into two distinct taxa: *Monardella viminea* (willowy monardella) and *Monardella stoneana* (Jennifer's monardella), the retention of *M. viminea* as endangered, the designation of critical habitat for *M. viminea* under the Act (16 U.S.C. 1531 *et seq.*), and our conclusion that *M. stoneana* does not meet the definition of endangered or threatened under the Act. For more information on the biology and ecology of *M. viminea* and *M. stoneana,* refer to the final listing rule published in the **Federal Register** on October 13, 1998 (63 FR 54938) and the critical habitat rule published November 8, 2006 (71 FR 65662). For new information specific to *M. viminea* and *M. stoneana,* including species descriptions, distributions, taxonomic ranks, and nomenclature, as well as new information on soils, potential pollinators, and current threats to the two species not included in our original listing or critical habitat rules for *M.* linoides ssp. *viminea,* refer to the proposed rule to designate revised critical habitat for *M. viminea* published in the **Federal Register** on June 9, 2011 (76 FR 33880). For information on the associated draft economic analysis for the proposed rule to designate revised critical habitat, refer to the document published in the **Federal Register** on September 28, 2011 (76 FR 59990).

Procedural Aspects of This Rule

In 2003, Elvin and Sanders proposed a taxonomic split of the previously listed entity *Monardella linoides* ssp. *viminea* into two distinct species. The Service initially disagreed with the segregation and classification of *M. stoneana* as a distinct species due to lack of sufficient supportive evidence presented by Elvin and Sanders (Bartel and Wallace 2004, pp. 1–3), but upon review of corroborating genetic analysis by Prince (2009), we accept the treatment of Elvin and Sanders (2003). This treatment found that some discrete occurrences that were previously identified as the listed entity *Monardella linoides* ssp. *viminea* do not in fact represent that entity, but rather a separate taxon. We also accept, and will use here, the scientific name *Monardella viminea* for the listed willowy monardella. Elvin and Sanders (2003, p. 426) provided the name *Monardella stoneana* for plants they determined were sufficiently distinct from willowy monardella to warrant recognition at the species rank. These authors returned willowy monardella to species status as *M. viminea,* the name under which it was originally described. In addition, Elvin and Sanders (2003, p. 431) point out its distinctiveness from *M. linoides* taxa in San Diego County, California.

Several consequences result from the change in taxonomy and recognition of the species split. First, we will refer to willowy monardella as *Monardella viminea.* Second, the range, description, and the magnitude and immediacy of threats to the listed entity (now *M. viminea*) have changed. A map of the distributions of the two species, *M. viminea* and *M. stoneana,* is provided in Figure 1, below. Third, those individuals now recognized as *M. stoneana,* which are identified as morphologically and ecologically distinct from the listed entity (*M. viminea*), are no longer afforded protections by the Act under the name *M. viminea.*

In this final rule, we present the results of a status review for *Monardella viminea* in consideration of its changed morphological and ecological description and diminished range. We also present our revised designation of critical habitat for *M. viminea.* Finally, we present the results of our status review for those plants previously protected under the Act as *M. viminea,* and that are now identified as *M. stoneana,* and conclude *M. stoneana* does not meet the definition of endangered or threatened under the Act.

We first proposed recognizing the taxonomic classification of *Monardella linoides* ssp. *viminea* as a distinct species (*M. viminea*) and reclassifying a portion of *Monardella linoides* ssp. *viminea* as a separate species (*M. stoneana*) in the proposed listing and revised critical habitat rule published in the **Federal Register** on June 9, 2011 (76 FR 33880). Based on the information presented in the proposed rule (see *Taxonomic and Nomenclatural Changes Affecting* Monardella linoides *ssp.* viminea of the

proposed rule (76 FR 33880, June 9, 2011)), and acceptance by the scientific community, we finalize the taxonomic change and amend the List of Endangered and Threatened Plants at 50 Code of Federal Regulations (CFR) 17.12(h) to identify the listed entity as ''*Monardella viminea* (willowy monardella).''

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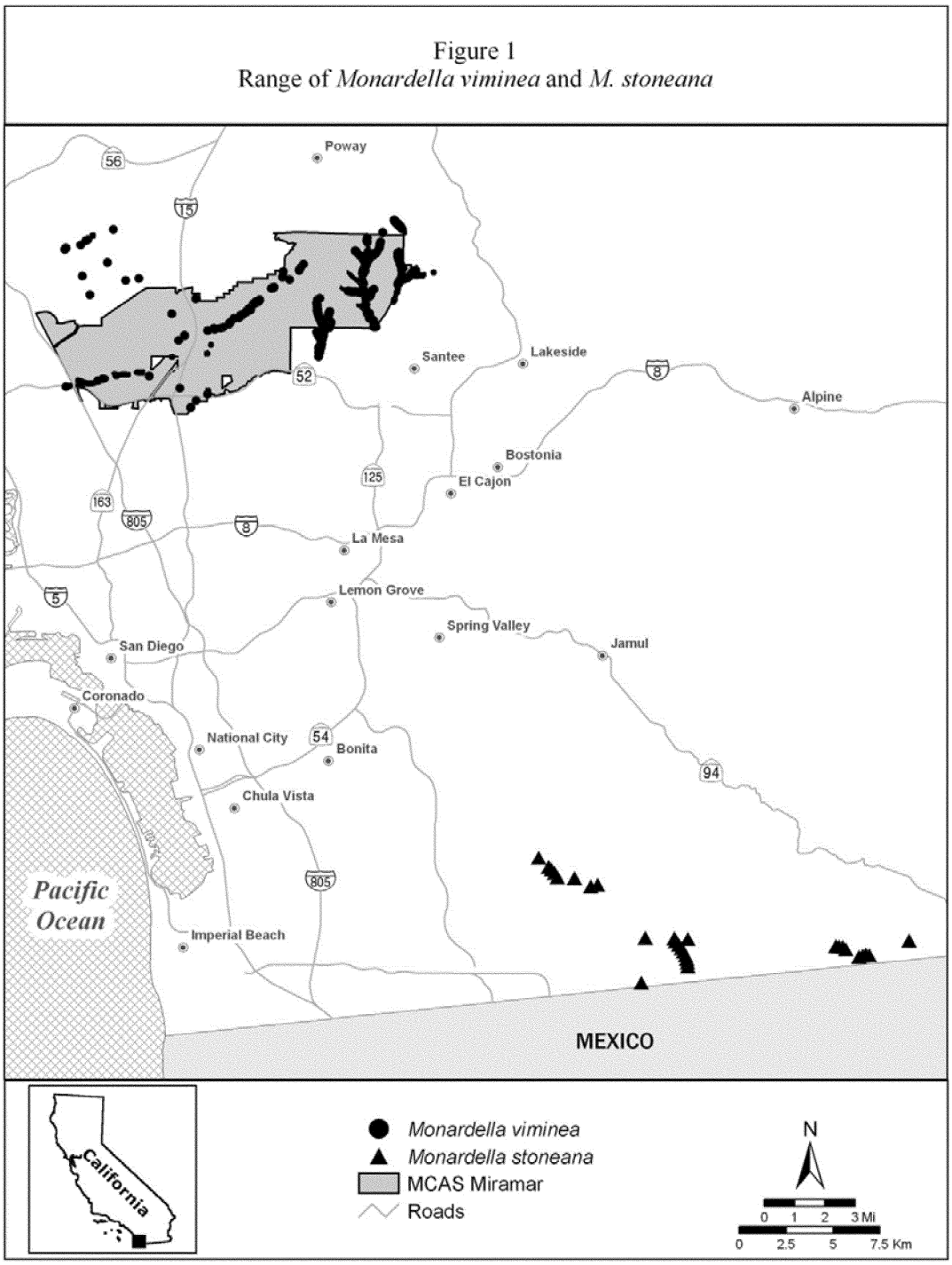

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New Information on Occurrences of Monardella viminea and Monardella stoneana

In this document we use the word ''occurrence'' when describing the location of *Monardella viminea* plants. In this context, we are referring to point locations that contain one or more *M. viminea* individuals or to polygons representing the boundaries of clumps of plants. These point locations or polygons may include one or more of the ''element occurrences'' (EOs) as described by the California Department of Fish and Game (CDFG) in the California Natural Diversity Database (CNDDB). Utilizing EOs to describe locations of *M. viminea* plants in our listing and critical habitat analyses is

consistent with terminology used by the Service in previous rules for this species. It also provides clarity in referencing clumps of plants in canyons that may be referred to by multiple or changing names. In all other respects in this document, ''element occurrence'' or ''occurrence'' references are those from the cumulative data of the CNDDB (2011a, EOs 1–31).

As discussed in the June 9, 2011, proposed rule (76 FR 33880), when we listed *Monardella linoides* ssp. *viminea,* we considered 20 occurrences to be extant in the United States (see Table 1) (63 FR 54938, October 13, 1998). As of 2008, 9 occurrences were considered extirpated, leaving 11 extant occurrences (Service 2008, p. 5). All nine extirpated occurrences were in central San Diego County in the range of what is now considered to be *M. viminea.* Based on updated information from Marine Corps Air Station (MCAS) Miramar (Kassebaum 2010, pers. comm.), 2 additional occurrences of those 11 extant occurrences have since been extirpated, again in the range of *M. viminea.* Additionally, as a result of taxonomic changes, the two southernmost element occurrences previously considered *M. linoides* ssp. *viminea* were reclassified as *M. stoneana* after the 2008 5-year review, leaving seven extant occurrences of *M. viminea* (see Table 1). We now consider an eighth occurrence to be extant, as described in the following paragraphs.

TABLE 1—LIST OF ELEMENT OCCURRENCES OF MONARDELLA VIMINEA AND MONARDELLA STONEANA BY LOCATION, AND WHEN THOSE OCCURRENCES WERE KNOWN TO BE EXTANT

Location	CNDDB Element Occurrence No. (EO)	Known and extant at listing	Extant at 2008 5-yr review	Currently extant
Monardella viminea:				
Lopez Canyon	1	X	X	X
Cemetery Canyon	3	X		
Carroll Canyon	4	X		
Sycamore Canyon	8	X	X	X
San Clemente Canyon	11	X		
San Clemente Canyon	12	X		X
San Clemente Canyon	13	X		
Murphy Canyon	14	X		
Murphy Canyon	15	X	X	
San Clemente Canyon	16	X		
San Clemente Canyon	17	X		
West Sycamore Canyon	21	X	X	X
Elanus Canyon	24	X	X	X
Carroll Canyon	25	X		
Spring Canyon	26	X	X	X
San Clemente Canyon	27	X	X	X
Otay Lakes	28	X	X	Now considered *M. stoneana* EO4
Sycamore Canyon	29	X	X	X
Miramar NAS	31	X	X	
Marron Valley	none	X	X	Now considered *M. stoneana* EO1
Monardella stoneana:				
Marron Valley	1	X	X	X
NW Otay Mountain	2		X	X
NW Otay Mountain	3		X	X
Otay Lakes	4	X	X	X
Buschalaugh Cove	5		X	X
Cottonwood Creek	6		X	X
Copper Canyon	7		X	X
S. of Otay Mountain	8		X	X
Tecate Peak	9		X	X

Sources: CNDDB 1998, 2007, 2011a, 2011b; Service 2008, Table 1; Kassebaum 2010, pers. comm.

After a new review of Geographical Information Systems (GIS) data and the most recent survey report from MCAS Miramar, we found that an occurrence of *M. viminea* in San Clemente Canyon had incorrectly been reported as extirpated both in the 2008 5-year review and the June 9, 2011, proposed rule. Further reviews of data from MCAS Miramar showed that plants have continuously been present in the location that was incorrectly considered extirpated (Rebman and Dossey 2006, Map 10; Tierra Data 2011, Map 6). Therefore, we now recognize EO 12 as extant. We believe there are now eight element occurrences of *M. viminea,* and that these eight EOs were extant at the time of listing. Therefore, we currently consider only 10 occurrences to be extirpated rather than 11. We are not aware of any new occurrences of *M. viminea,* other than those planted in 2007, as a conservation measure to offset impacts associated with the development of the Carroll Canyon Business Park. More information on four translocated occurrences is discussed in the *Geographic Range and Status* section in the proposed rule (76 FR 33880, June 9, 2011).

In addition to two occurrences now considered to be *Monardella stoneana* (but considered at listing to be *M. linoides* ssp. *viminea*), we now know of an additional seven occurrences of *M. stoneana,* all in what was once the southern range of *M. linoides* ssp. *viminea* (Figure 1, above). We presume those occurrences were extant at the time *M. linoides* ssp. *viminea* was listed. Although we reported in the June 9, 2011, proposed rule that the single plant in the *M. stoneana* occurrence at Otay

Lakes (*M. stoneana* EO 4, formerly *M. viminea* EO 28) was extirpated by the 2007 Harris Fire, 2011 surveys by the City of San Diego reported a single plant had resprouted in the same location (City of San Diego 2011a, p. 229). The monitor for the city reported that the plant was of robust size and height, making it more likely to be a resprout than a juvenile or seedling (Miller 2011, pers. comm.). Therefore, in this final rule, we now consider nine occurrences of *M. stoneana* to be extant.

Throughout this document we refer to previous reports and documents, including **Federal Register** publications. Information contained in documents issued prior to the present document may reference *Monardella viminea* as *M. linoides* ssp. *viminea,* and may include statements or data referring to plants or populations now known as *M. stoneana.*

Summary of Changes From Proposed Rule

In preparing this final listing rule and critical habitat designation, we reviewed and considered comments from the public on the proposed listing of *Monardella viminea,* proposed removal of plants now recognized as *M. stoneana* from the listed entity, and proposed designation of critical habitat for *M. viminea* published on June 9, 2011 (76 FR 33880). As a result of public comments and peer review, we made slight changes to our analysis of threats for both species and the revised designation of critical habitat for *M. viminea.* These changes are as follows:

(1) We added information from a *Monardella viminea* habitat study conducted by researchers at MCAS Miramar. The study examined three different treatments for enhancing habitat conditions for *M. viminea:* hand removal of nonnative grasses, herbicide application to nonnative grasses, and application of cobble to provide rock mulch (AMEC 2011, p. 1–1). We also added findings from the study to the Factor A and Factor C analyses for *M. viminea,* and to the *Special Management Considerations or Protection* section. Additionally, we added information on habitat fragmentation to the Factor A analysis for *M. viminea.*

(2) Based on information submitted by commenters, we added information to the five-factor analyses for both species, such as the effects of trampling on *Monardella viminea,* the effects of road construction on *M. stoneana,* and factors influencing the lack of recruitment for *M. viminea.*

(3) Based on a suggestion we received from a commenter, we added a discussion of protections afforded by the Clean Water Act (33 U.S.C. 1251 *et seq.*) to the five-factor analyses for both species.

(4) Based on information presented by a commenter, we revised the list of activities requiring consultation for critical habitat, including removal of activities that have previously had no detrimental effect on *Monardella viminea* (such as fire retardant use). We also removed mention of herbicide application as an activity that requires consultation because small-scale application of herbicide on weeds in direct proximity to *M. viminea* has a demonstrated benefit to the species.

(5) We updated this final rule to include information about protections afforded to *Monardella viminea* by the newly approved integrated natural resources management plan (INRMP) for MCAS Miramar.

(6) Based on information submitted by commenters, we updated the *Special Management Considerations or Protection* section with measures on how to manage and protect essential habitat that supports *Monardella viminea.*

(7) Based on further communication with managers of Otay Mountain Ecological Reserve, we updated the management policies and guidelines for the Reserve in the Factor D discussion for *Monardella stoneana.*

(8) We added further information on possible threats posed by illegal border crossings to Factor A for *Monardella stoneana.*

(9) As requested by a commenter, we revised the Altered Hydrology section in the Factor A analysis for *Monardella viminea* to address changing watershed conditions in the range of the species.

(10) The areas designated as critical habitat in this final rule constitute a slight revision of the critical habitat for *Monardella viminea* we proposed on June 9, 2011 (76 FR 33880). During the first public comment period, we received notification from MCAS Miramar that we were not using the most recent boundaries in the proposed rule (Dept. of Environmental Management, MCAS Miramar 2011, p. 3). While there was no change in the total area identified as critical habitat, ownership area totals in some areas did change, as shown in Table 2.

TABLE 2—CHANGES IN OWNERSHIP AREA TOTALS BETWEEN PROPOSED AND FINAL RULES

	Proposed critical habitat			Final critical habitat		
	Federal ac (ha)	State/local ac (ha)	Private ac (ha)	Federal ac (ha)	State/local ac (ha)	Private ac (ha)
Unit 1—Sycamore Canyon	156 (63)	25 (10)	170 (69)	153 (62)	22 (8)	175 (70)
Unit 2—West Sycamore Canyon	550 (222)	27 (11)	0 (0)	551 (223)	26 (11)	0 (0)
Unit 3—Spring Canyon	176 (71)	5 (2)	92 (37)	170 (69)	5 (2)	98 (40)
Unit 4—East San Clemente Canyon	454 (184)	13 (5)	0 (0)	462 (187)	5 (2)	0 (0)
Unit 5—West San Clemente Canyon	210 (85)	16 (7)	1 (<1)	227 (92)	0 (0)	0 (0)
Total	1,546 (626)	86 (35)	263 (106)	1,563 (663)	58 (24)	273 (111)
Total Essential Habitat	.....	.....	1,895 (767)	.....	.....	1,895 (767)
	Exempted	Proposed excluded	Proposed designation *	Exempted	Excluded **	Designated
	1,546 (626)	208 (84)	348 (141)	1,563 (663)	210 (85)	122 (50)

Values in this table may not sum due to rounding.

* "Proposed designation" includes acreages proposed for exclusion.

** Excluded acreages include private lands covered by the City of San Diego and County of San Diego Subarea Plans under the San Diego Multiple Species Conservation Program (MSCP).

(11) Table 3 of the proposed rule incorrectly listed Unit 1 as consisting of 158 ac (64 ha) of private land and 36 ac (15 ha) of state and local land. The table should have shown 170 ac (69 ha) of private land and 25 ac (10 ha) of state and local land.

(12) In the June 9, 2011, proposed revised rule, we stated that we were considering lands owned by or under the jurisdiction of the City of San Diego Subarea Plan and the County of San Diego Subarea Plan under the San Diego Multiple Species Conservation Program (MSCP) for exclusion under section 4(b)(2) of the Act. We have now made a final determination that the benefits of exclusion outweigh the benefits of inclusion of lands covered by the City and County Subarea Plans and that exclusion of these lands will not result in extinction of the species. Therefore, the Secretary is exercising his discretion to exclude approximately 177 acres (ac) (72 hectares (ha)) of land within the boundaries of the City of San Diego Subarea Plan and 32 ac (13 ha) within the County of San Diego Subarea Plan from this final designation. For a complete discussion of the benefits of inclusion and exclusion, see the Exclusions section below.

Only information relevant to actions described in this final rule is provided below. For additional information on *Monardella viminea,* including a detailed description of its life history and habitat, refer to the final listing rule published in the **Federal Register** on October 13, 1998 (63 FR 54938), the final rule designating critical habitat published in the **Federal Register** on November 8, 2006 (71 FR 65662), the 5-year review completed in March 2008 (Service 2008), and the proposed rule published on June 9, 2011 (76 FR 33880). Actions described below include status reviews of *M. viminea* and *M. stoneana* and a revision of the critical habitat designation for *M. viminea.*

Previous Federal Actions

Monardella linoides ssp. *viminea* was listed as endangered in 1998 (63 FR 54938, October 13, 1998). An account of Federal actions prior to listing may be found in the listing rule (63 FR 54938, October 13, 1998). On November 9, 2005, we published a proposed rule to designate critical habitat for *M. linoides* ssp. *viminea* (70 FR 67956). On November 8, 2006 (71 FR 65662), we published our final rule designating critical habitat for *M. linoides* ssp. *viminea.* On January 14, 2009, the Center for Biological Diversity filed a complaint in the U.S. District Court for the Southern District of California challenging our designation of critical habitat for *M. linoides* ssp. *viminea* (*Center for Biological Diversity* v. *United States Fish and Wildlife Service and Dirk Kempthorne, Secretary of the Interior,* Case No. 3:09–CV–0050–MMA–AJB). A settlement agreement was reached with the plaintiffs dated November 14, 2009, in which we agreed to submit a proposed revised critical habitat designation to the **Federal Register** for publication by February 18, 2011, and a final revised critical habitat designation to the **Federal Register** for publication by February 17, 2012. By order dated February 10, 2011, the district court approved a modification to the settlement agreement that extended the deadline for **Federal Register** submission to June 18, 2011, for the proposed revised critical habitat designation; we published the proposed rule in the **Federal Register** on June 9, 2011 (76 FR 33880). The deadline for submission of a final revised critical habitat designation to the **Federal Register** remains February 17, 2012. This rule complies with the conditions of the settlement agreement.

Summary of Factors Affecting *Monardella viminea*

Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors for *Monardella viminea* is discussed below.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Urbanization/Development

The original listing rule identified urban and residential development as a threat to *Monardella linoides* ssp. *viminea* (63 FR 54938, October 13, 1998). Prior to 1992, San Diego had grown by ''a factor of 10 over the last 50 years'' (Soule *et al.* 1992, p. 39). At the time of listing, two large occurrences were located on private property, and development proposals existed for one of the parcels. Since listing, one of those two occurrences, EO 25 from the Carroll Canyon Business Park (CNDDB 2011a), has been extirpated due to construction activities. Additionally, EO 14 in Murphy Canyon was believed extirpated after listing due to lingering impacts from construction activity near Highway 15 (CNDDB 2011a).

The Cities of San Diego and Santee have purchased private property as reserve land for *Monardella viminea.* Most occurrences are now found on land conserved or owned by MCAS Miramar, the City of San Diego, and the County of San Diego. Lands owned by the City and County of San Diego are covered by the MSCP, which is a habitat conservation plan (HCP) intended to maintain and enhance biological diversity in the San Diego region, and to conserve viable populations of endangered, threatened, and key sensitive species and their habitats (including *M. viminea*). The MSCP designates lands to be set aside for biological preserves. However, 10 percent of habitat for *M. viminea* occurs on privately owned land outside of the reserve areas. This land includes areas in the City of Santee outside of the purchased reserve land, and one of the four transplanted occurrences in Carroll Canyon within the boundaries of the City of San Diego (Ince and Krantz 2008, p. 1). Any sites outside of the MSCP reserve areas are vulnerable to development. Portions of Sycamore Canyon where *M. viminea* occurs were previously slated for development (Service 2003a, pp. 1–23), although the project has been put on hold due to bankruptcy issues, and no development is currently scheduled (San Diego Business Journal 2011, pp. 1–3).

Another potential impact of increased urbanization is habitat fragmentation. As noted in the *New Information on Occurrences of* Monardella viminea *and* Monardella stoneana section above, 11 occurrences of *Monardella viminea* have been extirpated since listing. To some extent, *M. viminea* evolved in a naturally fragmented landscape, as it occurs in individual drainages. In natural conditions, some habitat connectivity could be provided through pollinator movement between occurrences in close proximity to each other. Uninterrupted habitat within canyons is also important for maintaining the downstream flows that create secondary benches and sandbars upon which *M. viminea* grows, and for scouring nonnative grasses from those areas. Thus, under unaltered conditions, habitat fragmentation is not a threat to

M. viminea. However, urbanization (particularly in areas surrounding occurrences of *M. viminea* in Carroll and Lopez Canyons) interrupts pollinator movement and natural streamflow in the canyons, and urbanization could prevent movement and decrease genetic diversity of the species. Additionally, in San Clemente Canyon, the Sim J. Harris aggregate mine acts as a barrier to the physical and biotic continuity, and as a barrier to natural water flow between the east and west halves of the canyon, although natural habitat for pollinators remains.

The occurrences discussed above represent only a small proportion of habitat that contains clumps of *Monardella viminea.* Seventy percent of land where *M. viminea* occurs is owned and managed by MCAS Miramar, and most remaining large occurrences (with more than 100 clumps of *M. viminea*) are found on MCAS Miramar, with the exception of Spring Canyon (CNPS 2011, p. 7). All *M. viminea* on MCAS Miramar occurs within Level I or II management areas (see Exemptions below for explanation of the two levels of management). Management areas on MCAS Miramar provide a guide for mitigation actions for development on the base, and are organized based ''on differing resource conservation requirements and management concerns'' (Gene Stout and Associates *et al.* 2011, p. 5–2). Level I and II management areas are those that contain sensitive species. Specific mitigation measures within Level I and II management areas depend on the surrounding habitat type. For temporary habitat loss in riparian corridors, all actions must include measures to minimize direct impact to the habitat, decrease erosion and runoff, and provide for a 2:1 ratio of habitat enhancement and restoration for endangered and threatened plants. For permanent habitat loss within riparian areas where listed species are present, the following actions occur: Creation of a corridor for wildlife movement of 500 feet (ft) (150 meters (m)) or less, assurance of no net loss of wetland habitat, and suitable compensation for occupied habitat at a 2:1 ratio (Gene Stout and Associates *et al.* 2011, Tables 6.2.2.2a, 6.2.2.2b). Therefore, although urbanization does threaten some occurrences of *Monardella viminea,* and effects from habitat fragmentation may occur on the edge of the species' range, the threat to the species' habitat is not significant across the range of the species.

Sand and Gravel Mining

Sand and gravel mining was identified at the time of listing as adversely affecting *Monardella linoides* ssp. *viminea* (63 FR 54938, October 13, 1998). Sand and gravel mining has broad-scale disruptive qualities to native ecosystems (Kondolf *et al.* 2002, p. 56). The larger (340 individuals) of two occurrences found on private land at the time of listing was identified as being threatened by sand and gravel mining, which had the potential to eliminate or disrupt these local populations through changes in hydrology and elimination of individual plants. Since listing, all occurrences vulnerable to mining impacts have been extirpated, either by altered drainage patterns or construction unrelated to mining operations (CNDDB 2011a, EOs 3 and 25). Currently, we are not aware of any ongoing mining activities or plans for future mining activities that would impact the species. While we may not be fully aware of all potential gravel mining activities on private lands, few *M. viminea* occurrences are on private land. Therefore, we do not consider sand and gravel mining to be a threat to *M. viminea* now or in the future.

Altered Hydrology

The original listing rule identified altered hydrology as a threat to *Monardella linoides* ssp. *viminea,* particularly in those portions of the habitat now considered to be in the range of *M. viminea* (63 FR 54938, October 13, 1998). *Monardella viminea* requires a natural hydrological system to maintain and deposit material for the secondary benches and streambeds on which the species grows (Scheid 1985, pp. 30–31, 34–35). Upstream development can disrupt this regime, increasing storm runoff that can erode, rather than establish, the sandy banks and secondary benches upon which *M. viminea* grows. White and Greer (2006, p. 131) found that streamflow conditions in the Los Peñasquitos Creek system, which includes *M. viminea* occurrences in Carroll and Lopez Canyons, have changed drastically from historical conditions. Their study estimated that urbanization of the area increased from 9 percent in 1973, to 37 percent in 2000, and that, correspondingly, runoff in the canyons increased by 200 percent over that same period (White and Greer 2006, p. 134). Further, strong floods within the watershed have increased from 350 to 700 percent over the same time period, with no corresponding increase in rainfall (White and Greer 2006, pp. 134–135). Such watershed changes can alter the riparian vegetation community through changes in median and minimum daily discharges, dry season runoff, and flood magnitudes (White and Greer 2006, pp. 133–136). Increased strong floods also have the potential to wash away plants as large as or larger than *M. viminea,* as has occurred in Lopez Canyon during heavy runoff following winter storms (Kelly and Burrascano 2001, pp. 2–3), where flooding severely impacted the *M. viminea* occurrences (Kelly and Burrascano 2006, pp. 65–69).

Additionally, increases in surface and subsurface soil moisture (via direct effects to the water table associated with watershed urbanization), and changes in streamflow from ephemeral to perennial, adversely affect native plants, such as *Monardella viminea,* that are adapted to a drier Mediterranean climate (cool moist winters and hot dry summers). *Monardella viminea* has been unable to adapt to the increased soil moisture and nonnative species incursion has been exacerbated by the changing water regime (underground hydrology) (Burrascano 2007, pers. comm.). Nonnative species can smother seedling and mature plants and prevent natural growth of *M. viminea* (Rebman and Dossey 2006, p. 12).

Since listing, three occurrences have been extirpated due to altered hydrological patterns: Cemetery Canyon, Carroll Canyon, and western San Clemente Canyon (CNDDB 2011a, EOs 3, 4, 11). All three of these occurrences are on city-owned or private land. On MCAS Miramar, watersheds on the undeveloped eastern half of the base, where over 80 percent of *Monardella viminea* plants are found, appear to have retained their natural hydrological regime (Rebman and Dossey 2006, p. 37).

Considering the synergistic and cumulative effects of these combined hydrological threats exacerbated by heavy development surrounding several canyons, we expect that altered hydrology will continue to pose a significant threat to habitats that support *Monardella viminea,* particularly outside the border of MCAS Miramar. We anticipate that this threat will continue into the future.

Fire and Type Conversion

The listing rule mentioned that fuel modification to exclude fire could affect *Monardella linoides* ssp. *viminea* (63 FR 54938, October 13, 1998); the same is true of the reclassified *M. viminea* and its habitat. Otherwise, fire was not considered a severe threat to the species at the time of listing.

Our understanding of fire in fire-dependent habitats has changed since *Monardella linoides* ssp. *viminea* was listed in 1998 (Dyer 2002, pp. 295–296). Fire is a natural component for regeneration and maintenance of *M. viminea* habitat. The species' habitat needs concerning fire seem contradictory; a total lack of fire for long periods is undesirable, because the fires that eventually occur can be catastrophic, yet re-introduction of fire (either accidentally or purposefully) is also undesirable, because such fire often becomes catastrophic (megafire) as a result of high fuel loads due to previous lack of fire. This paradox has resulted from a disruption of the natural fire regime.

Fire frequency has increased in North American Mediterranean shrublands since about the 1950s, and studies indicate that southern California has the greatest increase in wildfire ignitions, primarily due to an increase in population density beginning in the 1960s, thus increasing the number of human-caused fires (Keeley and Fotheringham 2003, p. 240). Increased wildfire frequency and decreased fire return interval, in conjunction with other effects of urbanization, such as increased nitrogen deposition and habitat disturbance due to foot and vehicle traffic, are believed to have resulted in the conversion of large areas of coastal sage scrub to nonnative grasslands in southern California (Service 2003b, pp. 57–62; Brooks *et al.* 2004, p. 677; Keeley *et al.* 2005, p. 2109; Marschalek and Klein 2010, p. 8). This type conversion (conversion of one type of habitat to another) produces a positive feedback mechanism resulting in more frequent fires and increasing nonnative plant cover (Brooks *et al.* 2004, p. 677; Keeley *et al.* 2005, p. 2109).

Threats to the habitat from fire exclusion, which impact processes that historically created and maintained suitable habitat for *Monardella viminea,* may make the species even more vulnerable to extinction. The long-term ecological effects of fire exclusion have not been specifically detailed for *M. viminea;* however, we believe the effects of fire, fire suppression, and fire management in southern California habitats will be similar to those at locations in the Rocky, Cascade, and Sierra Nevada mountain ranges (Keane *et al.* 2002, pp. 15–16). Fire exclusion in southern California habitat likely affects: (1) Nutrient recycling, (2) natural regulation of succession via selecting and regenerating plants, (3) biological diversity, (4) biomass, (5) insect and disease populations, (6) interaction between plants and animals, and (7) biological and biogeochemical processes (soil property alteration) (Keane *et al.* 2002, p. 8). Where naturally occurring fire is excluded, species adapted to fire (such as *M. viminea*) are often replaced by nonnative invasive species better suited to the new fire regime (Keane *et al.* 2002, p. 9).

Some fire management is provided by California Department of Forestry and Fire Protection (CAL FIRE), which is both an emergency response and resource protection agency. Though CAL FIRE has signed a document to assist in management of backcountry areas in San Diego County, including Sycamore Canyon Preserve with its *Monardella viminea* occurrence (Department of Parks and Recreation (DPR) 2009, p. 14; County of San Diego 2011a, p. 1), the land protected under this agreement makes up only 2 percent of all *M. viminea* habitat. Therefore, although CAL FIRE provides a benefit to Sycamore Canyon Preserve and *M. viminea* habitat, it does not alleviate the threat to the species from type conversion due to frequent fire.

Therefore, given the conversion of coastal sage scrub to nonnative grasses and the changing fire regime of southern California, we consider type conversion and the habitat effects of altered fire regime, particularly from increased frequency of fire, to be a significant threat to habitat supporting *Monardella viminea* both now and in the future.

Summary of Factor A

Monardella viminea continues to be threatened by habitat loss and degradation by altered hydrological regimes that can result in uncontrollable flood events that negatively impact *M. viminea* by washing away plants, increasing erosion of sandbars and secondary benches where *M. viminea* grows, and increasing nonnative plant establishment. Habitat of this species is also threatened by an unnatural fire regime resulting from manmade disturbances and activities, which in turn can accelerate invasion of the area by nonnative plants. Of the eight natural and four transplanted occurrences of *M. viminea,* those in areas where continued development is anticipated may experience further alterations to their hydrology and unnatural fire regimes. These threats to *M. viminea* habitat are occurring now and are expected to continue into the future.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

To our knowledge, no commercial use of *Monardella viminea* exists. The listing rule suggested that professional and private botanical collecting could exacerbate the extirpation threat to the species due to botanists favoring rare or declining species (63 FR 54938, October 13, 1998). However, we are not currently aware of any interest by botanists in collecting *M. viminea.* Therefore, we do not believe that overutilization for commercial, recreational, scientific, or educational purposes constitutes a threat to this species now or in the future.

C. Disease or Predation

Neither disease nor predation was known to be a threat affecting *Monardella linoides* ssp. *viminea* at the time of listing (63 FR 54938, October 13, 1998). Volunteers have since noted browsing impacts to occurrences of *M. viminea* in Lopez Canyon by rabbits and deer (Kelly and Burrascano 2001, p. 5). Monitors at MCAS Miramar reported heavy herbivory in multiple canyons later in the season after much of the species' growth had occurred (AMEC 2011, p. 4–9). Many or most seed heads were consumed by herbivores in Spring Canyon. However, as *M. viminea* resprouts from perennial root crowns each year, herbivory is not likely to impact its survival or vigor (AMEC 2011, p. 5–1). Therefore, based on the best available scientific and commercial information, neither disease nor herbivory constitutes a threat to *M. viminea* now or in the future.

D. The Inadequacy of Existing Regulatory Mechanisms

At the time of listing, regulatory mechanisms that provided some protection for *Monardella linoides* ssp. *viminea* that now apply to *M. viminea* included: (1) The Act, in cases where *M. viminea* co-occurred with a federally listed species; (2) the California Endangered Species Act (CESA); (3) the California Environmental Quality Act (CEQA); (4) conservation plans pursuant to California's Natural Community Conservation Planning (NCCP) Act; (5) land acquisition and management by Federal, State, or local agencies, or by private groups and organizations; (6) The Clean Water Act (CWA); and (7) local laws and regulations. The listing rule analyzed the potential level of protection provided by these regulatory mechanisms (63 FR 54938, October 13, 1998).

Currently, *Monardella linoides* ssp. *viminea* is listed as endangered under the Act (63 FR 54938, October 13, 1998). Provisions for its protection and recovery are outlined in sections 4, 7, 9 and 10 of the Act. This law is the primary mechanism for protecting *M. viminea,* which, as part of the original listed entity, currently retains protection under the Act. However, the protections afforded to *M. viminea* under the Act as part of *M. linoides* ssp. *viminea,* the currently listed entity, would continue to apply only if we determine to retain listed status for *M. viminea.* Therefore, for purposes of our analysis, we do not include the Act as an existing regulatory mechanism that protects *M. viminea.* We do note that *M. viminea* would likely continue to receive protection indirectly through HCPs approved under section 10 of the Act and Natural Community Conservation Plans (NCCPs) approved by the State of California that will cover *M. viminea* even if the species is not federally listed.

Federal Protections

National Environmental Policy Act (NEPA)

All Federal agencies are required to adhere to the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*) for projects they fund, authorize, or carry out. The Council on Environmental Quality's regulations for implementing NEPA (40 CFR 1500–1518) state that in their environmental impact statements, agencies shall include a discussion on the environmental impacts of the various project alternatives (including the proposed action), any adverse environmental effects that cannot be avoided, and any irreversible or irretrievable commitments of resources involved (40 CFR 1502). NEPA itself is a disclosure law that provides an opportunity for the public to submit comments on a particular project and propose other conservation measures that may directly benefit listed species; however, it does not impose substantive environmental mitigation obligations on Federal agencies. Any such measures are typically voluntary in nature and are not required by the statute. Activities on non-Federal lands are also subject to NEPA if there is a Federal nexus.

Sikes Act

In 1997, section 101 of the Sikes Act (16 U.S.C. 670a(a)) was revised by the Sikes Act Improvement Act to authorize the Secretary of Defense to implement a program to provide for the conservation and rehabilitation of natural resources on military installations. To do so, the Department of Defense was required to work with Federal and State fish and wildlife agencies to prepare an integrated natural resources management plan (INRMP) for each facility with significant natural resources. The INRMPs provide a planning tool for future improvements; provide for sustainable multipurpose use of the resources, including activities such as hunting, fishing, trapping, and non-consumptive uses; and allow some public access to military installations. At MCAS Miramar and other military installations, INRMPs provide direction for project development and for the management, conservation, and rehabilitation of natural resources, including *Monardella viminea* and its habitat.

Approximately 70 percent of the remaining habitat for *Monardella viminea* occurs within MCAS Miramar. The Marine Corps completed an INRMP (2011–2015) with input from the Service (Gene Stout and Associates *et al.* 2011, p. ES–2). This new INRMP, which replaces the 2006–2010 version, continues to benefit the species by spatially and temporally protecting known populations on MCAS Miramar, most of which are not fragmented. Over 99 percent of all *M. viminea* occurrences on the base occur in Level I or II management areas, where conservation of listed species, including *M. viminea,* is a priority (Gene Stout and Associates *et al.* 2011, pp. 5–2, Table 5–1). It should also be noted that Table 5–1 states that only 85 percent of areas identified as essential habitat in the 2006 critical habitat rule for *M. viminea* (71 FR 65662, November 8, 2006) fall within Level I and Level II management areas; however, this may be due to mapping techniques used by the Service in that rule. We acknowledge that MCAS Miramar does protect virtually all known occurrences in Level I or II management areas and that our mapping techniques occur on a broad scale. Further, we believe our revised critical habitat boundaries described in this rule better represent habitat essential to *M. viminea* (see *Criteria Used to Identify Critical Habitat* below).

MCAS Miramar manages invasive species, a significant threat to *Monardella viminea,* in compliance with Executive Order 13112, which states that Federal agencies must provide for the control of invasive species (Gene Stout and Associates *et al.* 2011, p. 7–3). Invasive species management is a must-fund project to be carried out annually, following guidelines established in the National Invasive Species Management Plan (Gene Stout and Associates *et al.* 2011, p. 7–8). This plan mandates control measures for invasive species through a combination of measures, including pesticides and mechanical removal (National Invasive Species Council 2001, p. 37), thus providing a benefit by addressing type conversion that results following fires (see Factor A above). It also provides wildland fire management, including creation of fuelbreaks, a prescribed burning plan, and research on the effects of wildfire on local habitat types (Gene Stout and Associates 2011, pp. 7–9–7–10). As a result, MCAS Miramar is addressing threats related to the potential stress of fire on individual plants (see Factor E discussion, below). Despite the benefits to *M. viminea* provided through the INRMP, the species continues to decline on MCAS Miramar, likely due to the synergistic effects of flood, reduced shrub numbers, and exotic species encroachment (type conversion) following the 2003 Cedar Fire (Tierra Data 2011, p. 26).

Clean Water Act (CWA)

Under section 404 of the CWA (33 U.S.C. 1251 *et seq.*), the U.S. Army Corps of Engineers (Corps) regulates the discharge of fill material into waters of the United States, which include navigable and isolated waters, headwaters, and adjacent wetlands (33 U.S.C. 1344). In general, the term ''wetlands'' refers to areas meeting the Corps' criteria of hydric soils, hydrology (either sufficient annual flooding or water on the soil surface), and hydrophytic vegetation (plants specifically adapted to growing in wetlands). *Monardella viminea* occurs exclusively in ephemeral streambeds, which episodically experience seasonal flows that typically create the conditions that meet the Corps' criteria for wetlands.

Any human activity resulting in discharge of dredged or fill material into waters of the United States, including wetlands, requires a permit from the Corps. These include individual permits that are issued following a review of an individual application and general permits that authorize a category or categories of activities in a specific geographical location or nationwide (33 CFR parts 320–330). As *Monardella viminea* requires a natural hydrological regime to grow and persist, the regulation of discharge could prevent those flows from being interrupted or altered, thus providing a benefit to the species and its habitat.

State and Local Regulations

California's Native Plant Protection Act (NPPA) and Endangered Species Act (CESA)

Under provisions of the California Native Plant Protection Act (NPPA) (California Fish and Game (CFG) Code, division 2, chapter 10, section 1900 *et seq.*) and CESA (CFG code, division 3, chapter 1.5, section 2050 *et seq.*), the CDFG Commission listed *Monardella linoides* ssp. *viminea* as endangered in 1979. Currently, the State of California recognizes the State-listed entity as *M. viminea.*

Both CESA and NPPA include prohibitions forbidding the ''take'' of State endangered and threatened species (CFG code, chapter 10, section 1908 and chapter 1.5, section 2080). Under NPPA, landowners are exempt from this prohibition for take of plants in the process of habitat modification. When landowners are notified by the State that a rare or endangered plant is growing on their land, the landowners are required to notify CDFG 10 days in advance of changing land use in order to allow salvage of listed plants. Sections 2081(b) and (c) of CESA allow CDFG to issue incidental take permits (ITPs) for State-listed threatened species if:

(1) The authorized take is incidental to an otherwise lawful activity;

(2) The impacts of the authorized take are minimized and fully mitigated;

(3) The measures required to minimize and fully mitigate the impacts of the authorized take are roughly proportional in extent to the impact of the taking of the species, maintain the applicant's objectives to the greatest extent possible, and are capable of successful implementation;

(4) Adequate funding is provided to implement the required minimization and mitigation measures and to monitor compliance with and the effectiveness of the measures; and

(5) Issuance of the permit will not jeopardize the continued existence of a State-listed species.

The relationship between NPPA and CESA has not been clearly defined under State law. NPPA, which has been characterized as an exception to the take prohibitions of CESA, exempts a number of activities from regulation, including clearing land for agricultural practices or fire control measures; removing endangered or rare plants when done in association with an approved timber harvesting plan, or mining work performed pursuant to Federal or State mining laws or by a public utility providing service to the public; or changing land use in a manner that could result in take, provided the landowner notifies CDFG at least 10 days in advance of the change. These exemptions indicate that CESA and NPPA may be inadequate to protect *Monardella viminea* and its habitat, including from activities such as development or urbanization, altered hydrology, or fuel modification.

California Environmental Quality Act (CEQA)

CEQA (Public Resources Code 21000–21177) and the CEQA Guidelines (California Code of Regulations, title 14, division 6, chapter 3, sections 15000–15387) require State and local agencies to identify the significant environmental impacts of their actions and to avoid or mitigate those impacts, if feasible. CEQA applies to projects proposed to be undertaken or requiring approval by State and local government agencies. The lead agency must complete the environmental review process required by CEQA, including conducting an initial study to identify the environmental impacts of the project and determine whether the identified impacts are significant. If significant impacts are determined, then an environmental impact report must be prepared to provide State and local agencies and the general public with detailed information about the potentially significant environmental effects (California Environmental Resources Evaluation System 2010). ''Thresholds of Significance'' are comprehensive criteria used to define environmentally significant impacts based on quantitative and qualitative standards, and include impacts to biological resources such as candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by CDFG or the Service; or any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations, or by CDFG or the Service (CEQA Handbook, Appendix G, 2010). Defining these significance thresholds helps ensure a ''rational basis for significance determinations'' and provides support for the final determination and appropriate revisions or mitigation actions to a project in order to develop a mitigated negative declaration rather than an environmental impact report (Governor's Office of Planning and Research 1994, p. 5). Under CEQA, projects may move forward if there is a statement of overriding consideration. If significant effects are identified, the lead agency has the option of requiring mitigation through changes in the project or deciding that overriding considerations make mitigation infeasible (CEQA section 21002). Protection of listed species through CEQA is, therefore, dependent upon the discretion of the lead agency involved.

California's Natural Community Conservation Planning (NCCP) Act

The NCCP program is a cooperative effort between the State of California and numerous private and public partners with the goal of protecting habitats and species. An NCCP document identifies and provides for the regional or areawide protection of plants, animals, and their habitats, while allowing compatible and appropriate economic activity. The program began in 1991, under the State's NCCP Act (CFG Code 2800–2835). The primary objective of the NCCP program is to conserve natural communities at the ecosystem scale while accommodating compatible land uses (*http://www.dfg.ca.gov/habcon/nccp/*). Regional NCCPs provide protection to federally listed species, and often unlisted species, by conserving native habitats upon which the species depend. Many NCCPs are developed in conjunction with HCPs prepared pursuant to the Act. The City and County of San Diego Subarea Plans under the MSCP are discussed below.

City of San Diego and County of San Diego Subarea Plans Under the Multiple Species Conservation Plan (MSCP)

The MSCP is a regional HCP and NCCP that has been in place for over 14 years. Under the umbrella of the MSCP, each of the 12 participating jurisdictions, including the City of San Diego and the County of San Diego, is required to prepare a subarea plan that implements the goals of the MSCP within that particular jurisdiction. The MSCP covers 582,243 ac (235,625 ha) within the county of San Diego. Habitat conservation plans and multiple species conservation plans approved under section 10 of the Act are intended to protect covered species by avoidance, minimization, and mitigation of impacts.

The MSCP Subarea Plan for the City of San Diego includes *Monardella viminea* (referred to as *M. linoides* ssp. *viminea*) as a covered species. Furthermore, the most recent revision of the rare plant monitoring review lists *M. viminea* as a recognized narrow endemic (McEachern *et al.* 2007, p. 33). The changes mentioned in that report have been adopted into the City of San Diego's monitoring plan. The City of San Diego Subarea Plan affords additional protections to narrow endemic species beyond those provided generally for all covered species (City of San Diego 1997, p. 100). Impacts to

narrow endemic species within the plan's Multi-Habitat Planning Area (MHPA) are avoided, while outside the MHPA, impacts to narrow endemic species are addressed through avoidance, management, enhancement, or transplantation to areas identified for preservation (City of San Diego 1997, p. 100). The MHPA was developed by the City of San Diego in cooperation with partners to target core biological resource areas for conservation (City of San Diego 1997, p. 1). Currently, all *M. viminea* occurrences within the City of San Diego, with the exception of one transplanted occurrence, are within the boundaries of the MHPA. However, as of January 2011, less than 20 percent of all *M. viminea* occurrences were in the City of San Diego MSCP plan area (Service 2008, p. 10).

The majority of the other extant occurrences of *Monardella viminea* are on lands owned by MCAS Miramar, with small numbers of clumps occurring on private and county-owned lands. Occurrences in Lopez and Sycamore Canyons have been protected in MSCP reserves and are annually monitored (City of San Diego 2010a, p. 1). However, the management plan for the City of San Diego MSCP Subarea Plan has not been finalized; thus, long-term management and monitoring provisions for *M. viminea* are not in place for all areas where the species occurs. A draft plan was previously created for West Sycamore Canyon, and a draft plan for Spring Canyon is currently in development. The plan for West Sycamore Canyon was not finalized because construction and subsequent impacts did not take place. Should construction go forward, which is not anticipated at this time, the same restrictions would still apply and assist in reducing any impacts posed by construction activities. Additionally, a Natural Resource Management Plan has been finalized for Los Peñasquitos Canyon Preserve (EO 1) (City of San Diego 1998). However, even though this plan and the monitoring reports frequently identify management needs for *M. viminea,* the actions are not carried out on a regular basis to decrease threats to the plants such as nonnative vegetation encroachment and altered hydrology.

Within the City of San Diego MSCP Subarea Plan, further protections are afforded by the Environmentally Sensitive Lands (ESL) ordinance. The ESL provides protection for sensitive biological resources (including *Monardella viminea* and its habitat) by ensuring that development occurs, ''in a manner that protects the overall quality of the resources and the natural and topographic character of the area, encourages a sensitive form of development, retains biodiversity and interconnected habitats, maximizes physical and visual public access to and along the shoreline, and reduces hazards due to flooding in specific areas while minimizing the need for construction of flood control facilities,'' thus providing protection against alteration of hydrology, a significant threat to *M. viminea.* The ESL was designed as an implementing tool for the City of San Diego Subarea Plan (City of San Diego 1997, p. 98).

A monitoring plan was developed for the city-owned land within West Sycamore Canyon. This land, a total of 21 ac (9 ha), was included in the Sycamore Estates development project. This plan included monitoring of *Monardella viminea* occurrences within West Sycamore Canyon and provisions to prevent altered hydrology to areas containing *M. viminea* through construction of silt fences to prevent erosion and subsequent alteration of channel structure (T&B Planning Consultants 2001, pp. 136, 166). However, Sycamore Estates was never completed (see Factor A), and no monitoring has taken place yet in West Sycamore Canyon. Therefore, the plan addressing construction on Sycamore Estates is not currently protecting *M. viminea.*

The County of San Diego MSCP Subarea Plan covers 252,132 ac (102,035 ha) of unincorporated county lands in the southwestern portion of the MSCP plan area. Only 2 percent of *Monardella viminea* habitat occurs on lands within the boundaries of the County of San Diego Subarea Plan. The entirety of this habitat is included within the Sycamore Canyon Preserve established under the County of San Diego MSCP Subarea Plan. In 2009, a management plan was published for the preserve, with monitoring anticipated to begin in 2013 (County of San Diego 2011b, pp. 4–5). The plan specifically addresses *M. viminea* through removal of nonnative vegetation, habitat restoration, and implementation of a managed fire regime with a priority of protecting biological resources (DPR 2009, pp. 71, 76–77). Additionally, the plan mandates management to address the ''natural history of the species and to reduce the risk of catastrophic fire,'' possibly including prescribed fire (DPR 2009, p. 71). These measures address the stressor of fire on individual plants (Factor E) and the threat of type conversion due to frequent fire (Factor A).

Summary of Factor D

In determining whether *Monardella viminea* should be retained as a listed species under the Act, we analyzed the adequacy of existing regulatory mechanisms without regard to current protections afforded under the Act. The majority (greater than 70 percent) of *M. viminea* occurrences are on MCAS Miramar. The base has developed and is implementing an INRMP under the Sikes Act that provides a benefit to *M. viminea* by protecting these occurrences (see discussion under Factor E), and addressing threats from type conversion due to increased fire frequency from historical conditions (see discussion under Factor A). However, notwithstanding the benefit to *M. viminea* provided by the INRMP, the synergistic effects of flood, reduced shrub numbers, increased fire frequency, and nonnative species encroachment are resulting in a decline of *M. viminea* on the base (see discussion under Factor E). While the INRMP does not eliminate threats to the species from megafire, we do not believe that megafire can be eliminated through regulatory mechanisms.

The majority of *Monardella viminea* occurrences outside of MCAS Miramar are located on land owned by the City of San Diego and receive protection under the City of San Diego Subarea Plan under the MSCP, which was approved under CESA and the NCCP Act. The City of San Diego Subarea Plan provides protective mechanisms for *M. viminea* for proposed projects; these protective mechanisms are intended to address potential impacts that could threaten the species, such as development or actions that could result in altered hydrology. The City of San Diego Subarea Plan also includes provisions for monitoring and management through development of location-specific management plans for preserve land. However, the City of San Diego Subarea Plan has not developed final monitoring and management plans for *Monardella viminea.* As a result, even though occurrences of *M. viminea* are monitored on a yearly basis and management needs for *M. viminea* habitat are identified, conservation measures to ameliorate immediate and significant threats from nonnative species and alteration of hydrology are not actively being implemented because the management plans are not yet in place. With regard to lands covered by the County of San Diego Subarea Plan (2 percent of the species' habitat), regulatory mechanisms are in place to conserve and manage *M. viminea.*

Despite the protections afforded to *Monardella viminea* under the Sikes Act through the INRMP for MCAS Miramar and the protections afforded by the City and County of San Diego Subarea plans under the MSCP, we conclude that existing regulatory mechanisms at this time are inadequate to alleviate the threats to this species in the absence of the protections afforded by the Act.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Trampling

Trampling was identified as a threat to *Monardella linoides* ssp. *viminea* in the listing rule (63 FR 54938, October 13, 1998). Trampling of *M. viminea* occurs via human travel through the species' habitat. Monitors have noted impacts to *M. viminea* in Spring Canyon from hikers and off-road vehicles (Friends of Los Peñasquitos Canyon Preserve, Inc. 2011, p. 4), and from mountain bike trails (AMEC 2011, p. 2–5). However, these reports are only from Spring Canyon, and there is no evidence that this threat is impacting the species on a population level. Therefore, we do not consider trampling to be a significant threat across the range of the species now or into the future.

Nonnative Plant Species

The listing rule identifies nonnative plants as a threat to *Monardella linoides* ssp. *viminea* (63 FR 54938, October 13, 1998). This threat is ongoing for the occurrences now considered to be *M. viminea.* San Diego County habitats have been altered by invasion of nonnative species (Soule *et al.* 1992, p. 43). Nonnative grasses, which frequently out-compete native species for limited resources and grow more quickly, can smother seedling and mature *M. viminea* and prevent natural growth (Rebman and Dossey 2006, p. 12). Nonnative plants also have the potential to lower water tables and alter rates of sedimentation and erosion by altering soil chemistry, nutrient levels, and the physical structure of soil. As such, they can often out-compete native species such as *M. viminea* (Kassebaum 2007, pers. comm.). Nonnative plants also alter the frequency, size, and intensity of fires, including flame duration and length, soil temperature during a fire, and after-effects of long-term porosity and soil glassification (high heat causes silica particles in the soil to fuse together to form an impermeable barrier) (Vitousek *et al.* 1997, pp. 8–9; Arno and Fiedler 2005, p. 19).

When natural disturbance processes, such as fire regime and storm flow events, are altered, native and nonnative plants can overcrowd otherwise suitable habitat for *Monardella viminea* (Kassebaum 2007, pers. comm.). At least four occurrences of *M. viminea* are believed to have been extirpated since listing, due in part to invasion by native and nonnative plant species (CNDDB 2011a; EOs 11, 12, 13, and 15). Nonnative plants are present throughout all canyons on MCAS Miramar where *M. viminea* occurs, occupying areas that could instead be colonized by *M. viminea* seedlings (Tierra Data 2011, p. 29). Areas heavily invaded by nonnative grasses have fewer adult *M. viminea* plants than areas free from invasion, and areas that support adult plants have been reduced in size after the encroachment of nonnative species (Tierra Data 2011, p. 29). Additionally, an area where one occurrence monitored by the City of San Diego is located has undergone a rapid increase in nonnative plant cover from 26 percent in 2008, to 71 percent in 2010 (City of San Diego 2008, p. 1; City of San Diego 2010a, p. 11).

A recent study found that seedling establishment was highest in areas where nonnative vegetation was reduced through management, demonstrating that increased nonnative ground cover can prevent the establishment of *Monardella viminea* seedlings (AMEC 2011, p. ES–1).

Due to the absence or alteration of natural disturbance processes within the range of *Monardella viminea* resulting in competition for space and nutrients, increased fire intensity, and extirpation of *M. viminea* occurrences since listing, we consider nonnative plant species to be a significant factor threatening the continued existence of the species, both now and in the future.

Small Population Size and Restricted Range

The listing rule identifies the restricted range and small population size of *Monardella linoides* ssp. *viminea* as threats (63 FR 54938, October 13, 1998). These conditions increase the possibility of extinction due to stochastic (random) events that are beyond the natural variability of the ecosystem, such as floods, fires, or drought (Lande 1993, p. 912; 60 FR 40549, August 9, 1995). Chance or stochastic events have occurred in the range of *M. viminea,* and may continue to make *M. viminea* vulnerable to extinction due to its small numbers and limited range. Of the 20 occurrences of *M. viminea* known at the time of listing, 5 had fewer than 100 individuals. None of those smallest populations were protected at the time of listing, and all have since been extirpated due to competition with nonnative grasses, construction, or unknown reasons (CNDDB 2011a). As stated earlier, only eight occurrences remain. Currently, despite their protection on reserve lands, many of the largest occurrences with multiple clumps and the healthiest-looking leaves and flowers continue to decline in number.

In particular, small population size makes it difficult for *Monardella viminea* to persist while sustaining the impacts of fire, altered hydrological regimes, and competition with nonnative plants. Prior to the 2008 5-year review, monitoring of the MCAS Miramar occurrences indicated that the population had declined significantly for unknown reasons that could not be clearly linked to the cumulative impacts of fire, herbivory, or hydrological regimes (Rebman and Dossey 2006, p. 14). Since the 2006 surveys by Rebman and Dossey at MCAS Miramar, plants damaged in the 2003 Cedar Fire have resprouted from the root. Despite the fact that plants have resprouted, biological monitors at MCAS Miramar report that the decline continues and the cause is unknown, with 45 percent of the population on MCAS Miramar lost since 2002 (Kassebaum 2010, pers. comm.; Tierra Data 2011, p. 12), although some of this decline may be attributed to changes in survey methods (Tierra Data 2011, pp. 20, 22). No empirical information is readily available to estimate the rate of population decrease or time to extinction for *M. viminea;* however, both its habitat and population have decreased in size since the time of listing. Therefore, based on the best available scientific information, we consider that small population size and the declining trend of *M. viminea* exacerbate the threats attributable to other factors.

Fire

Although the habitat occupied by *Monardella viminea* is dependent upon some form of disturbance (such as periodic fire and scouring floods) to reset succession processes, we considered whether megafire events have the potential to severely impact or eliminate populations by killing large numbers of individual plants, their underground rhizomes (stems), and the soil seed bank. Also, severe fire could leave the soil under hydrophobic (water repellent) conditions, resulting in plants receiving an inadequate amount of water (Agee 1996, pp. 157–158; Keeley 2001, p. 87; Keane *et al.* 2002, p. 8; Arno and Fiedler 2005, p. 19).

Recently, San Diego County has been impacted by multiple large fire events, a trend that is expected to continue due to climate change. A model by Snyder *et al.* (2002, p. 9–3) predicts higher average temperatures for every month in every part of California, which would create drier, more combustible fuel types. Also, Miller and Schlegel (2006, p. 6) suggest that Santa Ana conditions (characterized by hot dry winds and low humidity) may significantly increase during fire season under global climate change scenarios. Small escaped fires have the potential to turn into large fires due to wind, weather conditions of temperature and humidity, lack of low-intensity fires to reduce fuels, invasive vegetation, and inadequate wildfire control or prevention. For example, the October 2007 Harris Fire in San Diego County burned 20,000 ac (8,100 ha) within 4 hours of ignition (California Department of Forestry 2007, p. 57). Another fire near Orange, California, turned into a large fire in less than 12 hours, and an unattended campfire set off the June 2007 Angora Fire near Lake Tahoe in northern California, which spread 4 miles (6.4 kilometers) in its first 3 hours, burned over 3,000 ac (1,200 ha) (USDA 2007, p. 1).

A narrow endemic (a species that occurs only in a very limited geographic region), such as *Monardella viminea,* could be especially sensitive to megafire events. One large fire could impact all or a large proportion of the entire area where the species is found, as occurred in the 2003 Cedar Fire, where 98 percent of *M. viminea* occurrences on MCAS Miramar and portions of the privately owned occurrences of Sycamore Canyon burned. However, despite the overlap of the Cedar Fire with *M. viminea* occurrences on MCAS Miramar, the decline of the burned occurrences was not as severe as initially expected, as plants were later able to resprout from the root. Additionally, new juveniles and seedlings occurred primarily on lands burned by the 2003 Cedar Fire (Tierra Data 2011, p. 16).

Given the increased frequency of megafire within southern California ecosystems, and the inability of regulatory mechanisms to prevent or control these fires, we find that megafire has the potential to impact occurrences of *Monardella viminea.* However, given *M. viminea's* persistence through past fires and its ability to recover from direct impact by fire, we do not find that megafire is a significant threat to individual *M. viminea* plants now, nor is it likely to become a significant threat in the future. However, as noted in the Factor A discussion above, we do find that type conversion due to altered fire regime and megafire is a threat to the habitat that supports *M. viminea.*

Climate Change

Consideration of climate change is a component of our analyses under the Act. In general terms, ''climate'' refers to the mean and variability of various weather conditions such as temperature or precipitation, over a long period of time (e.g., decades, centuries, or thousands of years). The term ''climate change'' thus refers to a change in the state of the climate (whether due to natural variability, human activity, or both) that can be identified by changes in the mean or variability of its properties and that persists for an extended period—typically decades or longer (Intergovernmental Panel on Climate Change (IPCC) 2007a, p. 78).

Changes in climate are occurring. The global mean surface air temperature is the most widely used measure of climate change, and based on extensive analyses, the IPCC concluded that warming of the global climate system over the past several decades is ''unequivocal'' (IPCC 2007a, p. 2). Other examples of climate change include substantial increases in precipitation in some regions of the world and decreases in other regions (for these and other examples, see IPCC 2007a, p. 30; Solomon *et al.* 2007, pp. 35–54, 82–85). Various environmental changes are occurring in association with changes in climate (for global and regional examples, see IPCC 2007a, pp. 2–4, 30–33; for U.S. examples, see Global Climate Change Impacts in the United States by Karl *et al.* 2009, pp. 27, 79–88).

Most of the observed increase in global average temperature since the mid-20th century cannot be explained by natural variability in climate, and is very likely due to the observed increase in greenhouse gas concentrations in the atmosphere as a result of human activities, particularly emissions of carbon dioxide from fossil fuel use (IPCC 2007a, p. 5 and Figure SPM.3; Solomon *et al.* 2007, pp. 21–35). Therefore, to project future changes in temperature and other climate conditions, scientists use a variety of climate models (which include consideration of natural processes and variability) in conjunction with various scenarios of potential levels and timing of greenhouse gas emissions (e.g., Meehl *et al.* 2007 entire; Ganguly *et al.* 2009, pp. 11555, 15558; Prinn *et al.* 2011, pp. 527, 529).

The projected magnitude of average global warming for this century is very similar under all combinations of models and emissions scenarios until about 2030. Thereafter, the projections show greater divergence across scenarios. Despite these differences in projected magnitude, however, the overall trajectory is one of increased warming throughout this century under all scenarios, including those which assume a reduction of greenhouse gas emissions (Meehl *et al.* 2007, pp. 760–764; Ganguly *et al.* 2009, pp. 15555–15558; Prinn *et al.* 2011, pp. 527, 529). Some of the IPCC's other key global climate projections, which they expressed using a framework for treatment of uncertainties (e.g., ''very likely'' is >90 percent probability; see Solomon *et al.* 2007, pp. 22–23) include the following: (1) It is virtually certain there will be warmer and more frequent hot days and nights over most of the earth's land areas; (2) it is very likely there will be increased frequency of warm spells and heat waves over most land areas; (3) it is very likely that the frequency of heavy precipitation events, or the proportion of total rainfall from heavy falls, will increase over most areas; (4) it is likely the area affected by droughts will increase, that intense tropical cyclone activity will increase, and that there will be increased incidence of extreme high sea level (IPCC 2007b, p. 8, Table SPM.2).

Various types of changes in climate can have direct or indirect effects on species, and these may be positive or negative depending on the species and other relevant considerations, including interacting effects with habitat fragmentation or other non-climate variables (e.g., Franco *et al.* 2006; Forister *et al.* 2010; Galbraith *et al.* 2010; Chen *et al.* 2011). Scientists are projecting possible impacts and responses of ecological systems, habitat conditions, groups of species, and individual species related to changes in climate (e.g., Deutsch *et al.* 2008; Berg *et al.* 2009; Euskirchen *et al.* 2009; McKechnie and Wolf 2009; Williams *et al.,* 2009; Sinervo *et al.* 2010; Beaumont *et al.* 2011). These and many other studies generally entail consideration of information regarding the following three main components of vulnerability to climate change: Exposure to changes in climate, sensitivity to such changes, and adaptive capacity (IPCC 2007a, p. 89; Glick *et al.* 2011, pp. 19–22). Because aspects of these components can vary by species and situation, as can interactions among climate and non-climate conditions, there is no single way to conduct our analyses. We use the best scientific and commercial data available to identify potential impacts and responses by species that may arise

in association with different components of climate change, including interactions with non-climate conditions as appropriate.

Projected changes in climate and related impacts can vary substantially across and within different regions of the world (e.g., IPCC 2007a, pp. 8–12). Thus, although global climate projections are informative and in some cases are the only or the best scientific information available, to the extent possible we use ''downscaled'' climate projections that provide higher-resolution information that is more relevant to the spatial scales used to assess impacts to a given species (see Glick *et al.* 2011, pp. 58–61 for a discussion of downscaling). With regard to the area of analysis for *Monardella viminea,* downscaled projections are not available, but many scientists believe warmer, wetter winters and warmer, drier summers will occur within the next century (Field *et al.* 1999, pp. 2–3, 20). The impacts on species like *M. viminea,* which depend on specific hydrological regimes, may be more severe (Graham 1997, p. 2).

Since approximately the time of listing in 1998, an extended drought in the region (San Diego County Water Authority (SDCWA) 2011, p. 2) has created unusually dry habitat conditions. From 2001 to 2010, at one of the closer precipitation gauges to the species' range (Lindberg Field, San Diego County, California), 7 of 10 years had precipitation significantly below normal (SDCWA 2011, p. 2). This extended drought has cumulatively affected moisture regimes, riparian habitat, and vegetative conditions in and around suitable habitat for *Monardella viminea,* and thus increased the stress on individual plants. As stated above, predictions indicate that future climate change may lead to similar, if not more severe, drought conditions.

The predicted future drought could impact the dynamic of the streambeds where *Monardella viminea* grows. Soil moisture and transportation of sediments by downstream flow have been identified as key habitat features required by *M. viminea.* The species is characterized as being associated with areas of standing water after rainfall (Elvin and Sanders 2003, p. 426). Monitors for the City of San Diego have observed decreased plant health and increased dormancy of *Monardella* species in years with low rainfall (City of San Diego 2003, p. 3; City of San Diego 2004, p. 3). Specific analyses of population trends as correlated to rainfall are difficult due to inconsistent plant count methods (City of San Diego 2004, p. 67).

Additionally, drier conditions may result in increased fire frequency. As discussed under Factors A and E, this could make the ecosystems in which *Monardella viminea* currently grows more vulnerable to the threats of subsequent erosion and invasive species. In a changing climate, conditions could change in a way that would allow both native and nonnative plants to invade the habitat where *M. viminea* currently occurs (Graham 1997, p. 10).

While we recognize that climate change and increased drought associated with climate change are important issues with potential effects to listed species and their habitats, the best available scientific information does not currently give evidence specific enough for us to formulate accurate predictions regarding climate change's effects on particular species, including *Monardella viminea.* Therefore, we do not consider global climate change a threat to *M. viminea,* now or in the future.

Summary of Factor E

Based on a review of the best available scientific and commercial data regarding trampling, nonnative plant species, megafire, climate change, and small population size and restricted range, we find that nonnative plant species pose a significant threat to *Monardella viminea.* Additionally, the small population size and restricted range of *M. viminea* could exacerbate threats to the species. We find no evidence that trampling or other natural or manmade factors pose a significant threat to *M. viminea,* either now or into the future. We conclude, based on the best available scientific information, that *M. viminea* could be affected by fire impacts associated with the death of individual plants; however, we do not consider this a significant threat to the continued existence of the species. Finally, with regard to the direct and indirect effects of climate change on individual *M. viminea* plants and its habitat, we have no information at this point to demonstrate that predicted climate change poses a significant threat to the species either now or in the future.

Cumulative Impacts

Several of the threats discussed in this finding have the potential to work in concert with each other. For example, as discussed under Factor A, increased fire frequency in habitats supporting *Monardella viminea* can lead to an increased density of nonnative vegetation. Furthermore, nonnative density can become more severe if natural flows within a hydrological system decrease to the point where they no longer scour nonnative grasses from secondary benches and sandbanks. We find that the synergistic effects of these threats combined with reduced shrub numbers have resulted in a population decline across the range of *Monardella viminea* and the continued population decline on MCAS Miramar. Therefore, the cumulative impacts of these threats may be even greater than the sum of their individual impacts and are a likely factor in the decline of this species.

Determination

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to *Monardella viminea.* In our analysis, we find that threats attributable to Factor A (The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range) pose significant threats to the species, particularly through severe alteration of hydrology in Carroll Canyon, Lopez Canyon, and western portions of San Clemente Canyon. Type conversion and habitat degradation due to frequent fire represent significant and immediate threats to the species across its range. Finally, we find that threats attributable to Factor E (Other Natural or Manmade Factors Affecting Its Continued Existence) represent significant threats to the species throughout its range, particularly impacts from nonnative plant species invading canyons where *M. viminea* exists. Additionally, the small population size of *M. viminea* could exacerbate the threats to the species. Finally, despite protections afforded to *M. viminea* by the City and County of San Diego Subarea Plans under the MSCP and the INRMP at MCAS Miramar, we find that other existing regulatory mechanisms as described under Factor D (The Inadequacy of Existing Regulatory Mechanisms) would not provide protections adequate to alleviate threats to *M. viminea* in the absence of the Act. We find no threats attributable to Factor B (Overutilization for Commercial, Recreational, Scientific, or Educational Purposes), or Factor C (Disease or Predation) impacting the species.

All threats impacting the species could be exacerbated by the ongoing decline of the species and the small size of the few occurrences that remain. Since the recent taxonomic revision of *Monardella linoides* ssp. v*iminea* into two separate species, we now know that both the number of clumps and the

limited geographic range of *M. viminea* are substantially smaller than originally thought, as two occurrences known at the time of listing are now considered to be *M. stoneana.* Natural occurrences of *M. viminea* now occur in only six watersheds in a very limited area of San Diego County.

The Act defines an endangered species as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species as any species ''that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future.'' Given the immediacy and magnitude of continuing significant threats, the rapid population decline (particularly the decline of approximately 45 percent of the population on MCAS Miramar since 2002), and the species' limited range and small population size, we find that *Monardella viminea* continues to be in danger of extinction throughout its range. Therefore, *M. viminea* will continue to be listed as an endangered species under the Act.

Significant Portion of Range

The Act defines ''endangered species'' as any species which is ''in danger of extinction throughout all or a significant portion of its range,'' and ''threatened species'' as any species which is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The definition of ''species'' is also relevant to this discussion. The Act defines the term ''species'' as follows: ''The term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment [DPS] of any species of vertebrate fish or wildlife which interbreeds when mature.'' The phrase ''significant portion of its range'' (SPR) is not defined by the statute, and we have never addressed in our regulations: (1) The consequences of a determination that a species is either endangered or likely to become so throughout a significant portion of its range, but not throughout all of its range; or (2) what qualifies a portion of a range as ''significant.'' In this rule, we list *Monardella viminea* throughout its entire range; therefore, a discussion of significant portion of its range is unnecessary.

Summary of Factors Affecting *Monardella stoneana*

As stated above in the Summary of Factors Affecting Monardella viminea section, the original listing rule for *M. linoides* ssp. *viminea* contained a discussion of these five factors, as did the 2008 5-year review. However, both of these documents included discussions regarding *M. linoides* ssp. *viminea,* without separation or recognition of *M. stoneana* or *M. viminea.* Below, each of the five listing factors is discussed for *M. stoneana* specifically.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Urbanization/Development

The original listing rule identified urban development as one of the most important threats to *Monardella linoides* ssp. *viminea* (63 FR 54938, October 13, 1998). However, the urbanization and development threats described in the 1998 listing rule apply only to those occurrences now attributable to *M. viminea.*

Within the United States, *Monardella stoneana* occurs almost entirely on publicly owned land managed by the Bureau of Land Management (BLM) (approximately 34 percent), CDFG (approximately 55 percent), and the City of San Diego (approximately 7 percent). The last 4 percent (6 acres (2 hectares)) of habitat supporting *M. stoneana* is privately owned land within the boundaries of the County of San Diego's MSCP subarea plan and is slated for inclusion in the Otay Ranch Preserve. These occurrences are collectively protected from habitat destruction or modification due to urban development because they are conserved and managed within the BLM's Otay Mountain Wilderness and the City of San Diego's or CDFG's preserves under the MSCP, or they will be conserved as part of the Otay Ranch Preserve under the County of San Diego's MSCP subarea plan. This situation contrasts with *M. viminea* occurrences conserved by the City of San Diego that do not have management plans (see also Factor D discussion for *M. stoneana* below and Factor D discussion for *M. viminea* above). We have no information about the distribution, land ownership, or status of *M. stoneana* populations in Mexico.

Based on the lack of threats from development on land currently occupied by *M. stoneana,* we do not believe that urban development is a threat to this species now or in the future, within the United States. While we are not aware of any proposed development in areas occupied by *M. stoneana* in Mexico, we are also not aware of the extent of the species' distribution there.

Sand and Gravel Mining

Sand and gravel mining activities were identified as threats to *Monardella linoides* ssp. *viminea* in the 1998 listing rule and the recent 5-year review (63 FR 54938, October 13, 1998; Service 2008). As was the case for urban development, the threats described in the 1998 listing rule apply only to those occurrences now attributable to *M. viminea.* We are not aware of any historical mining that has impacted occurrences of *M. stoneana,* nor are we aware of any plans for future mining activities that may impact the species. Therefore, we believe that sand and gravel mining activities do not pose a threat to the continued persistence of *M. stoneana.*

Altered Hydrology

The original listing rule identified altered hydrology as a threat to *Monardella linoides* ssp. *viminea* (63 FR 54938, October 13, 1998). *Monardella viminea* depends on a natural hydrological regime to maintain the secondary alluvial benches and streambeds on which it grows (Scheid 1985, pp. 30–31, 34–35); we believe the closely related *M. stoneana* does as well. Upstream development can disrupt this regime by increasing storm runoff, which can result in erosion of the stream banks and rocky cobble upon which *M. stoneana* grows. Floods also have the potential to wash away plants as large as and much larger than *M. stoneana,* as has occurred with *M. viminea* in Lopez Canyon (Kelly and Burrascano 2001, pp. 2–3). On the other hand, decreased flows increase the possibility of invasion by nonnative species into the creek bed, which can smother seedling and mature plants and disrupt growth processes (Rebman and Dossey 2006, p. 12).

Habitat characteristics for *Monardella stoneana* have not been described in detail, but, as with *M. viminea,* alteration of hydrology may disrupt the natural processes and habitat characteristics that support *M. stoneana. Monardella stoneana* reportedly, ''most often grows among boulders, stones, and in cracks of the bedrock of these intermittent streams in rocky gorges'' (Elvin and Sanders 2003, p. 429), which suggests the habitat of *M. stoneana* may be largely resistant to erosion events. More importantly, given the lack of urban development in the Otay area where the majority of the plants occur, substantial alteration of hydrology has not occurred to date and is not expected to occur in the future, and thus is not a threat to *M. stoneana.*

Fire and Type Conversion

As discussed under Factor A for *Monardella viminea,* our understanding of the role of fire in fire-dependent habitat has changed since the time of listing, and the intensity of wildfire and frequency of megafire has increased compared to historical regimes. However, *M. stoneana* is associated with different habitat types than *M. viminea.* While *M. viminea* occurs in coastal sage scrub and riparian scrub, *M. stoneana* is found primarily in chaparral habitats.

Chaparral is more resilient to the effects of frequent fire than coastal sage scrub, due to strong recruitment and effective germination after repeated fire events (Keeley 1987, p. 439; Tyler 1995, p. 1009). According to Keane *et al.* (2008, p. 702), chaparral is considered a crown-fire ecosystem, meaning an ecosystem that has ''mechanisms for recovery that include resprouting from basal burrs and long-lived seed banks that are stimulated to germinate by fire.'' These ecosystems are also resilient to high-intensity burns (Keeley *et al.* 2008, p. 1545).

The fire regime in Baja California, Mexico, where some *Monardella stoneana* occurs, has not been altered by the fire suppression activities that have occurred in the United States. Some researchers claim that the chaparral habitat in Baja California is thus not affected by megafires that result from fire suppression activities (Minnich and Chou 1997, pp. 244–245; Minnich 2001, pp. 1549–1552). Nevertheless, Keeley and Zedler (2009, p. 86) believe that the fire regime in Baja California mirrors that of Southern California, similarly consisting of ''small fires punctuated at periodic intervals by large fire events.'' Therefore, we expect that impacts from fire in Baja California will be similar to those in San Diego County.

Despite the resiliency of chaparral ecosystems to fire events, chaparral, like coastal sage scrub, has been experiencing type conversion in many areas of southern California. As with coastal sage scrub, chaparral habitat is also being invaded by nonnative species (Keeley 2006, p. 379). Nonnative grasses sprout more quickly after a fire than chaparral species, and when fire occurs more frequently than the natural historic regime, nonnative grasses have a greater chance to become established and outcompete native vegetation (Keeley 2001, pp. 84–85).

Monitoring data from the MSCP Rare Plant Field Surveys by the City of San Diego indicate that type conversion is not taking place in chaparral habitats surrounding occurrences of *Monardella stoneana.* For the past decade, the City of San Diego has been monitoring the occurrences of *M. stoneana* on City lands, documenting their general habitats, and assessing disturbances and threats. In the City of San Diego 2006 report, the Otay Lakes occurrence of *M. stoneana* (one clump comprised of two individuals) was reported as having ''fair to good'' habitat, with monitors noting that threats occurred, such as encroachment of tamarisk (*Tamarisk* spp.) and other nonnative plants (10 percent cover), and paths created and used by illegal immigrants (City of San Diego 2006, p. 8). This occurrence was lost after the 2006 survey, as described in the *New Information on Occurrences* of Monardella viminea *and* Monardella stoneana section of this final rule. Although the 2008 and 2010 survey reports for the Otay Lakes site describe habitat disturbances such as type conversion due to increased fire frequency and invasive species (particularly nonnative grasses) (City of San Diego 2008, p. 2; City of San Diego 2010a, p. 5), the surveys also indicate that the percent cover of native species has increased from 2008 to 2010 (from 23 to 42 percent) and the percent cover of nonnative species has increased (from 30 to 44 percent) (City of San Diego 2008, p. 1; City of San Diego 2010a; p. 5). The most recent survey report (2010) described the habitat at this site as ''fair to good'' (City of San Diego 2010a, p. 254).

For the Marron Valley site, the MSCP Rare Plant Field Surveys conducted by the City of San Diego recorded 95 individuals of *Monardella linoides* ssp. *viminea* (now *M. stoneana*) in its 2006 survey report; survey results from 2008 to 2010 were unchanged (City of San Diego 2010b, p. 2). Habitat at the Marron Valley site was characterized as ''fair to good'' from 2008 through 2010 (City of San Diego 2008, p. 2; City of San Diego 2010a, p. 11), and improving to ''good to very good'' in 2011 (City of San Diego 2011a, p. 217). As with the Otay Lakes location, type conversion due to frequent fire (as described in Factor A) and invasion of nonnative grasses was described as a disturbance or stressor to the *M. stoneana* habitat (City of San Diego 2008, p. 2; City of San Diego 2009, p. 2). Nonetheless, recent surveys indicate that the ground cover by native species at the Marron Valley site (EO 1) has increased from 2008 to 2010 (from 26 to 32 percent), while the ground cover by nonnative species has also increased (from 15 to 22 percent) (City of San Diego 2008, p. 1; City of San Diego 2010a, p. 5). While no habitat assessment surveys are available for other *M. stoneana* occurrences on Otay Mountain or near Tecate Peak, we would expect the results to be similar to those from the Marron Valley and Otay Lakes occurrences, as they occur in the same or similar habitat types (San Diego Association of Government (SANDAG) 1995).

Zedler *et al.* (1983, p. 816) concluded that short-interval fires on Otay Mountain will lead to an increase in herbs and subshrubs, such as *Monardella stoneana,* given that the ''common pattern after chaparral fires, like that of 1979 [on Otay Mountain], is for native and introduced annual herbs to dominate for the 1st yr [sic] and then gradually decline as the cover of shrub and subshrubs inceases [sic].'' Additionally, monitoring data for *M. stoneana* have not recorded the same rapid increases in nonnative vegetation as have occurred in habitat where *M. viminea* grows (City of San Diego 2008, p. 1; City of San Diego 2009, p. 1). While several *M. viminea* occurrences have been extirpated due to invasion of nonnative vegetation (see Factor A discussion for *M. viminea* above), no occurrences of *M. stoneana* have been similarly affected.

Illegal immigration is another potential source of fire within *Monardella stoneana* habitat. However, the Otay Mountain area is predominantly wilderness area and preserve, and is unlikely to receive an increase in visitors. Furthermore, in 2007, construction of the fence along the U.S. and Mexico border and other enforcement activities in the Otay Mountain Wilderness area have reduced illegal immigrant activity in this area to near zero (Ford 2011, pers. comm.), thereby reducing the likelihood of fire ignition by this source. Therefore, fire ignition due to illegal immigrant activities is not a significant threat to *M. stoneana* now, nor is it likely to become so in the future.

Fire remains a stressor to *Monardella stoneana* habitat and many other sensitive habitats throughout southern California. On land owned and managed by the CDFG and BLM, which contain approximately 88 percent of all occurrences of *M. stoneana,* fire management is provided by CAL FIRE. CAL FIRE's mission is the protection of lives, property, and natural resources from fire, and the preservation of timberlands, wildlands, and urban forests. CAL FIRES's protection strategies incorporate concepts of the National Fire Plan, the California Fire Plan, individual CAL FIRE Unit Fire Plans, and Community Wildfire Protection Plans (CWPPs). Fire Protection Plans outline the fire

situation within each CAL FIRE Unit with descriptions of water supplies, fire safety, and vegetation management, while CWPPs make the same assessment on the community level (CAL FIRE 2011, p. 1; County of San Diego Fire Safe Council, 2011). Planning includes other State, Federal, and local government agencies as well as Fire Safe Councils (CAL FIRE 2011, p. 1). CAL FIRE typically takes the lead with regard to planning for megafire prevention, management, and suppression, and is in charge of incident command during a wildfire.

The San Diego County Fire Authority (SDCFA), local governments, and CAL FIRE cooperatively protect 1.42 million ac (0.6 million ha) of land with 54 fire stations throughout San Diego County (County of San Diego 2011a, p. 1). Wildfire management plans and associated actions can help to reduce the impacts of type conversion due to frequent fire on natural resources, including *Monardella stoneana.*

Therefore, based on the best available scientific and commercial information, type conversion due to more frequent fire does not pose a threat to *Monardella stoneana* or its associated plant communities now or in the future. The potential threat of frequent fire on *M. stoneana* is further alleviated by management actions undertaken by CAL FIRE. More intense fire, however, could pose a threat to individual clumps of *M. stoneana;* these impacts are discussed below under Factor E.

Summary of Factor A

We evaluated several factors that have the potential to destroy, modify, or curtail habitat or range of *Monardella stoneana,* including urban development, sand and gravel mining, altered hydrology, and type conversion due to frequent fire. Based on our review of the best available scientific and commercial information, we conclude that *M. stoneana* is not threatened by the present or threatened destruction, modification, or curtailment of its habitat or range, either now or in the future.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

To our knowledge, no commercial use exists for *Monardella stoneana.* The 1998 listing rule for *M. linoides* ssp. *viminea* suggested that professional and private botanical collecting could exacerbate the extirpation threat to the subspecies due to botanists favoring rare or declining species (63 FR 54938, October 13, 1998). However, we are not currently aware of any interest by botanists in collecting *M. stoneana.* Therefore, we do not believe that overutilization for commercial, recreational, scientific, or educational purposes constitutes a threat to this species, either now or in the future.

C. Disease or Predation

Neither disease nor predation was known to be a threat affecting *Monardella linoides* ssp. *viminea* at the time of listing (63 FR 54938, October 13, 1998). Data from the CNDDB (CNDDB 2011b) list herbivory as a potential threat to the *M. stoneana* occurrence located on the Otay Ranch Preserve (EO 4). However, we have no other information quantifying the extent of this herbivory or its impact on the *M. stoneana* occurrence. Like *M. viminea, M. stoneana* resprouts from a perennial root crown each year, a trait that allows it to persist through herbivory events (AMEC 2011, p. 5–1). Therefore, based on the best available scientific and commercial information, neither disease nor herbivory constitutes a threat to *M. stoneana.*

D. The Inadequacy of Existing Regulatory Mechanisms

At the time of listing, regulatory mechanisms identified as providing some level of protection for *Monardella linoides* ssp. *viminea* included: (1) The Act, in cases where *M. linoides* ssp. *viminea* co-occurred with a federally listed species; (2) CESA, as the species was listed as endangered in California in 1979; (3) CEQA; (4) conservation plans pursuant to California's NCCP Act; (5) land acquisition and management by Federal, State, or local agencies, or by private groups and organizations; (6) local laws and regulations; (7) CWA; and (8) enforcement of Mexican laws (63 FR 54938, October 13, 1998). The listing rule provided an analysis of the potential level of protection provided by these regulatory mechanisms (63 FR 54938, October 13, 1998). With the separation of *M. viminea* from *M. stoneana,* we have re-evaluated current protective regulatory mechanisms for *M. stoneana,* as discussed below. However, as with *M. viminea,* protections afforded to *M. stoneana* under the Act as part of *M. linoides* ssp. *viminea,* the currently listed entity, would continue to apply only if we determine to retain listed status for *M. stoneana.* Therefore, for purposes of our analysis, we do not include the Act as an existing regulatory mechanism that protects *M. stoneana.* We do note that *M. stoneana* would likely continue to receive protection indirectly through habitat conservation plans approved under section 10 of the Act and NCCPs approved under the State of California that will cover *M. stoneana* even if the species is not federally listed.

Federal Regulations

National Environmental Policy Act (NEPA)

All Federal agencies are required to adhere to NEPA for projects they fund, authorize, or carry out. The Council on Environmental Quality's regulations for implementing NEPA (40 CFR 1500–1518) state that in their environmental impact statements agencies shall include a discussion on the environmental impacts of the various project alternatives (including the proposed action), any adverse environmental effects which cannot be avoided, and any irreversible or irretrievable commitments of resources involved (40 CFR 1502). NEPA itself is a disclosure law that provides an opportunity for the public to submit comments on a particular project and propose other conservation measures that may directly benefit listed species; however, it does not impose substantive environmental mitigation obligations on Federal agencies. Any such measures are typically voluntary in nature and are not required by the statute. Activities on non-Federal lands are also subject to NEPA if there is a Federal nexus.

Clean Water Act (CWA)

Under section 404 of the CWA, the U.S. Army Corps of Engineers (Corps) regulates the discharge of fill material into waters of the United States, which include navigable and isolated waters, headwaters, and adjacent wetlands (33 U.S.C. 1344). In general, the term ''wetlands'' refers to areas meeting the Corps' criteria of hydric soils, hydrology (either sufficient annual flooding or water on the soil surface), and hydrophytic vegetation (plants specifically adapted to growing in wetlands). *Monardella stoneana* occurs exclusively in ephemeral streambeds, which episodically experience seasonal flows that typically create the conditions that meet the Corps' criteria for wetlands.

Any human activity resulting in discharge of dredged or fill material into waters of the United States, including wetlands, requires a permit from the Corps. These include individual permits that are issued following a review of an individual application and general permits that authorize a category or categories of activities in a specific geographical location or nationwide (33 CFR parts 320–330). As *Monardella*

stoneana requires a natural hydrological regime to grow and persist, the regulation of discharge could prevent those flows from being interrupted or altered, thus providing a benefit to the species and its habitat.

Wilderness Act and Federal Land Policy and Management Act

Monardella stoneana is a BLM-designated sensitive species (BLM 2010, pp. 29–30). BLM-designated sensitive species are those species that require special management consideration to promote their conservation and reduce the likelihood and need for future listing under the Act. This status makes conservation of *M. stoneana* a management priority in the Otay Mountain Wilderness, where approximately 34 percent of *M. stoneana* occurs.

The Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1701 *et seq.*) governs the management of public lands under the jurisdiction of BLM. The legislative goals of FLPMA are to establish public land policy; to establish guidelines for its [BLM's] administration; and to provide for the management, protection, development, and enhancement of public lands. While FLPMA generally directs that public lands be managed on the basis of multiple use, the statute also directs that such lands be managed to ''protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; [to] preserve and protect certain public lands in their natural condition; [and to] provide food and habitat for fish and wildlife'' (43 U.S.C. 1701(a)(8)). Although BLM has a multiple-use mandate under the FLPMA, which allows for grazing, mining, and off-road vehicle use, BLM also has the ability under the FLPMA to establish and implement special management areas such as Areas of Critical Environmental Concern, wilderness areas, and research areas. BLM's South Coast Resource Management Plan (SCRMP) covers the San Diego County area.

The Otay Mountain Wilderness Act (1999) (Pub. L. 106–145) and BLM management policies provide protection for all *Monardella stoneana* occurrences within the Otay Mountain Wilderness. The Otay Mountain Wilderness Act provides that the Otay Mountain designated wilderness area (Otay Mountain Wilderness; 18,500 ac (7,486 ha)) will be managed in accordance with the provisions of the Wilderness Act of 1964 (16 U.S.C. 1131 *et seq.*). The Wilderness Act of 1964 strictly limits the use of wilderness areas, imposing restrictions on vehicle use, new developments, chainsaw use, mountain bikes, leasing, and mining, in order to protect the natural habitats of the areas, maintain species diversity, and enhance biological values. Lands acquired by BLM within the Otay Mountain Wilderness boundaries become part of the designated wilderness area and are managed in accordance with all provisions of the Wilderness Act and regulations pertaining to the Wilderness Act (see 43 CFR 6301–6305).

The memorandum of understanding (MOU) between the Service, BLM, the County of San Diego, the City of San Diego, SANDAG, and CDFG was issued in 1994, in conjunction with the development of the County of San Diego Subarea Plan under the MSCP for cooperation in habitat conservation planning and management (BLM 1994, pp. 1–8). The Otay Mountain Wilderness falls entirely within the boundary of this subarea plan. The MOU (BLM 1994, p. 3) details BLM's commitment to manage lands to ''conform with'' the County of San Diego Subarea Plan, which in turn requires protection of *Monardella stoneana* (see *City and County of San Diego Subarea Plans under the Multiple Species Conservation Plan (MSCP)* section below). Additionally, pursuant to the MOU, private lands acquired by BLM will be evaluated for inclusion within the designated wilderness area, and if the lands do not meet wilderness qualifications they will be included in the MSCP conservation system (BLM 1994, p. 3). Therefore, protections provided by the County of San Diego Subarea Plan under the MSCP (see *City and County of San Diego Subarea Plans under the Multiple Species Conservation Plan (MSCP)* section below) also apply to the Otay Mountain Wilderness.

Protections for *Monardella stoneana* are also included in BLM's draft SCRMP. Fire management activities occur on Otay Mountain as part of the current (1994) SCRMP. At some point in the future, on an as-needed basis, additional brush clearing and other fuels modifications, including burning, may occur.

BLM is collaborating with the Service to revise the SCRMP, which covers the Otay Mountain Wilderness. The draft revised plan specifically includes a goal of restoring fire frequency to 50 years through fire prevention or suppression and prescribed burns. Once an area has not burned for 50 years, the plan allows for annual prescribed burning of up to 500 ac (200 ha) in the Otay Mountain Wilderness (BLM 2009, pp. 4–171—4–172). We believe the management regime undertaken by BLM under both the current and the draft SCRMP is adequate to protect the species and its habitat from the threat of type conversion due to frequent fire (Factor A).

State and Local Regulations

Native Plant Protection Act (NPPA) and California Endangered Species Act (CESA)

Under provisions of NPPA (division 2, chapter 10, section 1900 *et seq.* of the CFG code) and CESA (Division 3, chapter 1.5, section 2050 *et seq.* of the CFG code), the CDFG Commission listed *Monardella linoides* ssp. *viminea* as endangered in 1979. Currently, the State of California recognizes the State-listed entity as *M. viminea.* No such recognition is afforded *M. stoneana* under CESA. Although not listed under CESA, CDFG does recognize *M. stoneana* as a rare and imperiled plant (lists S1.2 and 1B.2). Researchers working on plants identified on these lists must apply to CDFG's Rare Plant Program to receive research permits to study or collect rare plants.

California Environmental Quality Act (CEQA)

CEQA (Public Resources Code 21000–21177) and the CEQA Guidelines (California Code of Regulations (CCR) title 14, division 6, chapter 3, sections 15000–15387) require State and local agencies to identify the significant environmental impacts of their actions and avoid or mitigate those impacts, if feasible. CEQA applies to projects proposed to be undertaken or requiring approval by State and local government agencies. The lead agency must complete the environmental review process required by CEQA, including conducting an initial study to identify the environmental impacts of the project and determine whether the identified impacts are significant. If significant impacts are determined, then an environmental impact report must be prepared to provide State and local agencies and the general public with detailed information on the potentially significant environmental effects (California Environmental Resources Evaluation System 2010). ''Thresholds of Significance'' are comprehensive criteria used to define environmentally significant impacts based on quantitative and qualitative standards, and include impacts to biological resources such as candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by CDFG or the Service; or any riparian habitat or other sensitive

natural community identified in local or regional plans, policies, regulations, or by CDFG or the Service (CEQA Handbook, Appendix G, 2010). Defining these significance thresholds helps ensure a ''rational basis for significance determinations'' and provides support for the final determination and appropriate revisions or mitigation actions to a project in order to develop a mitigated negative declaration rather than an environmental impact report (Governor's Office of Planning and Research 1994, p. 5). Under CEQA, projects may move forward if there is a statement of overriding consideration. If significant effects are identified, the lead agency has the option of requiring mitigation through changes in the project or deciding that overriding considerations make mitigation infeasible (CEQA section 21002). Protection of listed species through CEQA is, therefore, dependent upon the discretion of the lead agency involved.

Otay Mountain Ecological Reserve

Fifty-five percent of *Monardella stoneana* occurrences are found on the Otay Mountain Ecological Reserve, which is owned by the State of California and managed by CDFG. The Reserve is managed in accordance with California Administrative Code 14 CCR S 630 (Nelson 2011, pers. comm.), which prohibits development and includes protection of resources, including prohibitions against take of plants, introduction of nonnative species, and use of pesticides. Such management prevents *M. stoneana* from mortality due to increased density of nonnative species (see Factor E discussion below).

The Natural Community Conservation Planning (NCCP) Act

The NCCP program is a cooperative effort between the State of California and numerous private and public partners with the goal of protecting habitats and species. An NCCP document identifies and provides for the regional or areawide protection of plants, animals, and their habitats, while allowing compatible and appropriate economic activity. The program began in 1991 under the State's NCCP Act (CFG Code 2800–2835). The primary objective of the NCCP program is to conserve natural communities at the ecosystem scale while accommodating compatible land uses (*http://www.dfg.ca.gov/habcon/nccp/*). Regional NCCPs provide protection to federally listed species, and often unlisted species, by conserving native habitats upon which the species depend. Many NCCPs are developed in conjunction with HCPs prepared pursuant to the Act. The City and County of San Diego Subarea Plans under the MSCP are discussed below.

City and County of San Diego Subarea Plans Under the Multiple Species Conservation Plan (MSCP)

As discussed under Factor D for *Monardella viminea,* the MSCP is a regional HCP and NCCP that has been in place for over 14 years. Habitat conservation plans and multiple species conservation plans approved under section 10 of the Act are intended to protect covered species by avoidance, minimization, and mitigation of impacts. *Monardella linoides ssp. viminea* is a covered species under the San Diego MSCP (City of San Diego 1997, Table 3–5). The most recent revision of the rare plant monitoring review lists *M. stoneana* as a recognized narrow endemic (McEachern *et al.* 2007, p. 33). The changes mentioned in this report have been adopted into the City of San Diego's monitoring plan. The City of San Diego Subarea Plan affords additional protections to narrow endemic species beyond those provided for all covered species (City of San Diego 1997, p. 100). Impacts to narrow endemic species within the MHPA are avoided, while outside the MHPA, impacts to narrow endemic species are addressed through avoidance, management, enhancement, or transplantation to areas identified for preservation (City of San Diego 1997, p. 100). Currently, all *M. stoneana* occurrences within the City of San Diego are within the boundaries of the MHPA.

Two known occurrences of *Monardella stoneana* are located within the City of San Diego Subarea Plan under the MSCP. These include the occurrence just east of Buschalaugh Cove on the lower Otay Reservoir (EO 5) and a portion of the occurrence in an unnamed tributary of Cottonwood Creek east of Marron Valley (EO 6). These two occurrences make up a total of 7 percent of the habitat for *M. stoneana,* and the City of San Diego Subarea Plan requires preservation of 100 percent of this habitat. As discussed above, additional impact avoidance and other measures under the City's Subarea Plan will protect narrow endemic species such as *M. stoneana.* The subarea plan also includes area-specific management directives designed to maintain long-term survival of narrow endemics (Service 1997, pp. 104–105). Additionally, the City has completed a fire management plan for the Marron Valley area. This plan includes addressing unnaturally short fire return intervals as a major goal. It also provides for protection of native plant community structure and biodiversity, including protection for *M. stoneana* and the canyon where it is found (EO 1) (Tierra Data 2006, pp. 4–1—4–2).

The County of San Diego Subarea Plan under the San Diego MSCP covers 252,132 ac (102,035 ha) in the southwestern portion of the County's unincorporated lands, and is implemented in part by the Biological Mitigation Ordinance (BMO). A total of 6 ac (2 ha) of privately owned land occupied by *Monardella stoneana* occurs within the County on lands covered by the County's MSCP subarea plan. As discussed in the *Wilderness Act and Federal Land Policy and Management Act* section above, protections provided by the County of San Diego Subarea Plan under the MSCP also apply to the Otay Mountain Wilderness. The County of San Diego Subarea Plan outlines the specific criteria and requirements for projects within the MSCP Subarea Plan's boundaries to alleviate threats from development and increased fire frequency (see MSCP, County of San Diego Subarea Plan (1997) and County of San Diego Biological Mitigation Ordinance (Ord. Nos. 8845, 9246) 2007). The BMO requires that all impacts to narrow endemic plant species, including *M. stoneana,* be avoided to the maximum extent practicable (County of San Diego 2010, p. 11). All projects within the County's MSCP subarea plan boundaries must comply with both the MSCP requirements and the County's policies under CEQA.

Apart from the coverage provided by the County of San Diego Subarea Plan, the 6 ac (2 ha) of private land on Otay Mountain where *Monardella stoneana* is known to occur is part of Otay Ranch, which is zoned as ''Open Space'' by the County of San Diego and identified as part of the County preserve for the MSCP. Additionally, this land is covered by the Otay Ranch Phase 2 Resource Management Plan (Otay Ranch 2002), which was approved by the County in 2002, and provides for the phased conservation and development of lands in southern San Diego County. A large portion of land is identified for conservation and will be dedicated as associated development occurs. The Otay Ranch Phase 2 Management Plan provides protection for 100 percent of *M. stoneana* occurring on the preserve, providing additional protection beyond that already provided by the County of San Diego Subarea Plan (Otay Ranch 2002, p. 144). The plan includes provisions to manage *M. stoneana* habitat in a way that will benefit this

species (Otay Ranch 2002, pp. 18–19, 52–53).

The County of San Diego Resource Protection Ordinance (RPO) (County of San Diego 2007) applies to unincorporated lands in the County, both within and outside of the MSCP subarea plan boundaries. The RPO identifies restrictions on development to reduce or eliminate impacts to natural resources, including wetlands, wetland buffers, floodplains, steep slope lands, and sensitive habitat lands. Sensitive habitat lands are those that support unique vegetation communities or are necessary to support a viable population of sensitive species (such as *Monardella stoneana*), are critical to the proper functioning of a balanced natural ecosystem, or serve as a functioning wildlife corridor (County of San Diego, 2007, p. 3). These can include areas that contain maritime succulent scrub, southern coastal bluff scrub, coastal and desert dunes, calcicolous scrub, and maritime chaparral, among others. Impacts to RPO sensitive habitat lands are only allowed when all feasible measures have been applied to reduce impacts and when mitigation provides an equal or greater benefit to the affected species (County of San Diego 2007, p. 13).

Summary of Factor D

On City and County lands occupied by *Monardella stoneana* or containing its habitat, we believe the County of San Diego RPO, the BMO, and the Subarea Plans for the City and County of San Diego provide adequate mechanisms to conserve *M. stoneana* in association with new development or other proposed projects, and for the creation of biological reserves. The County of San Diego Subarea Plan provides protection from new development or other proposed projects for the small percentage of *M. stoneana* on private land, and includes provisions for monitoring and management through development of location-specific management plans. The City of San Diego has developed final monitoring and management plans for *M. stoneana.* Conservation measures addressing stressors from type conversion due to frequent fire are thus identified and are being carried out at the Marron Valley occurrence, the only city-owned land where *M. stoneana* is extant. However, as only a small percentage of *M. stoneana* occurs on city-owned lands, these actions, although providing a benefit to the one occurrence on city-owned land, are not enough to protect the species as a whole.

On land owned and managed by CDFG and BLM, which includes approximately 89 percent of all occurrences of *Monardella stoneana,* fire management is provided by CAL FIRE. Further protection of natural resources on State lands is provided by management consistent with the Wilderness Act.

Based on our review of the best available scientific and commercial information, we conclude that *Monardella stoneana* is not threatened by inadequate existing regulatory mechanisms. Federal, State, and local regulatory mechanisms help reduce wildfire impacts, primarily to property and human safety, but they do not adequately protect *M. stoneana* from direct mortality caused by megafire, as discussed below under Factor E. However, the impact of megafire on wildlands is not a threat that can be eliminated by regulatory mechanisms. Therefore, we do not find existing regulations inadequate to protect *M. stoneana,* now or in the future.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Trampling

Trampling was identified as a threat to *Monardella linoides* ssp. *viminea* in the original listing rule (63 FR 54938, October 13, 1998). Trampling by pedestrians may result in damage or death to *M. stoneana* plants. The City of San Diego MSCP previously identified off-highway vehicle (OHV) activity and disturbance due to illegal immigrant activity as major management issues (City of San Diego 1997, p. 52). All *M. stoneana* clusters occur in close proximity to the Mexico border, where historically many illegal immigrants crossed on foot. Monitoring reports previously noted immigrant trails through *M. stoneana* habitat at the Otay Lakes location (City of San Diego 2006, p. 8). However, the recent border fence construction and other enforcement activities in the Otay Mountain Wilderness area have reduced illegal immigrant traffic (Ford 2011, pers. comm.) and thus potential impacts of trampling at the Otay Lakes, Marron Valley, and Otay Mountain locations. While there may be some impacts from trampling to individual plants, it is unlikely to occur at levels that would affect the status of the species as a whole. Based on the best scientific information, we believe that trampling (human disturbance activities) does not pose a significant risk to the persistence of *M. stoneana* now or in the future.

Nonnative Plant Species

The listing rule identified nonnative plants as a threat to *Monardella linoides* ssp. *viminea* (63 FR 54938, October 13, 1998). San Diego County habitats have been altered by invasion of nonnative species (Soule *et al.* 1992, p. 43). Nonnative grasses, which frequently grow more quickly than native species, can smother seedling and mature *M. viminea* and prevent natural growth (Rebman and Dossey 2006, p. 12). The same effect is likely for *M. stoneana.* Monitors for the City of San Diego MSCP recorded invasive plants at the Marron Valley location in the 2008 and 2009 survey reports (City of San Diego 2008, p. 2; City of San Diego 2009, p. 1). At the Otay Lakes location, the invasive plant tamarisk was documented in 2006 (City of San Diego 2006, p. 8), and nonnative grasses were documented in 2008 and 2009 (City of San Diego 2008, p. 2; City of San Diego 2009, p. 2).

However, despite the presence of nonnative plants in the range of *Monardella stoneana,* monitoring reports have not recorded the same level of invasion by nonnative grasses as has occurred in the vicinity of *M. viminea.* As discussed under Factor A, the ground cover of both nonnative and native plant species has increased between 2008 and 2010 at both Otay Lakes and Marron Valley. Additionally, the number of individual plants of *M. stoneana* at Marron Valley has not changed since 2006 (City of San Diego 2006, p. 1; City of San Diego 2008, p. 1; City of San Diego 2009, p. 1; City of San Diego 2010a, p. 11). These observations are consistent with those of Minnich and Bahre (1995, p. 17), who found that ground cover of all herbaceous plants, including nonnative grasses, was generally absent or consisted of thinly scattered plants within the chaparral along the California-Baja California boundary. Therefore, based on the best available scientific information, we find that nonnative species do not constitute a threat to the continued existence of *M. stoneana.*

Small Population Size

The original listing rule identified the restricted range and small population size of *Monardella linoides* ssp. *viminea* as a threat because it increases the possibility of extinction due to chance events, such as floods, fires, or drought, outside the natural variability of the ecosystem (Lande 1993, p. 912; 63 FR 54938, October 13, 1998). With the split of *M. linoides* ssp. *viminea* into two entities, the magnitude of this threat would likely increase. However, we note that several additional *M. stoneana* occurrences have been discovered. Additionally, Prince (2009, p. 2) suggests that multiple undiscovered occurrences of *M. stoneana* may exist in

the vicinity of Tecate Peak. This area has not been extensively surveyed because it is difficult to access. Additional habitat may exist in Mexico; however, we are unaware of any surveys confirming the presence or absence of *M. stoneana* there, apart from plants seen directly across the border. Based on information in our files, these are the only occurrences in Mexico of which we are aware. However, suitable habitat and landscape conditions exist in Mexico, close to the current range of the species in the United States.

Of the 20 known occurrences of *Monardella linoides* ssp. *viminea* at the time of listing, only 2 were later considered to be *M. stoneana.* Subsequent surveys have identified additional occurrences, and, currently, approximately eight occurrences of *M. stoneana* are known in the Otay Mountain area (CNDDB 2011b). The number of plants in Mexico is unknown and has been minimally investigated. Plants across the border in Mexico are visible from at least two occurrences south of Otay Mountain, but these have not been formally surveyed (EOs 7 and 8). Additionally, the most recent survey for this area was in 2005 (CNDDB 2011b), so the continued existence of the Mexico occurrences and number of clumps present cannot be confirmed.

Any decrease in occurrences may result in decreased reproductive opportunities due to decreased pollination events, and thus decreased genetic exchange between canyons. However, we do not consider small population size alone sufficient to meet the information threshold indicating that the species warrants listing. In the absence of information identifying threats to the species and linking those threats to the rarity of the species, the Service does not consider rarity or small population size alone to be a threat. For example, the habitat supporting *Monardella viminea* faces significant threats from the impacts of fire, altered hydrological regimes, and competition with nonnative plants. As discussed above, *M. stoneana* does not face such threats. Many naturally rare species have persisted for long periods within small geographic areas, and many naturally rare species exhibit traits that allow them to persist despite their small population sizes. *Monardella stoneana* appears to have persisted for over 2 decades in the two occurrences known since the 1970s and 1980s, respectively (CNDDB 2011b; EOs 1 and 4). This is in contrast to *M. viminea* occurrences, many of which have undergone population declines during the same time period. The other seven occurrences of *M. stoneana* were discovered in 2003 or later, so long-term data are not available for this species. One of those seven occurrences (EO 5) was considered extirpated after the 2007 Harris Fire, but has since resprouted (City of San Diego 2011a, p. 229). *Monardella stoneana* has not experienced a significant population decline since listing, nor have multiple occurrences been extirpated. One of two occurrences monitored by the City of San Diego (EO 1) has remained stable throughout the past decade, although the other occurrence (EO 5) containing one clump was extirpated (the EO 5 occurrence contained a maximum of only two clumps since monitoring began in 2000). This is in contrast to *M. viminea,* which has experienced a loss of several populations since listing. Consequently, the fact that *M. stoneana* is rare and has small populations does not indicate that it is in danger of extinction now or in the future. Therefore, although small population size may have the potential to pose a threat to *M. stoneana,* we do not find it to be a threat now or in the future.

Fire

As discussed under Factor E for *Monardella viminea,* fire can impact individual plants. This is especially true of megafire events that cannot be controlled or ameliorated through management efforts. A narrow endemic, such as *M. stoneana,* could be especially sensitive to megafire events. One large fire could impact all or a large proportion of the entire area where the species is found, as occurred for *M. viminea* in the 2003 Cedar Fire. However, as discussed in Factor E for *M. viminea,* the decline of the burned occurrences was not as severe as initially thought. We expect that *M. stoneana* would experience the same ability to sprout from the roots, as it is closely related to *M. viminea.*

Furthermore, despite the increased frequency of fire, *Monardella stoneana* has persisted through all large fires in the region. The GIS fire boundaries show that each occurrence of *M. stoneana* has been burned at least once in the past decade. In the past two decades, eight of nine EOs burned two or more times, and four occurrences burned three or more times. The only reports of damage are from EO 5, which lost its one remaining plant, and EO 4, which was ''damaged'' in a recent (unspecified) fire, but not extirpated (CNDDB 2011b). In the event of a fire that impacts all of the occurrences, we anticipate that the effects to *M. stoneana* individuals would be comparable to *M. viminea,* where the best available information shows that individuals are recovering from 98 percent of the occurrences on MCAS Miramar being burned in the 2003 Cedar Fire.

Given the increased frequency of megafire within southern California ecosystems and the inability of regulatory mechanisms to prevent or control megafire, we find that megafire does have the potential to impact occurrences of *Monardella stoneana.* However, given the species persistence through past fires, and the ability of a closely related species to recover from direct impact by fire, we do not expect that megafire is a significant threat to individual *M. stoneana* plants now, nor is it likely to become a threat in the future.

Climate Change

Please see discussion above in Factor E for *Monardella viminea* regarding background on how the Service evaluates the possible threat of climate change. With regard to the area of analysis for *Monardella stoneana,* downscaled projections are not available, but many scientists believe warmer, wetter winters and warmer, drier summers will occur within the next century (Field *et al.* 1999, pp. 2–3, 20). The impacts on species like *M. stoneana,* which depend on specific hydrological regimes, may be more severe (Graham 1997, p. 2).

Since approximately the time of listing in 1998, an extended drought in the region (SDCWA 2011, p. 2) created unusually dry habitat conditions. From 2001 to 2010, at one of the precipitation gauges close to the *Monardella stoneana* occurrences (Lindberg Field, San Diego County, California), precipitation measured significantly below normal in 7 out of 10 years (SDCWA 2011, p. 2). This extended drought has cumulatively affected moisture regimes, riparian habitat, and vegetative conditions in and around suitable habitat for *M. stoneana,* increasing the stress on individual plants. As stated above, future climate changes may lead to similar, if not more severe, conditions.

The predicted drought could impact the dynamics of the streambeds where *Monardella stoneana* grows. Soil moisture and transportation of sediments by downstream flow have been identified as key habitat features required by *M. stoneana.* The species is characterized as being associated with areas of standing water after rainfall (Elvin and Sanders 2003, p. 426). Monitors for the City of San Diego have observed decreased plant health and increased dormancy of *Monardella* species in years with low rainfall (City of San Diego 2003, p. 3; City of San Diego 2004, p. 3). However, specific

analyses of population trends as correlated to rainfall are difficult due to inconsistent plant count methods (City of San Diego 2004, p. 67).

While drier conditions associated with climate change may result in increased fire frequency within some plant communities, as discussed under Factor A, the effect of more arid conditions on chaparral, the plant community associated with *Monardella stoneana,* is not known. According to Minnich and Bahre (1997, p. 20), fires in the chaparral of northern Baja California, Mexico, are smaller and more frequent than those observed across the border in southern California. Despite these differences in the present fire regimes between chaparral in California and Mexico, Minnich and Bahre (1997, p. 20) found that ''repeat photographs of the monument markers, field samples, repeat aerial photography, and fire history maps show that chaparral succession is similar across the international boundary between Jacumba [in California] and Tecate [in Mexico] and that chaparral succession along the border is similar to that found elsewhere in California.'' Except for a statistically significant correlation that early autumn rains cut short the fire season at its peak, Keeley and Fotheringham (2003, p. 235) did not find patterns between rainfall and burning for chaparral and coastal sage shrublands. Therefore, increased aridity may have little effect on chaparral.

Preliminary information for *Monardella stoneana* does show that the effects of climate change on chaparral may be less than the effects on coastal sage scrub (see Climate Change section for *M. viminea* above). While we recognize that climate change and increased drought associated with climate change are important issues with potential impacts to listed species and their habitats, the best available scientific data do not give specific evidence for us to formulate accurate predictions regarding the effects of climate change on particular species, including *M. stoneana,* at this time. Therefore, at this time we do not consider climate change a current threat to *M. stoneana,* either now or in the future.

Summary of Factor E

We found no evidence that other natural or manmade factors pose a significant threat to *Monardella stoneana.* Based on a review of the best available scientific and commercial data, trampling and nonnative invasive plant species are not significant threats. We conclude, based on the best available scientific information, that *M. stoneana* could be affected temporarily by fire impacts associated with the death of individual plants; however, we do not consider this a threat to the continued existence of the species. Small population size could exacerbate other threats, but as there are none, this is not a factor; small population size in itself does not cause *M. stoneana* to be warranted for listing. In addition, BLM conducts ongoing management that provides a benefit to *M. stoneana.* Finally, with regard to the direct and indirect effects of climate change on individual *M. stoneana* plants, we have no information at this point to demonstrate that predicted climate change poses a significant threat to the species now or in the future.

Cumulative Impacts

As discussed in the Cumulative Impacts analysis for *Monardella viminea,* type conversion due to frequent fire, nonnative grasses, and altered hydrological regimes can work in concert to result in the decline of the species. However, based on the best available scientific information, we did not find that invasion by nonnative grasses or type conversion due to frequent fire are occurring in habitats that support *M. stoneana,* nor did we find that hydrology was altered from its natural regime to the point where it threatens the continued survival of the species. Therefore, we do not find evidence that any of the potential threats discussed in this finding pose additional stress to *M. stoneana* by acting in concert with one another.

Determination

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to *Monardella stoneana.* We found no significant threats to *M. stoneana* related to Factors A, B, C, D, or E, as described above. After an assessment of potential threats including urban development, altered hydrology, and type conversion due to frequent fire as attributable to Factor A (The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range), we find that none poses a significant threat to the species. We found no available information concerning Factors B (Overutilization) and C (Disease or Predation) to indicate that listing *M. stoneana* as endangered or threatened under the Act is warranted. We find that the best available information concerning Factor D (Inadequacy of Existing Regulatory Mechanisms) indicates that listing *M. stoneana* as endangered or threatened under the Act is not warranted. We find that the best available information concerning Factor E (Other Natural or Manmade Factors Affecting Its Continued Existence) indicates that trampling and nonnative plants are not currently threats to the continued existence of *M. stoneana,* nor are they expected to be in the future. Additionally, we have no information to demonstrate that predicted climate change or megafire will result in a significant threat to the species now or in the future.

Although *Monardella stoneana* has a similar life history to *M. viminea,* based on differences in location, land ownership and use, and habitat type, we find that potential threats impact the species differently. *Monardella stoneana* does face some stressors; however, the species is found primarily on protected (i.e., Federal and State) lands. To the extent that the species may be experiencing localized impacts, analysis of recent and current surveys of *M. stoneana* habitat in the Otay Mountain locations indicates that its habitat is under protective status and remains in relatively good condition. Furthermore, unlike *M. viminea, M. stoneana* has not undergone a documented decline in population size. While megafire and small population size may impact *M. stoneana,* these factors do not pose a threat to the continued existence of the species. Finally, we do not consider *M. stoneana's* small population size in and of itself a threat such that the species warrants listing, now or in the future.

In conclusion, we have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by *Monardella stoneana.* Our review of the information pertaining to the five threat factors does not support a conclusion that threats of sufficient imminence, intensity, or magnitude exist—either singly or in combination—to the extent that the species is in danger of extinction (endangered), or likely to become endangered (threatened) throughout its range now or within the foreseeable future. Therefore, based on the best available scientific information, we find *M. stoneana* does not warrant listing at this time. However, if we receive new information that alters our analysis, we will revisit and re-evaluate the status of *M. stoneana.*

Significant Portion of Range

The Act defines ''endangered species'' as any species which is ''in danger of extinction throughout all or a significant portion of its range,'' and ''threatened

species'' as any species which is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The definition of ''species'' is also relevant to this discussion. The Act defines the term ''species'' as follows: ''The term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment [DPS] of any species of vertebrate fish or wildlife which interbreeds when mature.'' The phrase ''significant portion of its range'' (SPR) is not defined by the statute, and we have never addressed in our regulations: (1) The consequences of a determination that a species is either endangered or likely to become so throughout a significant portion of its range, but not throughout all of its range; or (2) what qualifies a portion of a range as ''significant.''

Two recent district court decisions have addressed whether the SPR language allows the Service to list or protect less than all members of a defined ''species'': *Defenders of Wildlife* v. *Salazar,* 729 F. Supp. 2d 1207 (D. Mont. 2010), concerning the Service's delisting of the Northern Rocky Mountain gray wolf (74 FR 15123, April 2, 2009); and *WildEarth Guardians* v. *Salazar,* 2010 U.S. Dist. LEXIS 105253 (D. Ariz. Sept. 30, 2010), concerning the Service's 2008 finding on a petition to list the Gunnison's prairie dog (73 FR 6660, February 5, 2008). The Service had asserted in both of these determinations that it had authority, in effect, to protect only some members of a ''species,'' as defined by the Act (i.e., species, subspecies, or DPS), under the Act. Both courts ruled that the determinations were arbitrary and capricious on the grounds that this approach violated the plain and unambiguous language of the Act. The courts concluded that reading the SPR language to allow protecting only a portion of a species' range is inconsistent with the Act's definition of ''species.'' The courts concluded that once a determination is made that a species (i.e., species, subspecies, or DPS) meets the definition of ''endangered species'' or ''threatened species,'' it must be placed on the list in its entirety and the Act's protections applied consistently to all members of that species (subject to modification of protections through special rules under sections 4(d) and 10(j) of the Act).

Consistent with that interpretation, and for the purposes of this rule, we interpret the phrase ''significant portion of its range'' in the Act's definitions of ''endangered species'' and ''threatened species'' to provide an independent basis for listing; thus there are two situations (or factual bases) under which a species would qualify for listing: (1) A species may be endangered or threatened throughout all of its range; or (2) a species may be endangered or threatened in only a significant portion of its range. If a species is in danger of extinction throughout an SPR, it, the species, is an ''endangered species.'' The same analysis applies to ''threatened species.'' Therefore, the consequence of finding that a species is endangered or threatened in only a significant portion of its range is that the entire species will be listed as endangered or threatened, respectively, and the Act's protections will be applied across the species' entire range.

We conclude, for the purposes of this rule, that interpreting the SPR phrase as providing an independent basis for listing is the best interpretation of the Act because it is consistent with the purposes and the plain meaning of the key definitions of the Act; it does not conflict with established past agency practice (i.e., prior to the 2007 Solicitor's Opinion), as no consistent, long-term agency practice has been established, and it is consistent with the judicial opinions that have most closely examined this issue. Having concluded that the phrase ''significant portion of its range'' provides an independent basis for listing and protecting the entire species, we next turn to the meaning of ''significant'' to determine the threshold for when such an independent basis for listing exists.

Although there are potentially many ways to determine whether a portion of a species' range is ''significant,'' we conclude, for the purposes of this rule, that the significance of the portion of the range should be determined based on its biological contribution to the conservation of the species. For this reason, we describe the threshold for ''significant'' in terms of an increase in the risk of extinction for the species. We conclude that a biologically based definition of ''significant'' best conforms to the purposes of the Act, is consistent with judicial interpretations, and best ensures species' conservation. Thus, for the purposes of this rule, a portion of the range of a species is ''significant'' if its contribution to the viability of the species is so important that, without that portion, the species would be in danger of extinction.

We evaluate biological significance based on the principles of conservation biology using the concepts of resiliency, redundancy, and representation. *Resiliency* describes the characteristics of a species that allow it to recover from periodic disturbance. *Redundancy* (having multiple populations distributed across the landscape) may be needed to provide a margin of safety for the species to withstand catastrophic events. *Representation* (the range of variation found in a species) ensures that the species' adaptive capabilities are conserved. Redundancy, resiliency, and representation are not independent of each other, and some characteristic of a species or area may contribute to all three. For example, distribution across a wide variety of habitats is an indicator of representation, but it may also indicate a broad geographic distribution contributing to redundancy (decreasing the chance that any one event affects the entire species), and the likelihood that some habitat types are less susceptible to certain threats, contributing to resiliency (the ability of the species to recover from disturbance). None of these concepts is intended to be mutually exclusive, and a portion of a species' range may be determined to be ''significant'' due to its contributions under any one of these concepts.

For the purposes of this rule, we determine if a portion's biological contribution is so important that the portion qualifies as ''significant'' by asking whether, *without that portion,* the representation, redundancy, or resiliency of the species would be so impaired that the species would have an increased vulnerability to threats to the point that the overall species would be in danger of extinction (i.e., would be ''endangered''). Conversely, we would not consider the portion of the range at issue to be ''significant'' if there is sufficient resiliency, redundancy, and representation elsewhere in the species' range that the species would not be in danger of extinction throughout its range if the population in that portion of the range in question became extirpated (extinct locally).

We recognize that this definition of ''significant'' establishes a threshold that is relatively high. On the one hand, given that the consequences of finding a species to be endangered or threatened in an SPR would be listing the species throughout its entire range, it is important to use a threshold for ''significant'' that is robust. It would not be meaningful or appropriate to establish a very low threshold whereby a portion of the range can be considered ''significant'' even if only a negligible increase in extinction risk would result from its loss. Because nearly any portion of a species' range can be said to contribute some increment to a species' viability, use of such a low threshold would require us to impose restrictions and expend conservation resources disproportionately to conservation benefit: listing would be rangewide,

even if only a portion of the range of minor conservation importance to the species is imperiled. On the other hand, it would be inappropriate to establish a threshold for ''significant'' that is too high. This would be the case if the standard were, for example, that a portion of the range can be considered ''significant'' only if threats in that portion result in the entire species' being currently endangered or threatened. Such a high bar would not give the SPR phrase independent meaning, as the Ninth Circuit held in *Defenders of Wildlife* v. *Norton,* 258 F.3d 1136 (9th Cir. 2001).

The definition of ''significant'' used in this rule carefully balances these concerns. By setting a relatively high threshold, we minimize the degree to which restrictions will be imposed or resources expended that do not contribute substantially to species conservation. But we have not set the threshold so high that the phrase ''in a significant portion of its range'' loses independent meaning. Specifically, we have not set the threshold as high as it was under the interpretation presented by the Service in the *Defenders* litigation. Under that interpretation, the portion of the range would have to be so important that current imperilment there would mean that the species would be *currently* imperiled everywhere. Under the definition of ''significant'' used in this final rule, the portion of the range need not rise to such an exceptionally high level of biological significance. (We recognize that if the species is imperiled in a portion that rises to that level of biological significance, then we should conclude that the species is in fact imperiled throughout all of its range, and that we would not need to rely on the SPR language for such a listing.) Rather, under this interpretation we ask whether the species would be endangered everywhere without that portion, *i.e.,* if that portion were completely extirpated. In other words, the portion of the range need not be so important that even being in danger of extinction in that portion would be sufficient to cause the species in the remainder of the range to be endangered; rather, the *complete extirpation* (in a hypothetical future) of the species in that portion would be required to cause the species in the remainder of the range to be endangered.

The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that have no reasonable potential to be significant *and* threatened or endangered. To identify only those portions that warrant further consideration, we determine whether there is substantial information indicating that: (1) The portions may be ''significant,'' and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. Depending on the biology of the species, its range, and the threats it faces, it might be more efficient for us to address the significance question first or the status question first. Thus, if we determine that a portion of the range is not ''significant,'' we do not need to determine whether the species is endangered or threatened there; if we determine that the species is not endangered or threatened in a portion of its range, we do not need to determine if that portion is ''significant.'' In practice, a key part of the portion status analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the species' range that clearly would not meet the biologically based definition of ''significant'', such portions will not warrant further consideration.

As described in the Determination section above, we find that the stressors affecting *Monardella stoneana* are not of sufficient imminence, intensity, magnitude, or geographic concentration such that *M. stoneana* warrants listing under the Act. The stressors affecting *M. stoneana,* including megafire, occur across the species' entire range. Additionally, factors that might be limited to individual drainages, such as altered hydrology or urban development, do not threaten *M. stoneana.* Therefore, because *M. stoneana* has no geographical concentration of threats, it does not qualify for listing based on threats to the species in a significant portion of its range.

Decisions by the Ninth Circuit Court of Appeals in *Defenders of Wildlife* v. *Norton,* 258 F.3d 1136 (2001) and *Tucson Herpetological Society* v. *Salazar,* 566 F.3d 870 (2009) found that the Act requires the Service, in determining whether a species is endangered or threatened throughout a significant portion of its range, to consider whether lost historical range of a species (as opposed to its current range) constitutes a significant portion of the range of that species. While this is not our interpretation of the statute, we will consider whether the lost historical range might qualify as an SPR for *Monardella stoneana.*

We evaluated whether the best available information indicates that the range of *Monardella stoneana* has contracted over time. We have little information on the historical range of *M. stoneana.* However, unlike *M. viminea, M. stoneana* has not undergone a dramatic decline in population size. *Monardella stoneana* appears to have persisted for over 2 decades in the two occurrences known in the United States since the 1970s and 1980s, respectively (see proposed rule at 76 FR 33880, June 9, 2011). The other seven occurrences of *M. stoneana* in the United States were discovered in 2003 or later, so long-term data on *M. stoneana* are not available; only one of those seven occurrences has since been extirpated. We have almost no information about the range of *M. stoneana* in Mexico other than observations of plants directly across the Mexican border from occurrences in the United States. Because the best available information indicates that *M. stoneana* has not experienced a significant population decline, nor have multiple occurrences been extirpated within its known range, we are unable to find that a significant amount of historical range has been lost. Therefore, we conclude that there has not been a loss of historical habitat that represents a significant portion of the range of *M. stoneana.*

Critical Habitat

Due to the taxonomic split of *Monardella* linoides ssp. *viminea* into two distinct taxa, *Monardella viminea* (willowy monardella) and *Monardella stoneana* (Jennifer's monardella) (see *Procedural Aspects of this Rule* section above), and due to our conclusion that *M. viminea* is endangered, we are designating critical habitat for *M. viminea.* Because we have determined that *M. stoneana* does not meet the definition of endangered or threatened under the Act, we are not designating critical habitat for this species.

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are the elements of physical or biological features that are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographical area occupied by a species at the time of listing when a designation limited to the geographical area occupied at the time of listing would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to insure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) the prohibitions of section 9 of the Act if actions occurring in these areas may affect the species. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Physical or Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derive the specific physical or biological features essential for *Monardella viminea* from studies of this species' habitat, ecology, and life history as described in the Critical Habitat section of the proposed rule to designate critical habitat published in the **Federal Register** on June 9, 2011 (76 FR 33880), and in the information presented below. We also reviewed monitoring reports from private firms, the City of San Diego, Friends of Los Peñasquitos Canyon, the Service, and MCAS Miramar; technical reports; the CNDDB; GIS data (such as species occurrence data, soil data, land use, topography, aerial imagery, and ownership maps); correspondence to the Service from recognized experts; and other information as available. Additional information can be found in the final listing rule published in the **Federal Register** on October 13, 1998 (63 FR 54938). We have determined that *M. viminea* requires the physical or biological features described below.

Space for Individual and Population Growth and for Normal Behavior

Habitats that provide space for growth and persistence of *Monardella viminea* include: (1) Washes in coastal sage scrub or riparian scrub vegetation; (2) terraced secondary benches, channel banks, and stabilized sand bars; (3) soils with a high content of coarse-grained sand and low content of silt and clay; and (4) open ground cover, less than half of which is herbaceous vegetation cover (Scheid 1985, pp. 30–35; Service 1998, p. 54938; Elvin and Sanders 2003, pp. 426, 430; Kelly and Burrascano 2006, p. 51).

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Monardella viminea is most often found on the first above-water sandbar in intermittent streambeds where water runs for 24 to 48 hours after heavy rain events (Elvin and Sanders 2003, p. 430; Kelly and Burrascano 2006, p. 51). It can also be found within the streambed if flow is infrequent enough and the soil is stable (Scheid 1985, pp. 3, 38–39). The most robust *M. viminea* individuals tend to occur in wide, open canyons with broad channels and secondary benches, as opposed to narrow, graded canyons (Kassebaum 2010, pers. comm.).

Monardella viminea plants are found on soil where subsurface layers stay relatively moist throughout the year and water accumulates after rainstorms, such as north-facing slopes or canyon bottoms (Elvin and Sanders 2003, pp. 426, 430). Plants with inadequate soil moisture dry out during the summer months and do not survive (Kelly and Burrascano 2006, p. 5). The species does not occur on soils that are permanently wet (Elvin and Sanders 2003, p. 425). *Monardella viminea* occurrences have been lost from areas where wetter soils result in an increase in density of surrounding vegetation (Kelly and Burrascano 2001, p. 4).

Monardella viminea most generally occurs on soil types with high sand content, often characterized by sediment and cobble deposited by flood events (Scheid 1985, p. 35; Rebman and Dossey 2006, pp. 5–6). The Natural Resources Conservation Service soil series where *M. viminea* is known to occur includes (but may not be limited to): Stony Land, Redding Gravelly Loam, Visalia Sandy Loam, and Riverwash (Rebman and Dossey 2006, p. 6).

Cover or Shelter

Monardella viminea requires open to semi-open, foliar (canopy) cover consisting of coastal sage and riparian scrub with limited herbaceous understory. *Monardella viminea* plants usually occur in areas with an average of 75 percent ground cover, of which approximately 65 percent is woody cover and less than 10 percent herbaceous cover (Scheid 1985, pp. 32, 37–38). The species is most commonly associated with *Eriogonum fasciculatum* (California buckwheat) and *Baccharis sarothroides (*Scheid 1985, pp. 38–39; Rebman and Dossey 26, p. 22; Ince 2010, p. 3*).* Herbaceous cover, such as annual grasses, can grow in greater density than native riparian and chaparral species, and, through resource competition and shading, herbaceous cover would likely prevent natural growth and reproduction of *M. viminea* (Rebman and Dossey 2006, p. 12). Therefore, suitable habitat for the species is not dominated by herbaceous cover.

Sites for Breeding, Reproduction, and Rearing (or Development) of Offspring

Monardella viminea is visited by numerous bees and butterflies, and is likely pollinated by a diverse array of insects, each of which has its own habitat requirements; however, we are currently unaware of which insect species pollinate *M. viminea.* Pollinators facilitate mixing of genes within and among plant populations, without which inbreeding and reduced fitness may occur (Widen and Widen 1990, p. 191). Native sand wasps within the range of *M. viminea* (such as those from the Bembicine family) require sandy areas (such as dunes or sandy washes) to nest, while solitary bees (Andrenidae family) nest in upland areas (Kelly and Burrascano 2001, p. 8). Native bees typically are more efficient pollinators than introduced European honeybees (*Apis mellifera*) (Javorek *et al.* 2002, p. 345). Therefore, populations serviced by a higher proportion of native pollinator species are likely to maintain higher reproductive output and persist for more generations than populations served by fewer native pollinators or with pollination limitations of any kind (Javorek *et al.* 2002, p. 350). Pollinators also require space for individual and population growth, so adequate habitat should be preserved for pollinators in addition to the habitat necessary for *M. viminea* plants. In this final critical habitat rule, we acknowledge the importance of pollinators to *M. viminea.* However, we do not include pollinators and their habitats as a primary constituent element (PCE), because: (1) Meaningful data on specific pollinators and their habitat needs are lacking; and (2) we were not able to quantify the amount of habitat needed for pollinators, given the lack of information on the specific pollinators of *M. viminea.*

Habitats Protected From Disturbance or Representative of the Historical, Geographical, and Ecological Distributions of the Species

The long-term conservation of *Monardella viminea* is dependent on several factors, including, but not limited to, maintenance of areas necessary to sustain natural ecosystem components, functions, and processes (such as full sun exposure and natural hydrological regimes) and sufficient adjacent suitable habitat for vegetative reproduction, population expansion, and pollination.

Open or semi-open, rocky, sandy alluvium on terraced floodplains, benches, stabilized sandbars, channel banks, and sandy washes along ephemeral streams, washes, and floodplains is needed for individual and population growth of *Monardella viminea* (Scheid 1985, pp. 30–31, 34–35). Within those areas, *M. viminea* requires adequate sunlight to grow. Woody overgrowth is common and can help to maintain adequate soil moisture, but areas crowded with herbaceous

understory may not provide adequate light for *M. viminea.*

The 2008 5-year review (Service 2008, p. 7) concluded that *Monardella viminea* requires a natural hydrological regime to maintain or create suitable habitat conditions, including the floodplains, benches, and sandbars where *M. viminea* grows. Characteristics of riparian channels and seasonal streamflow determine timing, pattern, and depth of deposition of alluvial materials and formation of sandbars and channel banks, which in turn determine location of plants within the streambed and suitable habitat to support individuals and clumps of *M. viminea* (Scheid 1985, pp. 30–31 and 36–37). Decreases in flows, which would otherwise scour annual grasses and seeds from the area, result in increased cover of nonnative grasses and decreased light and moisture availability for *M. viminea.* Rapidly growing nonnative grasses can smother seedling and mature *M. viminea* and prevent natural growth (Rebman and Dossey 2006, p. 12). Additionally, increased flows can result in erosion that may alter floodplains and erode banks, channel bars, and sandy washes where *M. viminea* occurs (Kelly and Burrascano 2006, pp. 65–69).

Primary Constituent Elements for *Monardella viminea*

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of *Monardella viminea* in areas occupied at the time of listing, focusing on the features' primary constituent elements (PCEs). We consider PCEs to be the specific elements of physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the PCE specific to *Monardella viminea* is riparian channels with ephemeral drainages and adjacent floodplains:

(a) With a natural hydrological regime, in which:

(1) Water flows only after peak seasonal rainstorms;

(2) High runoff events periodically scour riparian vegetation and redistribute alluvial material to create new stream channels, benches, and sandbars; and

(3) Water flows for usually less than 48 hours after a rain event, without long-term standing water;

(b) With surrounding vegetation that provides semi-open, foliar cover with:

(1) Little or no herbaceous understory;

(2) Little to no canopy cover;

(3) Open ground cover, less than half of which is herbaceous vegetation cover;

(4) Some shrub cover; and

(5) An association of other plants, including *Eriogonum fasciculatum* (California buckwheat) and *Baccharis sarothroides* (broom baccharis);

(c) That contain ephemeral drainages that:

(1) Are made up of coarse, rocky, or sandy alluvium; and

(2) Contain terraced floodplains, terraced secondary benches, stabilized sandbars, channel banks, or sandy washes; and

(d) That have soil with high sand content, typically characterized by sediment and cobble deposits, and further characterized by a high content of coarse, sandy grains and low content of silt and clay.

All units designated as critical habitat are currently occupied by *Monardella viminea* and contain the PCE.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the physical or biological features within the geographical area occupied by the species at the time of listing that are essential to the conservation of the species may require special management considerations or protection.

The areas designated as critical habitat will require some level of management or protection to address the current and future threats to the physical or biological features. In all units, special management considerations or protection may be required to provide for the sustained function of the ephemeral washes on which *Monardella viminea* depends.

The features essential to the conservation of *Monardella viminea* may require special management considerations or protection to reduce the following threats, among others: Cover by nonnative plant species that crowds, shades, or competes for resources; habitat alteration due to altered hydrology from urbanization and associated infrastructure; and any actions that alter the natural channel structure or course, particularly increased water flow that could erode soils inhabited by *M. viminea* or cover them with sediment deposits.

Special management considerations or protection are required within critical habitat areas to address these threats. Management activities that could ameliorate these threats include, but are not limited to: Removal of nonnative vegetation by weeding, planting of native species along stream courses in canyons to help control erosion, use of silt fences to control erosion, restriction of development that alters natural hydrological characteristics of stream courses in canyons, and implementation of prescribed burns. Additionally, specialized dams and smaller barriers could be installed in canyons to help address floodwater runoff that results from upstream development (which can cause erosion and loss of clumps of *Monardella viminea*), although these dams must be of adequate size and strength to withstand increased storm flow caused by urbanization.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available to designate critical habitat. We review available information pertaining to the habitat requirements of the species. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we consider whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—is necessary to ensure the conservation of the species. We are not designating any areas outside the geographical area occupied by the species at the time of listing, because currently occupied areas (which are within the area occupied by the species at the time of listing) are sufficient for the conservation of the species.

This final rule updates the information used in our 2006 final designation of critical habitat for *Monardella linoides* ssp. *viminea* (71 FR 65662, November 8, 2006) with the best available data, including new information not available when the 2006 rule was completed.

This section provides details of the process we used to delineate the critical habitat designation. This final critical habitat designation is based on the best scientific data available, including our analysis of the distribution and ecology of *Monardella viminea* as identified in the 1998 final listing rule, the 2008 5-year review, new information on the species' distribution and ecology made available since listing, reclassification of *M. viminea* as a species, and State and local measures in place for the conservation of *M. viminea.* Specific differences from the 2006 designation of critical habitat are described in the Summary of Changes from Previously

Designated Critical Habitat section in the proposed rule that was published on June 9, 2011 (76 FR 33880).

The areas in this final designation of critical habitat for *Monardella viminea* were occupied by the species at the time of listing and remain occupied today, and they possess those specific physical or biological features identified in the PCE that are essential to the conservation of the species and which may require special management considerations or protection. For this final rule, we completed the following steps to delineate critical habitat: (1) Compiled all available data from observations of *M. viminea* into a GIS database; (2) identified occurrences that were extant at the time of listing and those occurrences that are currently extant or contain transplanted *M. viminea;* (3) identified areas containing all the components that make up the PCE that may require special management considerations or protection; (4) circumscribed boundaries of potential critical habitat units based on the above information; and (5) removed all areas that did not have the PCE and, therefore, are not considered essential to the conservation of *M. viminea,* and areas that are exempt from critical habitat under section 4(a)(3)(B)(i) of the Act. These steps are described in detail below.

(1) We compiled observational data from the following sources to include in our GIS database for *Monardella viminea:* (a) CNDDB data and supporting observation documentation on *M. viminea;* (b) monitoring reports from MCAS Miramar; and (c) monitoring reports from private and local government organizations, such as the Carroll Canyon Business Park and the City of San Diego Subarea Plan under the MSCP. No monitoring reports from the County of San Diego were available.

(2) We considered extant all occurrences where presence of living plants has been confirmed within the past 10 years. Using this information, we determined that eight occurrences are currently extant. Based on data from the CNDDB, we confirmed that all eight occurrences were known and extant at the time of listing. We also documented the presence of transplanted individual plants in Carroll, San Clemente, and Lopez Canyons, and included them in our analysis.

(3) To identify areas containing all the components that make up the PCE for *Monardella viminea* that may require special management considerations or protection, we conducted the following steps:

(a) We determined occurrence locations likely to belong to the same population. Regardless of observation date, all occurrence locations downstream from an extant occurrence, and which would be connected to the upstream occurrence during runoff events (that could transport seeds downstream), were considered part of the same extant occurrence. This was accomplished by examining survey reports from MCAS Miramar, the City of San Diego, and the Friends of Los Peñasquitos Canyon.

(b) In order to create a scientifically based approach to drawing critical habitat units, we first examined the GIS vegetation data polygons containing *Monardella viminea* occurrences (SANDAG 1995), because the species is frequently associated with coastal sage scrub and riparian scrub habitats (Scheid 1985, p. 3; Elvin and Sanders 2003, p. 430; Kelly and Burrascano 2006, p. 51). In an attempt to better distinguish the width of the specific areas within drainages that contain the PCE, we searched for a correlation between habitat type and clumps of *M. viminea.* We found *M. viminea* occurred in areas mapped as 11 different vegetation types, with the greatest number (45 percent) located within Diegan Coastal Sage Scrub. We noted that mapped polygons of this vegetation type and some other vegetation types were relatively large and did not correspond well with the drainage areas where *M. viminea* and the PCE were likely to occur, indicating that they were poor predictors for areas that contain the physical or biological features essential to the conservation of *M. viminea.*

(c) We examined polygons that were labeled as riparian vegetation for possible useful information to assist in delineating potential critical habitat areas because *Monardella viminea* is generally described as a riparian-associated species. We found that, although southern sycamore-alder riparian woodland is rare in canyons where *M. viminea* exists, where it is present it closely corresponds to areas that contain *M. viminea* and the physical or biological features essential to its conservation. Because of this close correlation, we used the southern sycamore-alder riparian woodland habitat type to identify the widest distance of a riparian vegetation type polygon from an occupied streambed line; we found this distance to be 490 ft (150 m).

(d) We then tested the 490-ft (150-m) value as an estimate of the distance from the streambed most likely to capture the PCE throughout the species' range. We used the widest distance from the streambed to help identify areas that meet the definition of critical habitat, rather than the median (or another value). We wanted to ensure that we captured all potential areas that have the physical or biological features essential to the conservation of *Monardella viminea* versus those areas that only contain occurrences of the species. We found that this 490-ft (150-m) distance, when applied to all streambeds where *M. viminea* occurred, captured all clumps of *M. viminea* except two in the southern end of West Sycamore Canyon. The two southern clumps are located in an area that appears to be a remnant habitat wash at the end of West Sycamore Canyon, which likely received additional streamflow during storm events longer than 48 hours after a rain event (or more frequently than just after a peak seasonal rainstorm), and thus does not likely support occupancy long term or significantly contribute to population persistence.

The conservation of *Monardella viminea* depends on preservation of habitat containing the physical or biological features essential to the conservation of the species. Like most plants, *M. viminea* is occasionally found in areas considered atypical for the species. For example, a plant was once found growing in mesa-top habitat along a tributary of Rose Canyon (Rebman and Dossey 2006, p. 24, no EO number). We considered that the habitat areas outlined using the method described above will capture only the habitat that contains the physical or biological features essential to the conservation of *M. viminea.* We determined the distance of 490 ft (150 m) was appropriate to capture areas surrounding occupied streambeds that contain the physical or biological features essential to the conservation of the species and that meet the definition of critical habitat, and we applied it across the species' range.

(4) We removed all areas not containing the physical or biological features essential to the conservation of the species. *Monardella viminea* requires all components of the PCE for growth and reproduction; thus, only areas that contained all components of the PCE were considered as critical habitat. We removed areas in Rose Canyon (no EO number), Elanus Canyon (EO 24), and Lopez Canyon (EO 1), and all four transplanted occurrences. All of these areas are characterized by dense urban development on at least one border. As discussed under Factor A for *M. viminea,* urbanization results in increased frequency and intensity of

storm flow events that wash away sandbars rather than scouring them of vegetation. Further discussion of why we did not include these occurrences as critical habitat appears in the Summary of Changes from Previously Designated Critical Habitat section in the proposed rule to designate critical habitat (76 FR 33880, June 9, 2011). We also removed areas within the boundaries of MCAS Miramar for this final rule because these areas are exempt from critical habitat designation under section 4(a)(3)(B)(i) of the Act (see Exemptions section below).

When determining critical habitat boundaries within this final rule, we made every effort to avoid including developed areas, such as lands covered by buildings, pavement, and other structures, because such lands lack physical or biological features for *Monardella viminea.* The scale of the maps we prepared under the parameters for publication in the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We are designating as critical habitat lands that we have determined are occupied at the time of listing and that contain sufficient physical or biological features to support the life-history processes essential for the conservation of the species. All units contain the PCE essential to support *Monardella viminea* life processes.

Final Critical Habitat Designation

In the proposed rule published June 9, 2011 (76 FR 33880), we proposed designating five units as critical habitat for *Monardella viminea.* Within the five proposed units, we identified essential habitat located on MCAS Miramar that is exempt from designation under 4(a)(3)(B)(i) of the Act. Based on the updated boundaries of MCAS Miramar (see Summary of Changes from Proposed Rule above and *Application of Section 4(a)(3) of the Act* below), we have determined that additional portions of Units 3 and 4, and all of Unit 5 are exempt under section 4(a)(3)(B)(i) of the Act. We are excluding the remaining portions of Unit 3 and Unit 4 under section 4(b)(2) of the Act (see Summary of Changes from Proposed Rule above and *Application of Section 4(b)(2) of the Act* below). Thus, in this final rule, we designate two critical habitat units. The critical habitat identified in each unit is shown in Table 3, and the changes of ownership due to the changed MCAS Miramar boundaries are shown in Table 4.

TABLE 3—COMPARISON OF THE 2006 FINAL CRITICAL HABITAT DESIGNATION FOR *Monardella linoides* SSP. *Viminea,* THE 2011 PROPOSED CRITICAL HABITAT DESIGNATION FOR *M. viminea,* AND THE 2012 FINAL CRITICAL HABITAT DESIGNATION FOR *M. viminea*

[**Note:** This table does not include the 255 ac (103 ha) of habitat now identified as occupied by *M. stoneana.* Further details on land ownership, exclusions and exemptions in this final rule are given in Tables 4 and 5]

Location	2006 Final critical habitat		2011 Proposed critical habitat		2012 Final critical habitat	
	Unit name	Area containing essential features ac (ha)	Unit name	Area containing essential features ac (ha)	Unit name	Area containing essential features ac (ha)
Sycamore Canyon	Unit 1 Partial 4(a)(3)(B)(i) exemption.	373 (151)	Unit 1 Partial 4(a)(3)(B)(i) exemption.	350 (142)	Unit 1 Partial 4(a)(3)(B)(i) exemption.	350 (142).
West Sycamore Canyon.		529 (214)	Unit 2 Partial 4(a)(3)(B)(i) exemption.	577 (233)	Unit 2 Partial 4(a)(3)(B)(i) exemption.	577 (234).
Spring Canyon		245 (99)	Unit 3 Partial 4(a)(3)(B)(i) exemption.	273 (111)	No name; all acres exempt or excluded.	273 (111).
East San Clemente Canyon.		638 (258)	Unit 4 Partial 4(a)(3)(B)(i) exemption.	467 (189)	No name; all acres exempt or excluded.	467 (189).
West San Clemente Canyon.		114 (46)	Unit 5 Partial 4(a)(3)(B)(i) exemption.	227 (92)	No name; complete exemption.	227 (92).
Lopez Canyon		77 (31)		0 (0)		0 (0).
Elanus Canyon		82 (33)		0 (0)		0 (0).
Rose Canyon		185 (75)		0 (0)		0 (0).
Total Habitat Containing Essential Features**.		2,242 (907)		1,894 (767)		1,894 (767).
Total Exempt		1,863 (754)		1,546 (626)		1,563 (633)
Total Excluded**.		306 (124) (excluded in 2006).		208 (84) (considered for exclusion).		210 (85) (excluded).
Total Critical Habitat.		73 (30) Designated.		348 (141) Proposed.		122 (50) Designated.

Note: Values in this table may not sum due to rounding.
** See Table 4 for acreages considered for exclusion in each unit.

The critical habitat areas described below constitute our best assessment at this time of areas that meet the definition of critical habitat. The two units we are designating as critical habitat are: (1) Sycamore Canyon, and (2) West Sycamore Canyon. Both units are currently occupied by the species. Both units are also specific areas within the geographic area occupied by the species at the time it was listed. The approximate area of each critical habitat unit is shown in Table 4, along with ownership acreages for all of the units described in the proposed rule and acreages exempt or excluded in this final rule.

TABLE 4—CRITICAL HABITAT UNITS FOR *Monardella viminea,* SHOWING ESTIMATED AREA IN ACRES (HECTARES), LAND OWNERSHIP, AREAS EXCLUDED UNDER SECTION 4(b)(2) OF THE ACT, AND AREAS EXEMPT UNDER SECTION 4(a)(3)(B)(i) OF THE ACT

Location	Federal ac (ha)	State and local ac (ha)	Private ac (ha)	Total area containing essential features ac (ha)	Area excluded ac (ha) **	Areas exempt ac (ha)	Final critical habitat ac (ha)
Unit 1. Sycamore Canyon	153 (62)	22 (9)	175 (71)	350 (142)	80 (32)	153 (62)	118 (48)
Unit 2. West Sycamore Canyon	551 (222)	26 (11)	0 (0)	577 (234)	22 (9)	551 (222)	4 (2)
Unit 3. Spring Canyon	170 (69)	5 (2)	98 (40)	273 (111)	103 (42)	170 (69)	0 (0)
Unit 4. East San Clemente Canyon	462 (187)	5 (2)	0 (0)	467 (189)	5 (2)	462 (187)	0 (0)
Unit 5. West San Clemente Canyon	227 (92)	0 (0)	0 (0)	227 (92)	0 (0)	227 (92)	0 (0)
Total Habitat Area	1,563 (633)	57 (23)	273 (111)	1,894 (767)	210 (85)	1,563 (633)	122 (50)

Note: Values in this table may not sum due to rounding.
** See Exclusions section for details of acreages excluded in each unit.

We present brief descriptions of the two critical habitat units below, and reasons why they meet the definition of critical habitat for *Monardella viminea.*

Unit 1: Sycamore Canyon

Unit 1 consists of 118 ac (48 ha), and is located in Sycamore Canyon at the northeastern boundary of MCAS Miramar, north of Santee Lakes in San Diego County, California. These acres fall within the boundaries of the City of Santee, which has no approved MSCP. This canyon is the only place where *Monardella viminea* is found in oak woodland habitat, and is one of the few areas in the range of *M. viminea* with mature riparian habitat (Rebman and Dossey 2006, p. 23). Sycamore Canyon is essential to the recovery of the species because it supports over 350 individual plants, or approximately 18 percent of the species' total population (City of San Diego 2010a, p. 257; Tierra Data 2011, p. 12), meaning this is an important unit that supports genotypes and diversity not found among the more impoverished occurrences. Additionally, this canyon is one of few that contains seedlings and juveniles (Tierra Data 2011, pp. 16–17), demonstrating that reproduction is occurring and the habitat in this unit is currently suitable to support all life-history phases of this declining species. The habitat in this unit provides redundancy and resiliency for *M. viminea* and, since there are areas of suitable habitat within the canyon where plants are not currently growing, the unit provides space for the growth and expansion of the species. This unit contains the physical or biological features essential to the conservation of *M. viminea,* including riparian channels with a natural hydrological regime, ephemeral drainages made up of rocky or sandy alluvium, sandy soil with sediment and cobble deposits, and surrounding vegetation that provides semi-open foliar cover. The PCE may require special management considerations or protection to address threats from nonnative plant species and erosion of the canyon (City of San Diego 2005, p. 68; 2006, p. 10; 2009, p. 2). Please see the *Special Management Considerations or Protection* section of this final rule for a discussion of the threats to *M. viminea* habitat and potential management considerations.

Unit 2: West Sycamore Canyon

Unit 2 consists of 4 ac (2 ha) of land owned by water districts, and is located in West Sycamore Canyon adjacent to the eastern section of MCAS Miramar, in San Diego County, California. The northernmost point of the unit is just outside the boundary of MCAS Miramar. West Sycamore Canyon, in which Unit 2 is found, is essential to the recovery of *Monardella viminea* because it contains the largest number of *M. viminea* individuals of any canyon in the species' range and over 25 percent of the species' total population (Tierra Data 2011, p. 12), meaning this is an important unit that supports genotypes and diversity not found among the more impoverished occurrences. Additionally, this canyon is one of few that contains seedlings and juveniles (Tierra Data 2011, pp. 16–17), demonstrating that reproduction is occurring and the habitat in this unit is currently suitable to support all life-history phases of this declining species. The plants in this canyon were recently observed to be in good health with little to no pressure from herbivores, in contrast to many other areas such as San Clemente or Carroll Canyon, where individuals are declining or are in poor health (Tierra Data 2011, p. 25; Ince 2010, Table 3). The habitat in this unit provides redundancy and resiliency for *M. viminea,* and because there are areas of suitable habitat within the canyon where plants are not currently growing, the unit provides space for the growth and expansion of the species. Unit 2, which contains critical habitat for *M. viminea* in that portion of West Sycamore Canyon located outside of MCAS Miramar, includes the physical or biological features essential to the conservation of *M. viminea,* including riparian channels with a natural hydrological regime, ephemeral drainages made up of rocky or sandy alluvium, sandy soil with sediment and cobble deposits, and surrounding

vegetation that provides semi-open foliar cover. The PCE in this unit may require special management considerations or protection to address threats associated with erosion from heavy rainfall events. Please see the *Special Management Considerations or Protection* section of this final rule for a discussion of the threats to *M. viminea* habitat and potential management considerations.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.,* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, or are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for *Monardella viminea.* As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for *Monardella viminea.* These activities include, but are not limited to:

(1) Actions that would alter channel morphology or geometry and resultant hydrology to a degree that appreciably reduces the value of critical habitat for either the long-term survival or recovery of the species. Such activities could include, but are not limited to: Water impoundment, channelization, or diversion; road and bridge construction (including instream structures); licensing, relicensing, or operation of dams or other water impoundments; and mining and other removal or deposition of materials. Examples of effects these activities may have on *Monardella viminea* habitat include, but are not limited to: A permanent removal or reduction of suitable space for individual and population growth, or an increase in woody or herbaceous ground cover (due to increased moisture levels in soil occupied by the species) that affects the availability of suitable habitat for reproduction and survival of *M. viminea.*

(2) Actions that would significantly affect pollinator abundance or efficacy, directly or indirectly, to a degree that appreciably reduces the value of the critical habitat for the long-term survival or recovery of the species. Such activities include, but are not limited to:

Destruction of critical habitat that contains pollinators, introduction of nonnative insects into designated critical habitat that could compete with native pollinators, clearing or trimming of other native vegetation in designated critical habitat in a manner that diminishes appreciably its utility to support *Monardella viminea* pollinators (such as clearing vegetation for fuels control), and application of pesticides.

(3) Actions that would significantly alter sediment deposition patterns and rates within a stream channel to a degree that appreciably reduces the value of the critical habitat for the long-term survival or recovery of the species. Such activities include, but are not limited to: Excessive sedimentation from road construction; excessive recreational trail use; residential, commercial, and industrial development; aggregate mining; and other watershed and floodplain disturbances. These activities may reduce the amount and distribution of suitable habitat for individual and population growth, and reduce or change habitat quality for reproduction, germination, and development.

(4) Actions that would significantly alter biotic features to a degree that appreciably reduces the value of the critical habitat for both the long-term survival or the recovery of the species. Such activities include, but are not limited to: Modifying the habitats that support *Monardella viminea,* including coastal sage scrub, riparian scrub, and (in some areas) riparian oak woodland. These activities may include large-scale application of herbicides, release of chemicals or other toxic substances, or activities that increase the possibility of accidental sewage outflows. These activities may reduce the amount or quality of suitable habitat for individuals and populations; reduce or change sites for reproduction and development; or reduce the quality of water, light, minerals, or other nutritional or physiological requirements.

(5) Actions that could contribute to the introduction or support of nonnative species into critical habitat to a degree that could appreciably reduce the value of the critical habitat for the long-term survival or recovery of *Monardella viminea.* Such activities include, but are not limited to: Landscape disturbance or plant introductions that result in increased numbers of individuals and taxa of nonnative species for landscape or erosion control purposes, or addition of nutrients that would fertilize nonnative plant taxa. These activities may reduce the suitable space for individual and population growth, reduce or change sites for reproduction and development of offspring, and introduce or support nonnative plant taxa that compete with *M. viminea.*

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

We consult with the military on the development and implementation of INRMPs for installations with federally listed species. We analyzed the INRMP developed by MCAS Miramar, the only military installation located within the range of the critical habitat designation for *Monardella viminea,* to determine if the military lands are exempt under section 4(a)(3) of the Act.

Marine Corps Air Station Miramar (MCAS Miramar)

Marine Corps Air Station Miramar has an approved INRMP (Gene Stout and Associates *et al.* 2011) that addresses *Monardella viminea,* and the Marine Corps has committed to working closely with the Service and CDFG to continually refine the existing INRMP as part of the Sikes Act's INRMP review process. In accordance with section 4(a)(3)(B) of the Act, the Secretary has determined that conservation efforts identified in the INRMP provide a benefit to *M. viminea* occurring on MCAS Miramar (see the following section that details this determination). Therefore, the 1,563 ac (633 ha) of habitat occupied by *M. viminea* at the time of listing, on which are found the physical or biological features essential to its conservation and thus are qualified for consideration as critical habitat on MCAS Miramar, are exempt from this critical habitat designation for *M. viminea* under section 4(a)(3)(B)(i) of the Act. The rationale for this exemption is the same as it was for the 2006 designation (71 FR 65662, November 8, 2006).

In the previous final critical habitat designation for *Monardella viminea,* we determined that essential habitat on MCAS Miramar is exempt from the designation of critical habitat (71 FR 65662, November 8, 2006), and we do so again in this revised designation. We base this decision on the conservation benefits to *M. viminea* identified in the INRMP developed by MCAS Miramar in May 2000 and the updated INRMP prepared by MCAS Miramar in April 2011 (Gene Stout and Associates *et al.* 2011). We determined that conservation efforts identified in the INRMP provide a benefit to *M. viminea* on MCAS Miramar (Gene Stout and Associates *et al.* 2011, section 7–19). We reaffirm that continued conservation efforts on MCAS Miramar provide a benefit to *M. viminea.* Therefore, lands containing features essential to the conservation of *M. viminea* on this installation are exempt from this critical habitat designation for *M. viminea* under section 4(a)(3)(B)(i) of the Act.

Provisions in the INRMP for MCAS Miramar benefit *Monardella viminea* by requiring efforts to avoid and minimize impacts to this species and riparian watersheds. All suitable habitat for *M. viminea* is managed as specified for Level I or Level II Habitat Management Areas defined by the INRMP (Kassebaum 2010, pers. comm.). Under the INRMP, Level I Management Areas receive the highest conservation priority of the various management areas on

MCAS Miramar. The conservation of watersheds in the Level I Management Areas is achieved through:

(1) Education of base personnel,

(2) Implementation of proactive measures that help avoid accidental impacts (such as signs and fencing),

(3) Development of procedures to respond to and restore accidental impacts, and

(4) Monitoring of *M. viminea* occurrences on MCAS Miramar (Gene Stout and Associates *et al.* 2011, p. 7–19).

Additionally, MCAS Miramar's environmental security staff reviews projects and enforces existing regulations and base orders that avoid and minimize impacts to natural resources, including *Monardella viminea* and its habitat. The INRMP for MCAS Miramar provides a benefit to *M. viminea* and includes measures designed to prevent degradation or destruction of the species' riparian habitat.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that *Monardella viminea,* habitat on MCAS Miramar is subject to the MCAS Miramar INRMP, and that conservation efforts identified in the INRMP provide and will continue to provide a benefit to *M. viminea* occurring in habitats within and adjacent to MCAS Miramar. Therefore, lands within this installation are exempt from critical habitat designation under section 4(a)(3) of the Act. We are not including approximately 1,563 ac (633 ha) of habitat in this critical habitat designation because of this exemption.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion would not result in the extinction of the species.

When identifying the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus; the educational benefits of mapping essential habitat for recovery of the listed species; and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

When identifying the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to avoid concentrated economic impacts or impacts to national security, or whether exclusion may result in conservation; the continuation, strengthening, or encouragement of partnerships; or the implementation of a management plan that provides equal to or more conservation than a critical habitat designation would provide, among other factors. For example, we consider our continued ability to seek new partnerships with future plan participants including the State, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within approved management plan areas are designated as critical habitat, it would likely have a negative effect on our existing partnerships and negatively affect our ability to establish new partnerships to develop and implement these plans, particularly plans that address landscape-level conservation of species and habitats. By excluding these lands, we preserve our current partnerships, promote future partnerships, and encourage additional conservation actions in the future.

When we evaluate conservation plans when considering the benefits of exclusion, we consider a variety of factors. We consider the benefits of working relationships we have formed with Federal, State, local and private entities and potential conservation agreements that may stem from those partnerships. Additionally, we consider factors including, but not limited to, whether the plan is finalized, how it provides for the conservation of the essential physical or biological features, whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future, whether the conservation strategies in the plan are likely to be effective, and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation. If the benefits of exclusion outweigh the benefits of inclusion and exclusion will not result in extinction, the Secretary may exercise his discretion to exclude the area.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we prepared a draft economic analysis of the proposed critical habitat designation and related factors (Industrial Economics Inc., 2011). The draft analysis, dated August 25, 2011, was made available for public review from September 28, 2011, through October 28, 2011 (76 FR 59990). Following the close of the comment period, a final analysis of the potential economic effects of the designation was developed, taking into consideration the public comments and any new information (Industrial Economics Inc., 2012).

The intent of the final economic analysis (FEA) is to identify and analyze the potential economic impacts of designating critical habitat for *Monardella viminea.* Some of these costs will likely be incurred regardless of whether we designate critical habitat (baseline). The economic impact of the final critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.'' The ''without critical

habitat'' scenario represents the baseline for the analysis, considering protections already in place for the species (for example, under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The ''with critical habitat'' scenario describes the incremental impacts specifically associated with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur with the designation of critical habitat.

The FEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The FEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decisionmakers can use this information to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, the FEA looks retrospectively at costs that have been incurred since the species was listed in 1998 (63 FR 54938, October 13, 1998), and considers those costs that may occur in the 19 years following the designation of critical habitat. This 19-year period was determined to be appropriate as it encompassed the available planning information for one of the two entities involved in the analysis, (its activities are forecast to the year 2030), and because limited planning information was available for most activities to forecast activity levels for projects beyond a 19-year timeframe (Industrial Economics Inc. 2011, p. 2–14). The FEA quantifies economic impacts of *Monardella viminea* conservation efforts associated with the following categories of activity: Transportation and construction.

The FEA determined that only minor economic impacts are likely to result from critical habitat designation. This conclusion stems from the following factors: (1) In the proposed rule, we identified 210 ac (85 ha) of lands covered by HCPs that protect the species and its habitat within the City of San Diego and County of San Diego MSCP Subarea Plans, and these 210 acres (85 ha) have been excluded in this final rule from critical habitat due to conservation partnerships (see *Exclusions Based on Other Relevant Impacts* below)); (2) as all critical habitat units are occupied, consultation would occur regardless of the designation of critical habitat; and (3) modifications to the project to avoid jeopardy to *Monardella viminea* and those to avoid adverse modification of critical habitat are indistinguishable (Industrial Economics Inc. 2012, p. ES–2). Further, those administrative costs resulting from critical habitat designation are minor (total undiscounted costs of $10,000) (Industrial Economics Inc. 2012, Table ES–1). Consequently, the Secretary has determined not to exercise his discretion to exclude any areas from this designation of critical habitat for *Monardella viminea* based on economic impacts.

A copy of the FEA with supporting documents may be obtained by contacting the Carlsbad Fish and Wildlife Office (see **ADDRESSES**) or by downloading from the Internet at *http://www.regulations.gov.*

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense where a national security impact might exist. In preparing this rule, we have exempted from the designation of critical habitat those lands on MCAS Miramar because the base has an approved INRMP that the Marine Corps is implementing and that we have concluded provides a benefit to *Monardella viminea.*

In this final rule, we have determined that there are no other lands within the designation of critical habitat that are owned or managed by the Department of Defense, and, therefore, we anticipate no impact on national security. Consequently, the Secretary is not exercising his discretion to exclude any areas from this final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts in addition to economic impacts and impacts on national security. We consider a number of factors, including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

Land and Resource Management Plans, Conservation Plans, or Agreements Based on Conservation Partnerships

Based on the information provided by entities seeking exclusion, as well as any additional public comments we received, we evaluated whether certain lands covered by existing HCPs in the critical habitat units were appropriate for exclusion from this final designation pursuant to the ''other relevant factor'' criterion of section 4(b)(2) of the Act. For the reasons summarized below, the Secretary determined to exercise his discretion to exclude essential habitat covered by the City of San Diego Subarea Plan and the County of San Diego Subarea Plan under the MSCP from the revised critical habitat designation for *Monardella viminea.* Table 5 provides approximate areas (ac, ha) of lands that meet the definition of critical habitat but are excluded under section 4(b)(2) of the Act from the final critical habitat rule.

TABLE 5—AREAS EXCLUDED UNDER SECTION 4(b)(2) OF THE ACT FROM THIS FINAL CRITICAL HABITAT DESIGNATION FOR *Monardella Viminea*

Unit **	Area covered by City of San Diego Subarea Plan (ac (ha))	Area covered by County of San Diego Subarea Plan (ac (ha))
1. Sycamore Canyon	47 (19)	32 (13)
2. West Sycamore Canyon	22 (9)	0 (0)
3. Spring Canyon	103 (42)	0 (0)
4. East San Clemente Canyon	5 (2)	0 (0)
Total ***	177 (72)	32 (13)

Note: Values in this table may not sum due to rounding.
** The areas being excluded that are noted in this table are included in Tables 3 and 4 above.
*** All areas covered by HCPs (City of San Diego Subarea Plan under the MSCP and County of San Diego Subarea Plan under the MSCP) are excluded.

In evaluating whether to exclude areas covered by a current land management or conservation plan (HCPs as well as other types), we consider whether:

(1) The plan is complete and provides a level of protection from adverse modification or destruction similar to or greater than that provided through a consultation under section 7 of the Act;

(2) There is a reasonable expectation that the conservation management strategies and actions will be implemented for the foreseeable future, based on past practices, written guidance, or regulations; and

(3) The plan provides conservation strategies and measures consistent with currently accepted principles of conservation biology.

In the case of plant species such as *Monardella viminea,* we also consider that including conservation measures to protect listed plant species and their habitats in an HCP or other conservation plan is voluntary. In contrast to listed wildlife species, the Act does not prohibit take of listed plant species. Further, an incidental take permit (ITP) under section 10 of the Act is not required to authorize impacts to listed plants. For this reason, the Service actively supports and encourages the voluntary inclusion of measures to protect listed plants and their habitats in an HCP or other conservation plan by plan proponents. The prospect of potentially avoiding a designation of critical habitat for a plant species provides a meaningful incentive to plan proponents to extend protections for plants and their habitat under a conservation plan. Achieving comprehensive, landscape-level protection for plant species, particularly narrow endemic plant species such as *M. viminea,* through their inclusion in regional conservation plans, provides a key conservation benefit for such species. Our consideration of the City of San Diego and County of San Diego Subarea Plans under section 4(b)(2) of the Act acknowledges the voluntary, proactive conservation measures undertaken by the City and County to protect *M. viminea* under these plans.

Taking into account all of the above factors, we conclude that essential habitat covered by the City of San Diego Subarea Plan and the County of San Diego Subarea Plan under the San Diego MSCP warrants exclusion from revised critical habitat for *Monardella viminea,* and we are excluding non-Federal lands covered by these plans.

The MSCP is a comprehensive habitat conservation planning program that encompasses 582,243 ac (235,626 ha) within 12 jurisdictions of southwestern San Diego County. The MSCP is a subregional plan that identifies the conservation needs of 85 federally listed and sensitive species, including *Monardella viminea,* and serves as the basis for development of subarea plans by each jurisdiction in support of section 10(a)(1)(B) permits. The subregional MSCP identifies where mitigation activities should be focused, such that upon full implementation of the subarea plans approximately 171,920 ac (69,574 ha) of the 582,243-ac (235,626-ha) MSCP plan area will be preserved and managed for covered species (County of San Diego 1998, pp. 2–1, 4–2–4–4). Conservation of *Monardella viminea* is addressed in the subregional plan, and in the City and County of San Diego Subarea Plans. The City and County Subarea Plans identify areas where mitigation activities should be focused to create its preserve areas (Multi-Habitat Planning Area (MHPA) or Pre-Approved Mitigation Area (PAMA)). Those areas of the MSCP preserve that are already conserved, as well as those designated for inclusion in the preserve under the plan, are referred to as the ''preserve area'' in this final critical habitat designation. When completed at the end of the 50-year permit term, the public sector (Federal, State, and local government, and the general public) will have contributed 108,750 ac (44,010 ha) (63.3 percent) to the preserve, of which 81,750 ac (33,083 ha) (48 percent) was existing public land when the MSCP was established, and 27,000 ac (10,927 ha) (16 percent) will have been acquired. At completion, the private sector will have contributed 63,170 ac (25,564 ha) (37 percent) to the preserve as part of the development process, either through avoidance of impacts or as compensatory mitigation for impacts to biological resources outside the preserve. Currently, and in the future, Federal and State governments, local jurisdictions and special districts, and managers of privately owned land will manage and monitor their land in the preserve for species and habitat protection (MSCP 1998, pp. 2–1, 4–2—4–4).

The City and County Subarea Plans include multiple conservation measures that provide benefits to *Monardella viminea.* To date, the City of San Diego has conserved within the boundaries of the MHPA 100 percent of *M. viminea* major occurrences and 100 percent habitat for *M. viminea* that we identified as essential in our critical habitat analysis (see the *Criteria Used to Identify Critical Habitat* section above). Additionally, 100 percent of *M. viminea* occurrences and 100 percent of essential habitat for *M. viminea* within the boundaries of the County subarea plan (a total of 2 percent of all *M. viminea* habitat) has been conserved in the Sycamore Canyon Preserve.

The MSCP requires the City and the County to develop framework and site-specific management plans, subject to the review and approval of the Service and CDFG, to guide the management of

all preserve land under City and County control. Currently, the framework plans for both the City and the County are in place. The County of San Diego has also developed a site-specific management plan for the one area under its ownership that contains *Monardella viminea* (Sycamore Canyon), which incorporates requirements to monitor and adaptively manage *M. viminea* habitat over time (City of San Diego 1997, p. 127). The City has not yet completed site-specific management plans for some preserve lands containing *M. viminea,* including lands we proposed for revised critical habitat designation on June 9, 2011 (76 FR 33880). However, the City is in the process of drafting a management plan for the Mission Trails area, which includes *M. viminea* occurrences in Spring Canyon (EO 26) (Miller 2011, pers. comm.). The plan specifically addresses *M. viminea* through removal of nonnative vegetation, habitat restoration, and implementation of a managed fire regime with a priority of protecting biological resources (DPR 2009, pp. 71, 76–77). Additionally, the plan mandates management to address the ''natural history of the species and to reduce the risk of catastrophic fire,'' possibly including prescribed fire (DPR 2009, p. 71). The City of San Diego has also completed a natural resource management plan for the Los Peñasquitos Canyon Preserve, which covers *M. viminea* habitat (EO 1) that does not meet the definition of essential habitat (see the *Criteria Used to Identify Critical Habitat* section above).

The MSCP also provides for a biological monitoring program, and *Monardella viminea* is identified as a first priority species for field monitoring under both the City and County Subarea Plans. Currently, the County of San Diego does not monitor the one occurrence of *M. viminea* in its jurisdiction, but anticipates that monitoring will begin in 2013 (City of San Diego 2011b, pp. 4–5). The City of San Diego monitors its occurrences in Sycamore Canyon and Lopez Canyon on an annual basis, although no monitoring has yet been completed at other locations including Spring Canyon (EO 26). Under the County's subarea plan, Group A plant species, including *M. viminea,* are conserved following guidelines outlined by the County's Biological Mitigation Ordinance, which uses a process that:

(1) Requires avoidance to the maximum extent feasible,

(2) Allows for a maximum 20 percent encroachment into a population if total avoidance is not feasible, and

(3) Requires mitigation at the 1:1 to 3:1 (in kind) for impacts if avoidance and minimization of impacts would result in no reasonable use of the property.

We are exercising our delegated discretion to exclude from critical habitat a portion of Unit 1 covered by the County of San Diego Subarea Plan under section 4(b)(2) of the Act. This area encompasses approximately 32 ac (13 ha) of land. We are also exercising our delegated discretion to exclude from critical habitat portions of Units 1–4 covered by the City of San Diego Subarea Plan under section 4(b)(2) of the Act. This area encompasses 177 ac (72 ha) of land. All essential habitat on non-federal lands covered by HCPs (City of San Diego Subarea Plan under the MSCP and County of San Diego Subarea Plan under the MSCP) are excluded from the final critical habitat designation.

Benefits of Inclusion—City of San Diego Subarea Plan and the County of San Diego Subarea Plan Under the San Diego MSCP

The principal benefit of including an area in a critical habitat designation is the creation of a Federal nexus through section 7(a)(2) of the Act. This section upholds the requirement for Federal agencies to ensure actions they fund, authorize, or carry out are not likely to result in the destruction or adverse modification of any designated critical habitat. Section 7(a)(2) also requires that Federal agencies must consult with us on actions that may affect a listed species and refrain from undertaking actions that are likely to jeopardize the continued existence of such species.

The benefits of inclusion of habitat within the critical habitat involves, in part, identifying the regulatory benefit of critical habitat. Determining these benefits is not always straightforward. The analysis of effects of a proposed project on critical habitat is both separate from and different from that of the effects of a proposed project on the species itself. The jeopardy analysis evaluates the action's impact to survival and recovery of the species, while the destruction or adverse modification analysis evaluates how the action could affect the value of critical habitat to the listed species. Therefore, the difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. The addition of this regulatory benefit will, in many instances, lead to different results and give rise to different regulatory requirements that will then apply to the proposed project. Thus, critical habitat designations may provide greater benefits to the recovery of a species than would be provided by listing alone.

However, for some species, and in some locations, the outcome of these analyses will be similar because effects to habitat will often also result in effects to the species. Though a jeopardy and adverse modification analysis must satisfy two different standards, any modifications to proposed actions resulting from a section 7 consultation to minimize or avoid impacts to *Monardella viminea* will be habitat-based. Because *M. viminea* requires properly functioning ephemeral streams, drainages, and floodplains, any alteration of that system will also likely be detrimental to the individual plants located in that system. Additionally, all lands considered for exclusion are currently considered occupied by *M. viminea* and will be subject to the consultation requirements of the Act in the future regardless of critical habitat designation. Thus, it is difficult to differentiate measures implemented solely to minimize impacts to the critical habitat from those implemented to minimize impacts to *M. viminea.* Therefore, in the case of *M. viminea,* we believe any additional regulatory benefits of critical habitat designation would be minimal because the regulatory benefits from designation are essentially indistinguishable from the benefits of listing.

Another possible benefit of including lands in a critical habitat designation is that the designation can serve to educate landowners and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high conservation value for certain species. Any information about *Monardella viminea* and its habitat that reaches a wide audience, including parties engaged in conservation activities, is valuable. In the case of *M. viminea,* however, there have already been multiple occasions when the public has been educated about the species. The framework regional San Diego MSCP was developed over a 7-year period, while the City and County Subarea plans have been in place for over a decade. Implementation of the subarea plans is formally reviewed yearly through publicly available annual reports and a public meeting, again providing extensive opportunity to educate the public and landowners about the location of, and efforts to conserve, essential *M viminea* habitat. As discussed above, the permit holders of the City and County Subarea Plans are aware of the value of these lands to the conservation of *M. viminea,* and conservation measures are already in

place to protect essential *M. viminea* and its habitat.

Furthermore, essential habitat covered by the City and County Subarea plans was included in the proposed designation published in the **Federal Register** on June 9, 2011 (76 FR 33880). This publication was announced in a press release and information was posted on the Service's Web site, which ensured that the proposal reached a wide audience. Therefore, the educational benefits of critical habitat designation (such as providing information to the City and other stakeholders on areas important to the long-term conservation of this species) have already been realized through development and ongoing implementation of the City and County Subarea plans, by proposing these areas as critical habitat, and through the Service's public outreach efforts.

Critical habitat designation can also result in ancillary conservation benefits to *Monardella viminea* by triggering additional review and conservation through other Federal and State laws. The primary State laws that might be affected by critical habitat designation are CEQA and CESA. However, essential habitat within the City and County has been identified in the Subarea plans and is either already protected or targeted for protection under the plans. Thus review of development proposals affecting essential habitat under CEQA by the City and County already takes into account the importance of this habitat to the species and the protections required for the species and its habitat under the Subarea plans. Similarly, because *M. viminea* is a State-listed endangered species under CESA, and CDFG is a signatory to the MSCP and City and County Subarea plans under the NCCP Act, the designation of critical habitat within the City and County would not result in additional conservation for the species and its habitat than currently exists under State law. The Federal law most likely to afford protection to designated *M. viminea* habitat is the Clean Water Act (CWA). Projects requiring a permit under the CWA, such as a fill permit under section 404 of the CWA, and that are located within critical habitat or are likely to affect critical habitat would trigger section 7 consultation under the Act. However, as discussed above, we conclude the potential regulatory benefits resulting from designation of critical habitat would be negligible because the outcome of a future section 7 consultation would not result in greater conservation for essential *M. viminea* habitat than currently is provided for under the City and County Subarea plans.

Based on the above discussion, we believe section 7 consultations for critical habitat designation conducted under the standards required by the Ninth Circuit Court in the *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service* decision would provide little conservation benefit and would be largely redundant with those benefits already provided by the City and County Subarea Plans. Therefore, we determine the regulatory benefits of designating those acres as *Monardella viminea* critical habitat, such as protection afforded through the section 7(a)(2) consultation process, are minimal. We also conclude that the educational and ancillary benefits of designating essential habitat covered by the City and County Subarea plans would be negligible because the location of essential habitat for this species within the City and County and the importance of conserving such habitat is well known through development and implementation of the Subarea plans and the independent regulatory protection already provided under CEQA, CESA, and the City and County Subarea plans.

Benefits of Exclusion—City of San Diego Subarea Plan and the County of San Diego Subarea Plan Under the San Diego MSCP

The benefits of excluding from designated critical habitat the approximately 177 ac (72 ha) of land within the boundaries of the City of San Diego Subarea Plan and 32 ac (13 ha) of land within the County of San Diego Subarea Plan are significant. The benefits of excluding essential habitat covered by these plans include: (1) Continuance and strengthening of our effective working relationships with all MSCP jurisdictions and stakeholders to promote the voluntary conservation of *Monardella viminea* and its habitat; (2) allowance for continued meaningful collaboration and cooperation in working toward recovering this species, including conservation benefits that might not otherwise occur; (3) encouragement of other jurisdictions with completed subarea plans under the MSCP to amend their plans to cover and benefit *M. viminea* and its habitat; (4) encouragement of other jurisdictions to complete subarea plans under the MSCP (including the cities of Poway and Santee) that cover or are adjacent to *M. viminea* habitat; and (5) encouragement of additional HCP and other conservation plan development in the future on other private lands that include *M. viminea* and other federally listed plant species.

We developed close partnerships with the City and County of San Diego and several other stakeholders through the development of the City and County Subarea Plans, which voluntarily incorporate appropriate protections and management for *Monardella viminea,* its habitat, and the physical or biological features essential to the conservation of this species. Those protections are consistent with statutory mandates under section 7 of the Act to avoid destruction or adverse modification of critical habitat. Furthermore, these plans go beyond that requirement by including active management and protection of essential habitat areas. By excluding the approximately 177 ac (72 ha) of land within the boundaries of the City of San Diego Subarea Plan and 32 ac (13 ha) within the County of San Diego Subarea Plan from critical habitat designation, we are eliminating a redundant layer of regulatory review for projects covered by the City and County Subarea Plans and encouraging new voluntary partnerships with other landowners and jurisdictions to protect *M. viminea* and other listed plant species. As discussed above, the prospect of potentially avoiding a future designation of critical habitat provides a meaningful incentive to plan proponents to extend voluntary protections to endangered and threatened plants and their habitat under a conservation plan. Achieving comprehensive, landscape-level protection for plant species, particularly narrow endemic plant species such as *M. viminea,* through their inclusion in regional conservation plans, provides a key conservation benefit for such species. Our ongoing partnerships with the City and County, the larger regional MSCP participants, and the landscape-level multiple species conservation planning efforts they promote, are essential to achieve long-term conservation of *M. viminea.*

As noted earlier, some HCP permittees have expressed the view that designation of lands covered by an HCP devalues the conservation efforts of plan proponents and the partnerships fostered through the development and implementation of the plans and would discourage development of additional HCPs and other conservation plans in the future. Where an existing HCP provides for protection for a species and its essential habitat within the plan area, particularly with regard to a listed plant species, or where the existence of a Federal nexus for future activities is uncertain, the benefits of preserving existing partnerships by excluding the

covered lands from critical habitat are most significant. Excluding lands owned by or under the jurisdiction of the permittees of an HCP, under these circumstances, promotes positive working relationships and eliminates impacts to existing and future partnerships while encouraging development of additional HCPs for other species.

Large-scale HCPs, such as the regional MSCP and subarea plans issued under its framework, take many years to develop and foster an ecosystem-based approach to habitat conservation planning, by addressing conservation issues through a coordinated approach. If local jurisdictions were to require landowners to obtain ITPs under section 10 of the Act individually prior to the issuance of a building permit, the local jurisdiction would incur no costs associated with the landowner's need for an ITP. However, this approach would result in uncoordinated, ''patchy'' conservation that would be less likely to achieve listed species recovery and almost certainly would result in less protection for listed plant species, which do not require an ITP. We, therefore, want to continue to foster partnerships with local jurisdictions to encourage the development of regional HCPs that afford proactive, landscape-level conservation for multiple species, including voluntary protections for covered plant species. We believe the exclusion from critical habitat of covered lands subject to protection and management under such plans will promote such partnerships and result in greater protection for listed species, particularly plant species, than would be achieved through section 7 consultation.

The Benefits of Exclusion Outweigh the Benefits of Inclusion—City of San Diego Subarea Plan and the County of San Diego Subarea Plan Under the San Diego MSCP

We reviewed and evaluated the exclusion of approximately 177 ac (72 ha) of land within the boundaries of the City of San Diego Subarea Plan and 32 ac (13 ha) within the County of San Diego Subarea Plan from our revised designation of critical habitat, and we determined the benefits of excluding these lands outweigh the benefits of including them. The benefits of including these lands in the designation are small because the regulatory, educational, and ancillary benefits that would result from critical habitat designation are almost entirely redundant with the regulatory, educational, and ancillary benefits already afforded through the City and County Subarea Plans and under State and Federal law. In contrast to the minor benefits of inclusion, the benefits of excluding lands covered by the City and County Subarea Plans from critical habitat are significant. Exclusion of these lands from critical habitat will help preserve the partnerships we developed with local jurisdictions and project proponents through the development and ongoing implementation of the MSCP and the City and County Subarea Plans, and aid in fostering future partnerships for the benefit of listed species. Designation of lands covered by the City and County Subarea Plans may discourage other partners from seeking, amending, or completing subarea plans under the MSCP framework plan or from pursuing other HCPs that cover *M. viminea* and other listed plant species. Designation of critical habitat does not require that management or recovery actions take place on the lands included in the designation. The City and County Subarea Plans, however, will provide for significant conservation and management of *Monardella viminea* habitat and help achieve recovery of this species through habitat enhancement and restoration, functional connections to adjoining habitat, and species monitoring efforts. Additional HCPs or other species-habitat plans potentially fostered by this exclusion would also help to recover this and other federally listed species. Therefore, in consideration of the relevant impact to current and future partnerships, as summarized in the *Benefits of Exclusion* section above, we determined the significant benefits of exclusion outweigh the minor benefits of critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—City of San Diego Subarea Plan and the County of San Diego Subarea Plan Under the San Diego MSCP

We determined that the exclusion of 177 ac (72 ha) of land within the boundaries of the City of San Diego Subarea Plan and 32 ac (13 ha) of land within the boundaries of the County of San Diego Subarea Plan from the designation of critical habitat for *Monardella viminea* will not result in extinction of the species. The jeopardy standard of section 7 of the Act and routine implementation of conservation measures through the section 7 process due to *M. viminea* occupancy and protection provided by the City and County Subarea Plans provide assurances that this species will not go extinct as a result of excluding these lands from the critical habitat designation. Therefore, based on the above discussion, the Secretary is exercising his discretion to exclude 177 ac (72 ha) of land within the boundaries of the City of San Diego Subarea Plan and 32 ac (13 ha) of land within the boundaries of the County of San Diego Subarea Plan from this final critical habitat designation.

Summary of Comments and Recommendations

We requested written comments from the public, during two comment periods, on: the proposed retention of the listing status of *Monardella viminea* as endangered; the proposed removal of protections afforded by the Act from those individual plants now recognized as a separate species, *M. stoneana;* and the proposed critical habitat for *M. viminea.* The first comment period associated with the publication of the proposed rule (76 FR 33880) opened on June 9, 2011, and closed on August 8, 2011. We also requested comments on the proposed critical habitat designation and associated draft economic analysis during a comment period that opened on September 28, 2011, and closed on October 28, 2011 (76 FR 59990). We did not receive any requests for a public hearing. We also contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule and draft economic analysis during these comment periods.

During the first comment period, we received six comment letters directly addressing the actions described in the proposed rule. During the second comment period, we received no comment letters addressing the actions described in the proposed rule or the draft economic analysis. All substantive information provided during these comment periods has either been incorporated directly into this final determination or addressed below. Comments we received were grouped into three general issue categories specifically relating to: the proposed retention of the listing status of *Monardella viminea* as endangered; the proposed removal of protections afforded by the Act from those individuals now recognized as a separate species, *M. stoneana;* and the proposed critical habitat for *M. viminea.* These are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions

from three knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received a response from one of the peer reviewers.

We reviewed all comments received from the peer reviewer for substantive issues and new information regarding the actions described in this proposed rule. While the peer reviewer supported the determinations made by the rule, the reviewer requested clarification on critical habitat designation and threats to *Monardella viminea* and *M. stoneana.* The peer reviewer also provided suggestions on additional information and analysis to add to the rule. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Reviewer Comments

Comments About *Monardella viminea*

(1) *Comment:* The peer reviewer was supportive of the proposed rule. The reviewer stated that the proposed designation of critical habitat is important to the conservation of *Monardella viminea,* and that the Service had presented a thorough review of scientific literature related to the taxonomic split of *M. linoides* ssp. *viminea.*

Our Response: We appreciate the peer reviewer's comment.

(2) *Comment:* The peer reviewer recommended that we provide further discussions of hydrological regime in watersheds where Monardella viminea is found, and its influence on habitat dynamics for the species.

Our Response: We have updated the Factor A analysis to include information on changing watershed conditions in the range of *Monardella viminea.* However, we were only able to find information on the Los Peñasquitos watershed, containing Lopez and Carroll Canyons, and only information current to the year 2000. We invite anyone with additional or more recent detailed information on hydrological regimes relating to *M. viminea* to submit it to our Carlsbad Fish and Wildlife Office (see the **FOR FURTHER INFORMATION CONTACT** section above).

(3) *Comment:* The peer reviewer noted the dual role of scouring floods within drainages containing *Monardella viminea;* floods have the potential to destroy sandbars hosting *M. viminea* occurrences, but also can create new habitat and remove nonnative vegetation. The reviewer recommends discussing this aspect of the hydrological regime both in the five-factor analysis and in the description of the PCE.

Our Response: In the description of physical or biological features for the proposed rule and this final rule, we included a description of the importance of a natural hydrological regime in creating habitat and removing nonnative vegetation (see the *Physical or Biological Features* section above). Additionally, we include the dual role of scouring floods in the PCE (see the Primary Constituent Elements for *Monardella viminea* section above). Further, in the Factor A analysis for both species, we stated that ''*Monardella viminea* requires a natural hydrological system to maintain the secondary benches and streambeds on which it grows (Scheid 1985, pp. 30–31, 34–35). Additionally, areas where altered hydrology caused decreased flows may experience an increase in invasion by nonnative species into creek beds, which can smother seedling and mature plants, and prevent natural growth of *M. viminea* (Rebman and Dossey 2006, p. 12). We believe this adequately covers the dual role of flood regime in *M. viminea* and *M. stoneana* habitat.

(4) *Comment:* The peer reviewer recommended addressing any efforts to discover previously unknown *Monardella viminea* occurrences and an evaluation of the likelihood that other unknown occurrences may exist.

Our Response: Researchers at MCAS Miramar regularly survey all suitable habitat on the base for *Monardella viminea.* The Service is also aware of recent surveys conducted within previously unsurveyed side channels of Spring Canyon. New *M. viminea* plants were found during this survey (Friends of Los Peñasquitos Canyon Preserve, Inc. 2011, p. 11). Surveys have been conducted by species experts across the current range of the species, but have not confirmed any new occurrences, although a few unsurveyed canyons outside the currently occupied range of the species do remain (Burrascano 2011, pers. comm.; Kelly 2011, pers. comm.). Otherwise, most yearly monitoring focuses on known occurrences.

The species is distinctive in appearance and not easily confused with other plants when in bloom; however, during the fall, the plant dies back and could be overlooked, particularly within areas with high nonnative plant density. Therefore, we consider the discovery of previously unknown *Monardella viminea* occurrences to be possible, but we have no further survey information than what is presented here, which is the best available scientific information.

(5) *Comment:* The peer reviewer requested more information on the statement that ''all canyon areas on the base are protected from development.'' Three comment letters addressed the same sentence, noting that it was in error.

Our Response: We acknowledge that our phrasing did not accurately convey the state of protections afforded by the INRMP. We have clarified the text within the Factor D analysis for *Monardella viminea* with language from the updated INRMP that better explains land management within canyons on MCAS Miramar. The Level 1 or Level II management areas where almost all *M. viminea* occurrences are found provide measures to maintain and enhance habitat for sensitive species, such as *M. viminea,* while maintaining maximum compatible use for operational requirements. Management measures include minimizing the effects of planned actions on endangered species, posting signs identifying sensitive habitats, and avoiding threats such as trampling.

(6) *Comment:* The peer reviewer asked if protections in the canyons on MCAS Miramar extended upstream and would thus protect the plant from altered hydrology.

Our Response: As discussed under Factor A for *Monardella viminea,* all riparian areas on the base fall within Level I or Level II management areas. Furthermore, the INRMP requires all construction in riparian areas to contain measures for impact avoidance, minimization, and compensation, including measures to reduce stormwater runoff and erosion (Gene Stout and Associates *et al.* 2011, Tables 6.2.2.2a and 6.2.2.2b). Therefore, the protections do extend upstream and provide measures to counter altered hydrology that could impact *M. viminea.*

(7) *Comment:* The peer reviewer recommended adding a discussion of threats to *Monardella viminea* and its habitat due to habitat fragmentation and edge effects. Specifically, the commenter recommended discussing: Barriers to seed or pollen dispersal; trampling; introduction of nonnative species; runoff from pesticides, herbicides, and fertilizers; and other results of human land use.

Our Response: During the first open comment period, we received additional information on trampling and weed introductions, and we have added it to the rule (see the Factor E analyses for both species).

In regard to edge effects, we do not consider edge effects in and of themselves as a threat, but rather as a

portion of fragmented habitat where threats are more likely to occur. One consequence of edge effects, an increased presence of nonnative species, is discussed in both the Factor A and Factor E analyses for *Monardella viminea.* With regard to habitat fragmentation, we have added a discussion of threats due to habitat fragmentation to the Factor A analysis for *M. viminea.*

With regard to runoff from pesticides, herbicides, and fertilizers, we have not reviewed any information that shows impacts from those factors on *Monardella viminea* or *M. stoneana.* We have listed runoff as an action that may require section 7 consultation in the *Application of the ''Adverse Modification'' Standard* section in our inclusion of activities that could ''significantly alter biotic features to a degree that appreciably reduces the value of the critical habitat for both the long-term survival or the recovery of the species.'' These activities may include large-scale application of herbicides, release of chemicals or other toxic substances, or activities that increase the possibility of accidental sewage outflows.'' However, the best available scientific information does not currently demonstrate that runoff is, or has previously been, a threat impacting either of the two species.

Comments About *Monardella stoneana*

(8) *Comment:* The peer reviewer and three commenters requested a further clarification to the discussion of small population size as it relates to *Monardella stoneana,* including demographic and genetic consequences of reducing small populations into smaller, increasingly isolated populations. Two commenters further noted that a population the size of *M. stoneana* would be vulnerable to stochastic risks. Additionally, the peer reviewer thought the current discussion on small population size would be stronger if it included an expanded discussion of *M. stoneana's* habitat and demographic stability, and provided more specific statements on which traits may allow it to persist despite its small population size.

Our Response: In regard to the peer reviewer's request to further discuss habitat and demographic stability, we reiterate that very limited information exists on habitat preferences for *Monardella stoneana.* We believe that our current analysis of known habitat characteristics of *M. stoneana* and information presented in the proposed rule (76 FR 33880, June 9, 2011) represent an analysis of the best available scientific information and all known habitat characteristics of the species. With regard to the peer reviewer's request for a discussion of traits that would allow *M. stoneana* to persist, despite its small population size, we note that one important trait that likely allows *M. stoneana* to persist is its demonstrated ability to resprout after fire (City of San Diego 2011a, p. 229; Miller 2011, pers. comm.). While the best available scientific and commercial information does not provide further details on how *M. stoneana* might be well adapted to small population size, we reiterate that *M. stoneana* has not undergone a documented recent decline. The best available scientific information indicates that this species has persisted as a narrow endemic, and that it will continue to do so in the future. Recent genetic analysis has shown that *M. stoneana* has comparable genetic diversity to other rare perennial plant species, which provides evidence that this species has not undergone a recent genetic bottleneck (Prince 2009, p. 20).

With regard to the request for a discussion of small population size, we do not consider rarity, in and of itself, to be a threat. However, we acknowledge that small population size can exacerbate existing threats to a species. As discussed in the five-factor analysis for *Monardella stoneana,* we concluded that stressors do not impact the species to the extent that they pose a threat to the current status of the species. See our response to comment 36 below for further discussion of small population size and the consequences of the split of *M. linoides* ssp. *viminea* into two entities.

Further, we note that *Monardella stoneana* shows little evidence of fragmenting into smaller, more isolated populations. We acknowledge that one occurrence has undergone a decline (CNDDB 2011b, EO 4); however, we have no other data demonstrating a decrease in population size, and one occurrence previously thought to be extirpated has resprouted after fire (Miller 2011, pers. comm.).

(9) *Comment:* The peer reviewer stated that a discussion of differing fire regimes between the Mexico and U.S. populations of *Monardella stoneana* is unnecessary given that all known occurrences are found directly across the border.

Our Response: We respectfully disagree with the peer reviewer's comment. While it is true that all known occurrences of *Monardella stoneana* occur within sight of the Mexican border, we believe that there may be other unknown occurrences of *M. stoneana* farther south in Baja California. Further, an analysis found that significant differences in fire frequency exist immediately across the border (Keeley and Fotheringham 2001, p. 1540 and Figure 1b). Therefore, we believe that the discussion of differing fire frequency is both warranted and necessary.

(10) *Comment:* The peer reviewer recommended a more detailed discussion of the possible effects of U.S. Border Patrol and illegal immigrant activities in areas occupied by *Monardella stoneana,* such as changing economic conditions that could cause the border fence to fall into disrepair. The peer reviewer also requested a discussion of any programs the Service is aware of to monitor those potentially changing conditions and their specific effects on occurrences of *M. stoneana.*

Our Response: We appreciate the peer reviewer's critical review. We have added an expanded discussion of the effects of U.S. Border Patrol and illegal immigrant activities to the Factor A and Factor E discussions for *Monardella stoneana* above, and we added information submitted by public commenters (see comments 40 and 41 below). However, we do not have adequate information to make a determination on how changing economic conditions might affect the status of the border fence. It is worth noting that construction of the border fence occurred during times of poor economic conditions in the United States, so economic circumstances may not be a reliable basis upon which to judge public or political interest in border protection or the likelihood the border fence will fall into disrepair.

With regard to the peer reviewer's query about border monitoring, of the four land managers who own land where *Monardella stoneana* occurs (BLM, the State of California, the County of San Diego, and the City of San Diego), the only regular monitoring we are aware of is conducted by the City of San Diego at their two occurrences (EOs 1 and 4). Temporary monitoring occurred during the construction of the border fence, with surveys conducted before construction for rare species, including *Monardella stoneana* (e^2M 2008, p. 1; e^2M 2009, p. 1). We encourage all agencies and members of the public to submit any information on changing conditions along the border and the consequent impact on *M. stoneana* to our office (see the **FOR FURTHER INFORMATION CONTACT** section above).

(11) *Comment:* The peer reviewer recommended discussing any potential changes for MSCP treatment of *Monardella stoneana* given the removal

of protections under the Act. First, how it would affect the continued protection of the species itself if *M. stoneana* were no longer included in the listed entity, and whether it would retain its status as a narrow endemic. Second, the reviewer recommended discussing impacts on lands specifically set aside for *M. linoides* ssp. *viminea* that are now determined to be occupied by plants identified as *M. stoneana,* and whether they could potentially be available for future development or other land use changes.

Our Response: Currently, *Monardella stoneana* is identified as a narrow endemic species by the City of San Diego Subarea Plan under the MSCP (McEachern *et al.* 2007, Appendix A). The plan defines narrow endemic species as those with ''very limited geographic range'' and states that protections for narrow endemics will ''require additional conservation measures to assure their long-term survival'' beyond those afforded to covered species not recognized as narrow endemics (City of San Diego 1997, p. 100). Identification of a species as a narrow endemic is based on distribution, not on listing status; therefore, we do not expect the removal of *M. stoneana* from the listed entity to affect the protections afforded to it by the MSCP as a narrow endemic.

With regard to the peer reviewer's question about protections on lands set aside for *Monardella linoides* ssp. *viminea,* 100 percent of habitat currently occupied by *M. stoneana* within lands covered by the City of San Diego Subarea Plan is within the MHPA (Multi-Habitat Planning Area), and all 6 ac (2 ha) on land covered by the County of San Diego MSCP subarea plan is within the PAMA. All areas identified for conservation in the MHPA and PAMA were determined based on a combination of factors, including conservation of covered species. No lands were identified and specifically set aside for one particular species, including *Monardella linoides* ssp. *viminea.* Lands on which the species occurs today will remain unavailable for future development regardless of the listing status of any species that occurs within their boundaries. Furthermore, *M. stoneana* habitat within the County of San Diego will also be conserved as part of the Otay Ranch Preserve. Therefore, we do not anticipate that *M. stoneana* or the lands on which it occurs will lose any protection as a result of the split of the species.

(12) *Comment:* The peer reviewer found the June 9, 2011, proposed rule's statement ''a species like *Monardella stoneana* that has always had small population sizes or been rare, yet continues to survive, is likely well equipped to continue to exist into the future'' to be too general and recommended deleting it. Additionally, the peer reviewer found that the statement ''though small population size may pose a threat to *M. stoneana,* it is alone not enough to cause the extinction of the species within the foreseeable future'' seemed primarily directed at the Act's criterion for listing as endangered, and that we may wish to re-evaluate the threat of small population size in terms of threatened status, as defined in the Act.

Our Response: We appreciate the peer reviewer's critical review, and we have made the suggested changes and re-evaluation.

Comments About Critical Habitat

(13) *Comment:* The peer reviewer recommended designating areas upstream of *Monardella viminea* occurrences in order to preserve natural hydrological regimes.

Our Response: We agree that natural hydrological regimes are important to the conservation of *Monardella viminea.* We made the decision not to designate upstream areas because there are no data to suggest that a quantifiable measure of land upstream would be necessary to preserve the natural hydrological regime specific to the needs of *M. viminea.* No data exist to accurately measure what impacts upstream would begin to affect this species downstream, nor do we know at what distance from the occurrences of essential habitat these activities begin to impact survival and recovery. We believe the areas we have designated as critical habitat in this final rule are sufficient for the conservation of *M. viminea.*

Critical habitat creates a Federal nexus; thus, under section 7(a)(2) of the Act, agencies must ensure that any action is not likely to jeopardize the continued existence of any endangered species or result in the destruction or adverse modification of its critical habitat. As factors supporting a natural hydrological regime are included in the physical or biological factors necessary for the conservation of the species, agencies must consult on any action that could impact or adversely modify critical habitat. The critical habitat boundaries we are finalizing in this rule are based upon the best available scientific information.

(14) *Comment:* The peer reviewer and two public commenters acknowledged the benefits that MCAS Miramar has provided to *Monardella viminea.* However, they also pointed out that, despite those protections, *M. viminea* occurrences on MCAS Miramar have still declined. All three comment letters suggested that designation of critical habitat on the base could result in improved management for *M. viminea,* and that the INRMP is inadequate to protect the species. The peer reviewer further requested a legal analysis of the possibility of designating critical habitat on the base, and whether such designation could indeed result in increased management.

Our Response: The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now states: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan [INRMP] prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation'' (see *Application of Section 4(a)(3) of the Act* section above for further discussion). We determined the INRMP for MCAS Miramar (Gene Stout and Associates *et al.* 2011) provides a benefit to *Monardella viminea;* therefore, the Act mandates we exempt this military base from critical habitat designation (see *Application of Section 4(a)(3) of the Act* section above for further discussion).

As to the commenters' question as to whether designation of critical habitat on the base would improve management, we note that critical habitat does not create a requirement for management or monitoring. The primary benefit of a critical habitat designation is that it creates a Federal nexus through which Federal agencies consult with the Service under section 7(a)(2) of the Act. A Federal nexus already exists on military-owned lands, and the military consults with us on all actions that could impact listed species. Therefore, critical habitat designation on military-owned lands would not improve management of *Monardella viminea.*

Comments From Federal Agencies

(15) *Comment:* A representative from MCAS Miramar stated that the proposed revised critical habitat and taxonomic change is a well-written overview both of the known information acquired for *Monardella viminea* and of the critical habitat regulatory requirement.

Our Response: We appreciate the commenter's feedback.

(16) *Comment:* The commenter requested more information on the geographical location of extirpated occurrences in Sycamore Canyon, San Clemente Canyon, and ''Miramar NAS.'' The commenter stated that MCAS Miramar currently has occurrences within all the canyon drainages except Murphy Canyon, and asked us to clarify if the extirpated occurrences in the proposed rule's Table 1 were inside or outside the border of MCAS Miramar.

Our Response: Regarding the occurrence named ''Miramar NAS'' in the CNDDB, the presence of plants there was never confirmed, as discussed in the *New Information on Occurrences of Monardella viminea and Monardella stoneana* section above. The CNDDB gives its location as ''Miramar Naval Air Station, west of bend in I–15, 0.3 km northwest of Benchmark 462'' (CNDDB 2011a, EO 31). As recent surveys have not found any plants in that location, we consider the occurrence to be extirpated. As for the occurrences in San Clemente Canyon, all extirpated occurrences are west of the boundary of MCAS Miramar. Regarding the commenter's assertion that the proposed rule's Table 1 listed an occurrence in Sycamore Canyon as extirpated, there is no such occurrence listed in the table. All occurrences in Sycamore Canyon are currently extant.

(17) *Comment:* The commenter was concerned that we had placed too much emphasis on the role of coastal sage scrub for *Monardella viminea* habitat, when many different habitat types support the species. The commenter further noted that hydrology and soil texture appear to be the most important constituent elements for the species, and that so much focus on habitat could be misleading.

Our Response: We agree that *Monardella viminea* is not limited to coastal sage scrub habitats, and that it can prosper in a wide variety of habitats. In our *Criteria Used To Identify Critical Habitat* section above, we noted that mapped polygons of coastal sage scrub were relatively large and did not correspond well with the drainage areas where *M. viminea* and its PCE were likely to occur. We believe this indicates that coastal sage scrub habitat is a poor predictor for areas that contain the physical or biological features essential to the conservation of *M. viminea.*

However, despite the fact that coastal sage scrub may be a poor predictor for where *Monardella viminea* occurs, our vegetation mapping showed that 45 percent of *M. viminea* habitat occurs within coastal sage scrub (SANDAG 1995). The second most common habitat type, chaparral, makes up only 14 percent of *M. viminea* habitat, with southern mixed chaparral and non-vegetated channel at 12 percent. Therefore, we judged that, for the purposes of the five-factor analysis, coastal sage scrub was the best representative of habitats supporting *M. viminea.*

We agree with the commenter that a natural hydrological regime is crucial to the survival and recovery of the species. We identify a natural hydrological regime as one of the physical or biological features essential to the conservation of *Monardella viminea,* and an altered hydrological regime as a threat to *M. viminea* (see the Summary of Factor A section for *M. viminea* above). Therefore, we do not believe that we have put undue emphasis on coastal sage scrub as habitat for *M. viminea.*

(18) *Comment:* The commenter requested clarification of the statement in the proposed rule that ''two occurrences at MCAS Miramar have been partially destroyed by road construction since the time of listing.'' The commenter stated that no impacts to *Monardella viminea* from road construction have occurred on MCAS Miramar.

Our Response: Upon further review, we agree that the statement was incorrect, and we have removed it from this final rule.

(19) *Comment:* The commenter stated that drought has been one of the most significant factors impacting *Monardella viminea* occurrences on MCAS Miramar, and that drought has resulted in the loss of plants in Murphy Canyon, poor success of seedlings, and difficulty of *M. viminea* in competing for resources. The commenter stated that drought should be more heavily evaluated as a threat to *M. viminea.*

Our Response: We have evaluated the best information available on the impacts of drought on *Monardella viminea,* which we present in the Factor E discussion for *M. viminea.* The impact of drought on riparian vegetation in general is well documented, including increased invasion of more drought-tolerant nonnative species, decreased health of native riparian vegetation, and decreased seedling survival (McBride and Strahan 1984, p. 243; Stromberg 2001, p. 18; Gitlin *et al.* 2006, p. 1479). However, we were unable to find additional specific information relating to the potential effects of drought specific to *M. viminea* apart from what we presented in the proposed rule. Further, as we discuss in the Factor E analysis for *M. viminea,* although we expect that climate change may cause an increased frequency of drought, we do not have enough information to accurately forecast its effects.

We appreciate the information submitted by the commenter, and invite anyone with detailed information on the impact of drought on *Monardella viminea* to submit it to our Carlsbad Fish and Wildlife Office (see **ADDRESSES**).

(20) *Comment:* The commenter suggested analyzing the Clean Water Act in Factor D to assess any protections it may provide to Monardella viminea and M. stoneana.

Our Response: We have added an assessment of the protections afforded by the Clean Water Act to the Factor D analyses for both species.

(21) *Comment:* The commenter noted that, in the proposed rule, we had highlighted ''frequent'' fire as occurring on MCAS Miramar in the *Summary of Factor D* for *Monardella viminea.* The commenter disagreed that fires have occurred frequently within *M. viminea* habitat within the boundaries of MCAS Miramar and requested that we remove that wording.

Our Response: The phrase that the commenter refers to was not meant to imply that uncontrolled fire was common on MCAS Miramar. Rather, we were attempting to make a distinction between habitat-based changes due to fire and threats to individual plants. In order to avoid confusion, we have revised the phrase ''frequent fire'' to ''increased fire frequency from historical conditions.''

(22) *Comment:* The commenter pointed out that the updated INRMP will be available from 2011 to 2015, not 2014 as stated, and that it is awaiting agency letters to complete the process, not publication processes.

Our Response: We appreciate the commenter's critical review. Since the publication of the proposed rule and the closing of the first comment period, the new INRMP was signed. We have updated this final rule with information from the new INRMP.

(23) *Comment:* The commenter reported that MCAS Miramar would soon complete a 3-year study addressing habitat factors that promote the survival of seedling and juvenile *Monardella viminea,* and stated that they would send this study to us when it is completed.

Our Response: We appreciate the additional information. Our office received the study during the second open comment period. We have updated this rule with the information submitted in the new report (see the Summary of

Changes from Proposed Rule section above).

(24) *Comment:* The commenter found our criteria for drawing critical habitat boundaries was ''the most accurate delineation identification method offered to date.'' However, the commenter also worried that the strict delineation of 490 ft (150 m) may miss some essential habitat and include non-essential habitat elsewhere, that it may include too much upland habitat in narrower canyons, and that it ''leaves out drainages without trees.'' The commenter recommends that we examine each drainage individually, and worries that otherwise landowners may regard the 490 ft (150 m) as a ''magic habitat area tool.''

Our Response: We appreciate the commenter's feedback. In reference to the commenter's assertion that critical habitat ''leaves our drainages without trees,'' we believe the commenter may have misunderstood our methodology. In drawing our critical habitat boundaries, we applied the 490-ft (150-m) guideline to all watersheds, even those that contained no southern sycamore-alder riparian woodland. Southern sycamore-alder riparian woodland, and riparian woodland in general, are very rare in canyons containing *Monardella viminea.*

However, as described in the *Criteria Used to Identify Critical Habitat* section above, we found that where southern sycamore-alder riparian woodland co-occurred with *Monardella viminea,* the two occupied nearly identical portions of the canyons. This was the case even though, as mentioned above, the habitat type is quite rare in canyons containing *Monardella viminea.* Therefore, this habitat width appeared to be an accurate predictor for areas containing the physical or biological features necessary for the conservation of *M. viminea.*

In regard to drainage width, although we agree with the commenter that individually based drainage assessments have the potential to very accurately capture the PCE for *Monardella viminea,* the literature on the species does not present any information on topography necessary for the conservation of the species. We lack the GIS data on which to base individual evaluation at each site. We are unable to visit every site ourselves for individual evaluation, particularly as some areas contain private land that we do not have permission to access (for example, Spring Canyon). Further, critical habitat lines must be unambiguous and the methods clearly defined for later evaluation of project effects and consultations, and we believe this habitat delineation method provides a clear guide to measure impacts to habitat supporting *M. viminea.*

As to the commenter's question regarding upslope habitat, we note that although the basis for critical habitat was vegetation, we wanted to include habitat for all necessary physical or biological features, including habitat that supports pollinators. Although we lack data to provide a quantifiable estimate of how much habitat is needed by the diverse species suspected to pollinate *Monardella viminea,* we believe that including the projected stream width will support pollinators necessary for *M. viminea.*

As to the commenter's concern that this number might become a ''magic habitat area tool,'' we do not believe that this will be the case. We believe this rule contains adequate explanation and documentation of our methodology so that land managers will understand how we reached our habitat delineation methods.

Therefore, we believe that our critical habitat lines are based on the best available scientific information, provide a clear and understandable boundary for projects, and provide for the conservation of *Monardella viminea.*

(25) *Comment:* The commenter was concerned about listing fire retardant or herbicide application as an activity that could require section 7 consultation. The commenter has found no negative effects on *Monardella viminea* following fire retardant use. Additionally, spot herbicide application is frequently used for weed control on *M. viminea* with great success.

Our Response: We appreciate the commenter's insights. Indeed, we submit documents for public comment in large part to solicit such pertinent information as provided by the commenter. The section of text to which the commenter refers was meant to relate to widespread general herbicide use upstream of *Monardella viminea* occurrences. However, we acknowledge that the language could be confusing, and have revised this rule to clarify this issue. We have also highlighted the use of spot application of herbicides within the *Special Management Considerations or Protection* section.

Comments From Local Agencies

(26) *Comment:* The City of San Diego requested an exclusion from critical habitat. They stated that their annual monitoring reports demonstrate that the MSCP is functioning properly and that it provides appropriate protection for *Monardella viminea.* They also stated that the City would continue to implement the MSCP by acquiring habitat and ensuring that all projects conform to MSCP requirements.

Our Response: We value our partnership with the City of San Diego and appreciate their efforts to protect *Monardella viminea.* With regard to the commenter's assertion that lands owned or under the jurisdiction of the City of San Diego Subarea Plan under the MSCP should be excluded because the HCP provides adequate protection for the species, the adequacy of an HCP to protect a species and its essential habitat is one consideration taken into account in our evaluation under section 4(b)(2) of the Act. Exclusion of an area from critical habitat is based on our determination that the benefits of exclusion outweigh the benefits of inclusion, and that exclusion of an area will not result in extinction of a species, which is a more complex analysis process. We have examined the protections afforded to *M. viminea* by the City of San Diego Subarea Plan under the MSCP during our exclusion analysis in this critical habitat designation, and have determined that the benefits of excluding areas owned by or under the jurisdiction of the City of San Diego Subarea Plan under the MSCP outweigh the benefits of including these areas, including fostering our ongoing conservation partnership with the City of San Diego.

(27) *Comment:* The County of San Diego requested an exclusion from critical habitat, given that the Sycamore Canyon Preserve adequately supports and manages *Monardella viminea* in accordance with the MSCP, and that the lands will be designated in perpetuity.

Our Response: We value our partnership with the County of San Diego and appreciate their efforts to protect *Monardella viminea.* With regard to the commenter's assertion that lands owned or under the jurisdiction of the County of San Diego under the MSCP should be excluded because the HCP provides adequate protection for the species, the adequacy of an HCP to protect a species and its essential habitat is one consideration taken into account in our evaluation under section 4(b)(2) of the Act. Exclusion of an area from critical habitat is based on our determination that the benefits of exclusion outweigh the benefits of inclusion, and that exclusion of an area will not result in extinction of a species, which is a more complex analysis process. We have examined the protections afforded to *M. viminea* by the County of San Diego Subarea Plan under the MSCP during our exclusion analysis in this critical habitat designation, and have determined that the benefits of excluding areas owned

by or under the jurisdiction of the County of San Diego under the MSCP outweigh the benefits of including these areas, including fostering our continuing conservation partnership with the County of San Diego.

(28) *Comment:* One commenter stated that the proposed rule's Figure 1, which shows the geographic location of *Monardella viminea* and *M. stoneana,* was not included in the proposed rule. The commenter requested that the figure be included in the final rule.

Our Response: Figure 1 was published on page 33885 of the proposed rule (76 FR 33880, June 9, 2011). It is included in this final rule as well. However, we have altered the figure for clarity and ease of distinguishing the range of the two species.

(29) *Comment:* The SDCWA expressed concern that the designation of critical habitat might interfere with maintenance of existing facilities and construction of new facilities that enable the delivery of water to San Diego County. SDCWA requested that ''provisions should be made in the designation to address existing activities and operations of the Water Authority to fulfill the mission to provide a safe and reliable water source.'' Specifically, the commenter requested exclusions or textual exemptions to address existing activities and operations of the SDCWA.

Our Response: Sections 4(b)(2) and its implementing regulations (50 CFR 424.12) govern exclusions under the Act. The Secretary may exclude an area—not activities—from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat (see Exclusions section above). We do not exclude or exempt specific activities from critical habitat designation. Furthermore, SDCWA has prepared a Subregional Natural Community Conservation Plan/Habitat Conservation Plan (NCCP/HCP; Plan) in support of an application for an incidental take permit pursuant to section 10(a)(1)(B) of the Act. We completed an intra-Service formal section 7 consultation for issuance of a section 10(a)(1)(B) incidental take permit under the Act for the Plan. In our ''Conference Opinion'' for the section 10(a)(1)(B) permit, we determined that the activities proposed by the SDCWA in their NCCP/HCP will not result in the destruction or adverse modification of proposed critical habitat for *Monardella viminea* (Service 2011, pp. 284–286). The NCCP/HCP was signed on December 20, 2011. Therefore, the designation should not impede the existing activities, operations, or the ability of the SDCWA to fulfill the mission to provide a safe and reliable water source.

Public Comments

During the first comment period, we received two public comments submitted by species experts on *Monardella viminea* and *M. stoneana.* Overall, both commenters recommended endangered status and designation of critical habitat for *M. stoneana.* Both commenters also supported the recognition by the Service of the taxonomic split of *M. linoides* ssp. *viminea.* We have organized the comments into four sections: those regarding the taxonomic split, those regarding *M. viminea,* those regarding *M. stoneana,* and those pertaining to the critical habitat designation for *M. viminea.*

Comments Regarding the Taxonomic Split of *Monardella linoides* ssp. *viminea*

(30) *Comment:* Two commenters referenced previous listing rules and candidate assessments where previously listed entities were split: the spotted frog (*Rana pretiosa*), the flatwoods salamander (*Ambystoma cingulatum*), and the Uinta Basin hookless cactus (*Sclerocactus glaucus*). In each case, all species were given the same status as the original listed entity as threatened, were uplisted to endangered status, or both recognized as candidate species. One commenter argued that, based on these precedents, the Service did not appear to be consistent in its treatment of split taxon.

Our Response: We respectfully disagree that a decision not to list *Monardella stoneana* is inconsistent with previous rules. In our evaluation of the stressors impacting *M. viminea* and *M. stoneana,* we conducted a thorough review of all available scientific and commercial data. Section 4(b)(1)(A) of the Act requires us to make listing decisions for each species based solely on the best scientific and commercial data available, and not on previous actions taken by the Service. We believe our consistency comes from constantly upholding this standard as our method for determining listing status.

In the case of *Monardella viminea,* we determined that listing as endangered was warranted, because we found that threats were likely to cause the species to become extinct in the foreseeable future. In contrast, we did not find that *M. stoneana* is currently endangered, and we did not find that it is likely to become endangered in the foreseeable future. Please see our Summary of Factors sections above for further details on the potential threats impacting each species, and Comment 37 below for a further analysis of our treatment of potential threats impacting each species.

Comments Regarding *Monardella viminea*

(31) *Comment:* One commenter disagreed with our assessment that climate change is not threatening *Monardella viminea* or *M. stoneana.* The commenter stated that although the current reason for the decline of the two species is unknown, impacts associated with climate change would cause a future increase of altered hydrology and increasing fire risk. The commenter then requested an explanation of declining occurrences in drainages without development (for example, MCAS Miramar) if climate change is not occurring.

Our Response: While we recognize that climate change is an important issue with potential effects to listed species and their habitats, we lack adequate information to make accurate projections regarding its effects to *Monardella viminea* or *M. stoneana* at this time.

We acknowledge that the decline of *Monardella viminea* in undeveloped drainages is not well understood. However, as we stated in the Cumulative Impacts section above, based on our review of the best available scientific information, we believe that in the case of *M. viminea* there is strong evidence that the synergistic effects of increased fire frequency, megafire, and invasive grasses are causing the decline of the species, including on MCAS Miramar. We believe that section summarizes the best available scientific information, and that the threats strongly support the continued listing of *M. viminea* as endangered.

With regard to *Monardella stoneana,* we do not believe that the best available scientific information shows a decline in species numbers across all or a significant portion of the range. Again, we do not have adequate information to determine the potential future impacts of climate change on *M. stoneana.* Further discussion of this issue can be found in the Factor E discussion of *M. stoneana.*

(32) *Comment:* Two commenters provided new information related to *Monardella viminea.* One commenter submitted unpublished data from a recent survey for *M. viminea* in Spring Canyon and provided information about additional threats to the species there, including trampling and off-road vehicle use. Another commenter provided insight on lack of recruitment of *M. viminea,* and stated that seed germination has appeared to be good for

the species, but that seed head predation was occurring across the range of *M. viminea.*

Our Response: We appreciate receiving these results. We have incorporated the survey reports into our database and added the information on threats to our five-factor analysis for *Monardella viminea.*

(33) *Comment:* One commenter believed that a pollination study for *Monardella viminea* had been conducted by MCAS Miramar and recommended that we request it.

Our Response: We contacted MCAS Miramar to inquire about the existence of such a report. A biologist at MCAS Miramar reported that, although data related to pollinators has been gathered throughout the years, no such study has been completed (Kassebaum 2011a, pers. comm.).

(34) *Comment:* One commenter requested a discussion of lack of seedling recruitment, as very few seedlings are seen in the species' range and the reasons behind low seedling establishment are not well understood. The commenter requested that we evaluate this as a threat, stating that, ''The ability to reproduce in an ephemeral drainage subject to rapid water flow seems to be a critical factor given that this species occurs in braided channels.''

Our Response: We agree that a strong understanding of factors influencing seedling establishment could be a crucial factor in the recovery of *Monardella viminea* and the continued persistence of *M. stoneana.* Based on information in the report submitted by MCAS Miramar during the second open comment period, we added details about seedling recruitment to the five-factor analysis. However, upon review of the report, we concluded that there was not enough information on seedling recruitment to discuss it as distinct from other effects, although we discussed the influence that other factors (such as nonnative grasses) could have on *M. viminea* or *M. stoneana.*

We further acknowledge that seedlings are very rare in *Monardella viminea.* As discussed in the Summary of Changes from Proposed Rule section above, we received a study on seedling establishment from MCAS Miramar during the second open comment period and have added information from that report to this final rule.

(35) *Comment:* One commenter noted that lack of recruitment in drainages may be due to nonnative plants taking up suitable habitat where seedlings might otherwise grow. The commenter further recommends managing nonnative species on a habitat-wide basis, rather than managing for individual plants.

Our Response: We agree with the commenter's assertion, and have updated the *Special Management Considerations and Protection* section of this rule to reflect this idea.

Comments Regarding *Monardella stoneana*

(36) *Comment:* Two commenters noted that it seems illogical to delist a portion of the original listed entity when *Monardella linoides ssp. viminea* was originally listed in part due to small population size, and when the 2008 5-Year Review stated that, ''In particular, small population size makes it difficult for this subspecies to persist while sustaining the impacts of fire, flooding, and competition with invasive plants. Because *M. linoides* subsp. *viminea* is found in small and declining populations, immediate action to conserve the subspecies may be inadequate as the extinction threshold (vortex) for the subspecies may already have been reached.''

One commenter further noted that plants with both more occurrences and more individual plants are protected or federally endangered, and that it therefore does not make sense that *Monardella stoneana* does not warrant such protections.

Our Response: As discussed in the Factor E analyses for both species, rarity is not in itself a threat, although we acknowledge that small population size can exacerbate other potential threats to a species. Further, as discussed in the Determination section for *Monardella stoneana,* the best available scientific information does not allow us to conclude that fire, flooding, or invasive plants are impacting *M. stoneana* and its habitat to the extent that the species is endangered now, or likely to become so in the foreseeable future. Therefore, the factors mentioned by the commenter that were believed at the time of the 5-year review to be exacerbating the small population size of *M. linoides* ssp. *viminea* are not present in the range of what is now *M. stoneana.* Further, in regard to the quoted text about the ''extinction vortex,'' new information reviewed since the publication of that document has shown that this effect may not be applicable to *M. stoneana.* Specifically, although information exists on the possible effect of a declining spiral in population size on animals, no such empirical evidence exists for plant species (Matthies *et al.* 2004, p. 482).

With regard to the issue of other listed species that have more occurrences and more individuals than *Monardella stoneana,* as we discussed in comment 30 above, we make decisions on listing status based solely on the best scientific and commercial information available at the time. This listing is based on threats applicable to an individual species, and not made in comparison to other listed species. Therefore, the population size of other listed species is not relevant to the consideration of listing status for *M. viminea* or *M. stoneana.*

(37) *Comment:* One commenter stated that the analysis of threats for *Monardella viminea* and *M. stoneana* was not consistent. For example, the commenter stated that altered hydrology also exists in the habitat for *M. stoneana,* caused by border security, road construction, higher local rainfall upslope, and excessive runoff following burns. The commenter pointed out that, as *M. stoneana* occurs in connected drainages, a strong rain event in one watershed could impact many occurrences downstream. Additionally, the commenter stated that nonnative plants are an equally strong threat to *M. stoneana,* especially due to type conversion after frequent fire (Factor A). The commenter also added that they believe that trampling is not a threat to the species.

Our Response: We appreciate the commenter's insights and the information on the effects of trampling on *Monardella stoneana.* However, we respectfully disagree with the commenter that we were inconsistent in our treatment of threats for the two species. We used the best available scientific information, including published peer-reviewed papers, survey reports, GIS data, and correspondence with species experts and land managers, to study the differences in the habitat and conditions of the two species. From that review, we found differing habitat conditions, regulatory mechanisms, urbanization, and fire history that impact the two species, all of which we used to analyze the way that threats impact the two species.

In reference to our different determinations for altered hydrological regimes for the two species, we again highlight the different surrounding conditions for *Monardella viminea* and *M. stoneana.* Several *M. viminea* occurrences are found in areas that have been heavily urbanized for many years. *Monardella stoneana* is found almost entirely in wilderness areas or other public lands protected from development. We acknowledge that at the time the proposed rule was published we did not have any information on impacts to hydrology from activities due to Border Patrol and road construction. Based on the information submitted by the

commenters, we have added an analysis of impacts to hydrology as pertaining to *M. stoneana.* However, as discussed in the summary for Factor A, we do not believe that impacts to hydrology stemming from occasional road construction and maintenance impact *M. stoneana's* habitat to the extent that it currently endangers the species or could cause the plant to become endangered within the foreseeable future. While road construction within the area of *M. stoneana* may have some temporary impacts on seasonal streamflows, we have no information that suggests that these flows are substantial enough to wash away the rocky terraces that support *M. stoneana.* Further, the altered hydrology in *M. stoneana* habitat is nowhere near the extent of streamflow changes that have resulted from permanent development and increased pavement cover that has occurred in canyons surrounding *M. viminea.* While the connected nature of the canyons does indeed mean that streamflow in one canyon could impact occurrences found downstream, we do not find that the hydrology of the canyons has been altered to the point that such a flow event is likely to occur.

With regard to nonnative plants impacting *Monardella stoneana,* although we acknowledge that an invasion of nonnative plants could have a detrimental influence on *M. stoneana* and its habitat, we have been unable to find evidence that such an invasion exists, or will exist in the foreseeable future. Further, as discussed in the Factor A analysis, the chaparral vegetation that *M. stoneana* favors is less vulnerable to type conversion following frequent fire than the vegetation types that support *M. viminea.* Additionally, as discussed in the same section, those occurrences of *M. stoneana* that are currently monitored contain lower cover of nonnative vegetation than do occurrences of *M. viminea.*

(38) *Comment:* One commenter asserted that CAL FIRE has, in the past, been unable to mitigate the impacts of large fire on *Monardella viminea,* especially the decline of plants after the 2003 Cedar Fire. Another commenter asked how type conversion of lands has been addressed by current protections. Another stated that CAL FIRE devotes all its resources to protecting homes, not plants, and that CAL FIRE is unlikely in the future to alter the dynamics of fire on Otay Mountain during Santa Ana conditions.

Our Response: As discussed earlier in this rule, on land owned and managed by CDFG and BLM, which contain approximately 88 percent of all occurrences of *Monardella stoneana,* fire management is provided not only by CAL FIRE, but further protection of natural resources on Federal and State lands is provided by management conducted consistent with the Wilderness Act. Furthermore, the first step to preventing damage to homes and natural resources is suppression. It is not clear whether more could be done to protect natural resources once a wildfire becomes large, and the focus must be on human health and safety once the ability to control a wildfire is limited.

Fire management activities occur on Otay Mountain (34 percent of all occurrences of *Monardella stoneana*) as part of the BLM's current (1994) SCRMP. Information provided by BLM summarizes these ongoing management actions: BLM Fire Management provides an initial attack dispatch and agency representative to ensure appropriate actions are taken on a fire incident; fire prevention and law enforcement patrols occur on Otay Mountain; and, on large incidents, several resource specialists may form a team to evaluate fire and fire suppression effects (Howe 2010, pers. comm.). If a determination is made to pursue fire restoration and repair, these specialists work with Burned Area Emergency Response (BAER) Teams to implement appropriate actions.

BLM is further collaborating with the Service to revise the SCRMP, which covers the Otay Mountain Wilderness. In the current draft revised plan, *Monardella stoneana* is identified as a federally listed species and is given conservation priority (BLM 2009, pp. 3–23, 3–54, 4–175). As of this final rule, *M. stoneana* will no longer be considered an endangered species. However, the draft SCRMP also provides protection for BLM-identified sensitive species, which includes *M. stoneana* (BLM 2009, p. 3–50; BLM 2010, pp. 29–30). All special status species are considered as a group for conservation measures (BLM 2010, p. 50), and thus the change in the listing status of *M. stoneana* status would not affect the protections afforded by the draft SCRMP. Moreover, one of BLM's primary objectives in the draft revised plan is improved fire management and collaboration with local communities and agencies to prevent wildfires. The draft revised plan specifically includes a goal of restoring fire frequency to 50 years through fire prevention or suppression and prescribed burns. When an area has not burned for 50 years, the plan allows for annual prescribed burning of up to 500 ac (200 ha) in the Otay Mountain Wilderness (BLM 2009, pp. 4–171—4–172). Actions implemented under the revised plan, when final, will be designed to promote conservation of *M. stoneana* and its habitat.

Furthermore, it is worth noting that CAL FIRE only has jurisdiction over 2 percent of lands containing *Monardella viminea.* The remainder of the area is managed by MCAS Miramar's fire division or by local fire agencies. Therefore, fire history impacting *M. viminea* does not provide a good comparison for how *M. stoneana* will be managed by CAL FIRE in the future.

(39) *Comment:* One commenter asserted that the current status of *Monardella stoneana* is not known, as only the City of San Diego has surveyed for the species on its smaller piece of the range (two plants) and that, despite the existence of an HCP for these lands, BLM, CDFG, and the Service have not monitored or managed their populations. The commenter stated that ''the decline of the species from historic levels and the current lack of monitoring and management neglect argue for designating this range as Critical Habitat. This designation is needed to raise the status of these lands and to provide leverage for actual management.'' One commenter further asked how type conversion of lands with repeated fire has been addressed for habitat essential to *M. stoneana.*

Our Response: We acknowledge throughout this final rule that monitoring data are lacking for most occurrences of *Monardella stoneana.* However, under section 4(b) of the Act, we are required to make determinations based on the best available scientific and commercial information. We invite any individual or agency with recent monitoring reports on occurrences of *M. stoneana* to submit them to our Carlsbad Fish and Wildlife Office (see the **FOR FURTHER INFORMATION CONTACT** section above).

Furthermore, as we have determined that listing *Monardella stoneana* under the Act as endangered or threatened is not warranted, critical habitat cannot be designated, and a discussion of the potential impact that a hypothetical critical habitat designation would have on BLM or CDFG-owned lands is, therefore, not relevant. We also note that the City of San Diego in fact monitors two occurrences of *M. stoneana.* The first occurrence, Buschalaugh Cove (EO 4) contains one individual plant (City of San Diego 2011a, p. 229). The second occurrence, in Marron Valley, comprises approximately 95 plants (City of San Diego 2010a, p. 238). No *M. stoneana* occurs on lands owned or managed by the Service.

(40) *Comment:* One commenter asserted that, despite *Monardella stoneana's* protected status as a part of the original listed entity, in recent years Border Patrol and other activities on BLM land trump any State, County, or Federal environmental regulations. The commenter stated that because of this situation, the City of San Diego MSCP is unable to adequately protect *M. stoneana.* The commenter then concluded that the HCP could not be considered an adequate regulation if its protections were not fully implemented.

Our Response: On April 3, 2008, the Secretary of Homeland Security published a determination in the **Federal Register** (73 FR 18294) and stated that, due to high amounts of illegal immigrant traffic, he was creating a waiver to allow the Department of Homeland Security to construct barriers to stem the high flow of illegal immigrant traffic. This waiver permitted construction of the border fence without need for consultation under the Act under the authorization of section 102 (c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub. L. 104–208).

Before construction of the fence, the Border Patrol prepared an environmental stewardship plan (ESP) to examine impacts of construction of the border fence to listed and rare species and sensitive habitats. Prior to the start of the project, surveys were conducted to determine the presence or absence of rare species, including *Monardella stoneana* (Department of Homeland Security *et al.* 2008, p. 8–5). No individuals were found during the surveys, but as these surveys took place in fall when the plant was dormant, subsequent surveys were undertaken during construction of the fence to determine presence or absence of *M. stoneana* (Department of Homeland Security *et al.* 2008, pp. 8–30, 8–34). When plants were documented during the construction period, best management practices were implemented to avoid and minimize impacts to *M. stoneana* (e^2M 2008, p. 1; e^2M 2009, p. 1).

Therefore, despite the waiver that mandated that border fence activities could carry on without environmental oversight, we have no available information suggesting that this project threatened the continued existence of *Monardella stoneana.* The San Diego MSCP continues to be adequately implemented and carried out.

(41) *Comment:* Two commenters stated that Otay Mountain has undergone recent habitat degradation due to increased roads and trails, Border Patrol activities, road construction upstream from *Monardella stoneana* that has altered hydrology, and weeds that have invaded upslope of *M. stoneana.* One commenter stated that ''it is only a matter of time before weeds become a more serious issue on Otay Mountain. Road repair work has to be conducted on a more regular basis. Those factors could easily result in changes to the speed of water flow during peak rainfall periods creating an impact to *M. stoneana.''*

Both commenters reported impacts to EO 7 and EO 8 from construction of an access road by the Department of Homeland Security. The commenters further reported that the roads ''were not revegetated'' in 2010, despite the fact that the area is a Wilderness Area. The commenters reported that in the winter after construction, the road and fence were washed out and both had to be replaced. One commenter added that the effects of the construction are not well known due to lack of monitoring for *Monardella stoneana.*

Our Response: The commenters did not provide information on the hydrology prior to the occurrence, or any data on altered terrain, to support their statements or to allow us to evaluate the extent of altered streamflows that might have directly impacted *Monardella stoneana.* While we acknowledge that any erosion can impact streamflows, we do not believe that construction of dirt roads can have the same level of impact on natural hydrology that occurs in the range of *M. viminea,* where some occurrences are surrounded by urbanized areas and high density of pavement on all sides, all of which result in substantial alterations to hydrology.

Further, while we agree that a landscape with increased nonnative cover could negatively impact *Monardella stoneana,* the best available scientific and commercial information does not show that such an increase in cover is likely to occur in the future. We invite anyone with information on those occurrences or any changing cover of nonnative plants to submit this information to our Carlsbad Fish and Wildlife Office (see the **FOR FURTHER INFORMATION CONTACT** above).

(42) *Comment:* The commenter asserted that *Monardella stoneana* has experienced increased fire frequency due to nonnative plant invasion, which has resulted in weed invasion, habitat conversion, increased sheet runoff of rainfall, and erosion. The commenter further stated that fire was credited with having wiped out the occurrence at Buschalaugh Cove (CNDDB EO5) and caused the location at Otay Lakes to be reduced by 87 percent. Another commenter agreed, and stated that fire frequency could cause increased alteration of hydrology due to increased runoff from slopes that were devegetated by fire. The commenter stated that a task force was created with local agencies to address the fire frequency changes as the numbers of fires on the mountain had increased so dramatically over historical levels.

Our Response: We have not found any evidence, nor did the commenter provide any evidence, that nonnative plants are invading occurrences of *Monardella stoneana* to the degree that they would pose a threat to the species. We are also not aware of any incidences of increased streamflow following fire events. Although we agree that it is possible that such changes could occur, in our Determination section for *M. stoneana* above, we did not find that these factors were currently threatening, or likely to threaten, *M. stoneana* in the future.

It is worth noting that EO 5 consisted of only one plant when it was thought to be extirpated by fire. Since the first open comment period, as discussed above, this plant has now resprouted from the root (City of San Diego 2011a, p. 229).

(43) *Comment:* The commenter highlighted the decrease in occurrences in a protected area monitored by the City of San Diego. The commenter stated that since monitoring began in accordance with the HCP, EO 6 has dropped from 120 plants to 95 plants.

Our Response: We believe that in this case the commenter is suggesting that the protections afforded by the MSCP are inadequate to conserve the species. However, survey data are inconclusive due in large part to changing monitoring methods. *Monardella stoneana* often grows in clumps of one to four individual plants. The number of plants within a clump cannot be reliably distinguished without exposing the roots. In the first 3 years of surveys, clumps of *M. stoneana* were counted, rather than individual plants. In 2003, 113 plants were reported, then 192 in 2004, and 103 plants in 2010 (City of San Diego 2010b, p. 2). Given the difficulty of determining individual plants from clumps of *M. stoneana,* we believe these counts are due to differing methods rather than population fluctuations. The City of San Diego acknowledged this in their 2006 survey report for Marron Valley, saying that ''It should be noted that implementation of the current monitoring method may have been inconsistent from season to season. Monitoring of this species is being analyzed and methods may be revised in order to provide more reliable

data'' (City of San Diego 2006, p. 67). It is worth noting that in all subsequent reports the number of plants has held steady at 95 clumps (City of San Diego 2010b, p. 2). Therefore, the best available scientific information does not allow us to conclude that this occurrence has declined in size since monitoring began.

(44) *Comment:* One commenter asked how lighting associated with a fencing project constructed by the Border Patrol had impacted the insects needed to pollinate *Monardella stoneana.*

Our Response: Surveys conducted prior to the construction of the border fence found no known occurrences of *Monardella stoneana* within the impact corridor of the project, although known occurrences are located in proximity to the construction sites (Department of Homeland Security *et al.* 2008, p. 8–30). Therefore, we do not believe that lighting associated with the construction of the border fence would have affected pollinators. As for future impacts, even though road maintenance is ongoing, road construction typically does not occur during night hours (Ford 2011, pers. comm.)

Critical Habitat for *Monardella viminea*

(45) *Comment:* Two commenters believed that Lopez, Carroll, and Cemetery Canyons should be designated as critical habitat. One commenter further stated that ''Circular logic seems to being [sic] used to state that those two canyons that are supporting plants cannot support the species due to changed hydrology'' and that ''we do agree that the hydrology of both systems has changed but there are still plenty of lands within the braided system that could support plants if they did not support such a large weed load.''

Our Response: We respectfully disagree with the commenters' assertion that areas within Carroll and Lopez Canyons meet the definition of critical habitat. We do agree, however, with the commenter's assertion that Lopez Canyon could support more plants if there were not such a high density of nonnative species. However, as described in the Summary of Changes from Previously Designated Critical Habitat section in the proposed rule (76 FR 33880), our primary reason for not designating those areas was the lack of a natural hydrological regime (all components of the PCE), and not the presence of nonnative species. Thus, the best available scientific information does not lead us to conclude that these two canyons are essential to the conservation of *Monardella viminea,* and, due to the lack of physical and biological features essential to the species, these areas indeed do not meet the definition of critical habitat. We believe the areas identified as essential are sufficient for recovery of the taxon.

In response to the commenter's assertion that we used ''circular logic'' in our determination of critical habitat, we note that section 3(5)(A) of the Act defines critical habitat, in part, as those areas with physical or biological features that are essential to the ''conservation'' of the species. Regulations at 50 CFR 424.02 define conservation as ''the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary.'' With the language in the Act and its supporting regulations focusing on conservation rather than survival, we are bound to identify those areas with the physical or biological features necessary to achieve species conservation. We also note that features needed for conservation are not necessarily the same as those needed for survival. Therefore, it is not contradictory that *Monardella viminea* clumps can occur in areas without the physical and biological features identified in this rule.

We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For this reason, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be required for recovery of the species. We also note that, in addition to protections afforded by the MSCP, occupied habitat outside the final revised critical habitat designation will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act, regulatory protections afforded by the section 7(a)(2) jeopardy standard, and the prohibitions of section 9 of the Act.

We also note that under section 4(a)(3)(A) of the Act and regulations at 50 CFR 424.12(g), we may revise critical habitat designations as appropriate and as new data become available. We encourage all members of the public to submit such information to our Carlsbad Fish and Wildlife Office (see the **FOR FURTHER INFORMATION CONTACT** section above).

(46) *Comment:* One commenter asserted that Cemetery Canyon should be designated as critical habitat, as it has the attributes that support *Monardella viminea* and was occupied at the time of listing.

Our Response: In identifying areas that meet the definition of critical habitat, we first identified areas currently occupied and occupied at the time of listing. We acknowledge that Cemetery Canyon was occupied by *Monardella viminea* at the time of listing. However, we respectfully disagree with the commenter that Cemetery Canyon still contains the physical and biological features necessary for the conservation of the species. As discussed in our response to comment 45 above, we found that Cemetery Canyon lacks a natural hydrological regime (all components of the PCE), and therefore does not meet the definition of critical habitat (see the *Criteria Used to Identify Critical Habitat* section above for more details).

(47) *Comment:* Two commenters stated that the proposed rule argues that INRMPs and HCPs afford equal protection to critical habitat, and the commenters disagree with that idea.

Our Response: The City of San Diego and County of San Diego Subarea Plans under the MSCP provide ongoing protection and monitoring for *Monardella viminea* that will benefit the long-term conservation of the species. These protections extend to private lands that otherwise lack a Federal nexus under which consultation could be triggered. The INRMP for MCAS Miramar further provides for management and research into the life history and threats impacting *M. viminea.* Both plans provide monitoring and management of conserved lands important to the survival and recovery of *M. viminea.* These conservation measures provided by the INRMP and the HCPs are typically not addressed through a critical habitat designation, that is, through application of the statutory prohibition on destruction or adverse modification of critical habitat. Therefore, we find that in this case the INRMP and the HCPs provide clear benefits to *M. viminea.*

(48) *Comment:* One commenter stated that it was difficult to understand exclusions for the City of San Diego when management is not occurring, threats from nonnative plants and altered hydrology are increasing, plant numbers are declining, and lands in Spring Canyon have not yet been acquired. Another commenter argued that critical habitat designation is needed to raise the status of these lands and to provide leverage for actual management. Both commenters asserted that exclusions should not be made for the City of San Diego until management begins and species numbers are increasing, and one commenter added, ''the species is continuing to decline partially due to lack of management and that behavior should not be rewarded by

granting exclusions due to purported benefits.'' The commenters further asserted that designation of critical habitat within City of San Diego MSCP lands would greatly increase protections for *Monardella viminea,* spur more active management and protection, and prevent development of lands containing *M. viminea.*

Our Response: We reiterate that conservation measures provided by the INRMP and the HCPs are separate from the prohibition on destruction or adverse modification provided by a critical habitat designation. Critical habitat does not create a requirement for management or monitoring. The primary benefit of a critical habitat designation is that it creates a Federal nexus through which Federal agencies consult with the Service under section 7(a)(2) of the Act. In other words, the Federal agencies are required to not fund, authorize, or carry out actions on designated lands that adversely modify or destroy critical habitat.

We also note that exclusions are not based on the difference between protection measures provided by critical habitat designation or HCPs in isolation, but on how the redundancy of protections provided by an HCP with those provided by critical habitat designation minimizes the overall conservation value of designation, and how the remaining benefits of designation may be negated by the benefits of exclusion (maintaining partnerships and fostering future HCPs). Conservation benefits provided by existing HCPs are not considered a benefit of exclusion because they would remain in place regardless of critical habitat designation; however, they do minimize the benefits of inclusion to the extent that they are redundant with protection measures that would be provided by critical habitat designation.

We assume that the commenters mean that designation of critical habitat would pressure the City to increase management. Again, critical habitat does not create a requirement for management or monitoring, and there is no regulatory mechanism in place that would guarantee such measures. Further, critical habitat does not create a preserve or a refuge. In fact, designating critical habitat within the City's HCP could have a detrimental effect on our conservation partnerships (see Exclusions section above).

Based on the conservation benefits provided by the City of San Diego and County of San Diego Subarea Plans under the MSCP, we believe the additional protection provided to *Monardella viminea's* essential habitat by critical habitat designation would be minimal and are outweighed by the benefits of excluding the habitat. Therefore, we are excluding lands within the plan areas of these HCPs based on the benefits of maintaining our conservation partnerships.

(49) *Comment:* One commenter disagreed with our statement that almost all occurrences in the City of San Diego MSCP Subarea Plan have been protected in MSCP reserves and are annually monitored. The commenter cited large populations of Spring Canyon that are neither monitored nor protected, and lands in Carroll Canyon that are not monitored by the City (although the commenter acknowledged that they are monitored by contractors), transplants in Lopez Canyon that are not monitored, and Sycamore Canyon lands associated with Rancho Encantata that are not monitored.

Our Response: We have updated this rule with the information submitted by the commenter.

(50) *Comment:* Two commenters expressed concern about lands in Spring Canyon being purchased for conservation, as outlined in the MSCP. The commenter claims that the City of San Diego gave up the right to eminent domain in creating the MSCP, and pointed out that lands designated for possible open space acquisition under the City's MSCP retain 25 percent development rights. Finally, the commenter claimed that previous attempts by the City to purchase the Spring Canyon parcels have been unsuccessful. One commenter noted that development would be on the least sensitive parts of the acreage, but that the development would still impact *Monardella viminea* through altered hydrology.

Our Response: We appreciate the commenter's concerns regarding adequate protection of *Monardella viminea* under the City of San Diego Subarea Plan for the MSCP. In the biological opinion issued by the Service, we concluded that the City's Subarea Plan provides a benefit to *M. viminea* because the plan provides for conservation of all major occurrences (Service 1997, p. 83), including all areas we have identified in this rule as essential habitat as well as other occupied areas such as Lopez Canyon. Development within *M. viminea* habitat is restricted to a maximum of 20 percent of the habitat, and, should development occur, in-kind mitigation would be required at a 1:1 to 3:1 ratio, in addition to the protections for riparian habitat, which require no net loss of wetland acreage or function (Service 1997, p. 83).

Additionally, the commenter provided no evidence regarding the failure of the City of San Diego to acquire the parcel of private lands. We invite any individual or agency with information regarding conservation of *Monardella viminea* within the MSCP to submit it to our Carlsbad Fish and Wildlife Office (see the **FOR FURTHER INFORMATION CONTACT** section above).

(51) *Comment:* One commenter stated that the Sycamore Estates occurrence of *Monardella viminea* should be designated as critical habitat. Specifically, the commenter stated that development of this project was stopped due to the economy and bankruptcy, leaving the status of the project uncertain. In addition, the commenter stated that the status of *M. viminea* on the planned open space was also uncertain. Finally, the commenter stated that management of the naturally occurring plants and transplants were put on hold.

Our Response: See our response to comment 48 above. Sycamore Estates falls within the boundaries of the City of San Diego Subarea Plan under the MSCP and, thus, we have decided to exclude it under section 4(b)(2) of the Act (also see Exclusions section above).

(52) *Comment:* Two commenters reported that they were unaware of any management or monitoring actions conducted by the County of San Diego, whose lands host one population of 14 plants at the southern end of the Sycamore Canyon Preserve (corresponding to the southern portion of EO 9). Based on their monitoring efforts, the commenters reported that the occurrence was subject to a high density of nonnative species. They further reported that this occurrence was down to one live plant and a number of dead standing *Monardella viminea* in 2007, and that no live plants were present in 2008. The commenters did not report the date of their most recent survey on County lands, but stated that they considered this occurrence to be extirpated. The commenters stressed that existing conservation measures on County lands were inadequate to protect the species, and that designation of lands would increase the likelihood of management.

Our Response: We appreciate the information submitted by the commenters. Despite the decline of plants on lands within the boundaries of the County of San Diego Subarea Plan, we have decided to exclude lands under the jurisdiction of the County of San Diego Subarea Plan under the MSCP. As discussed in Exclusions section, we found that exclusion of these lands from critical habitat will help preserve the

partnerships we developed with the County and project proponents in the development of the MSCP. Conservation plans such as the County of San Diego Subarea Plan provide landscape-level conservation that can better address threats to *Monardella viminea* habitat, as opposed to the piecemeal conservation approach that could result should private landowners complete individual section 7 consultations.

Comparison of regulatory benefits provided by critical habitat to conservation benefits provided by implementation of HCPs is not straightforward. However, we point out that critical habitat does not create a requirement for management or monitoring, and that the County of San Diego has recently completed a management plan for preserve lands supporting *M. viminea* that includes removal of nonnative vegetation, habitat restoration, and implementation of a managed fire regime with a priority of protecting biological resources including *M. viminea* (DPR 2009, pp. 71, 76–77). We believe that the County of San Diego Subarea Plan under the MSCP provides equivalent or superior benefits to *M. viminea* and its habitat than would result from critical habitat designation.

(53) *Comment:* The commenter listed multiple incidences where MCAS Miramar had previously turned over land to other agencies or private landowners, thus losing protected habitat for the species and degrading drainages and vernal pool habitat for other listed species. One parcel proposed for sale, the Stowe Trail, would connect lands occupied by *Monardella viminea* to the Sycamore Canyon Preserve. The commenter believes critical habitat should be designated in the area to protect it from future development.

Our Response: The most recent information we have received from MCAS Miramar indicates that the station currently has no intent of selling or transferring the property (Kassebaum 2011b, pers. comm.). Therefore, it appears that the land will remain under the ownership of MCAS Miramar and the conservation of the INRMP, and that critical habitat designation is not appropriate.

(54) *Comment:* The commenter noted that critical habitat has previously been designated for military lands, specifically for the critical habitat designation for the southwest Alaska distinct population segment (DPS) of the northern sea otter (*Enhydra lutris kenyoni*), which published October 8, 2009 (74 FR 51988).

Our Response: Critical habitat for the southwest Alaska DPS of the northern sea otter is almost entirely aquatic, consisting of nearshore waters to the mean high tide line. Therefore, this rule did not, in fact, designate critical habitat on military lands. Specifically, we state in that rule that ''there are no Department of Defense lands with a complete INRMP within the critical habitat designation'' (p. 52005, 74 FR 51988, October 8, 2009). Additionally, as stated in our response to comment 30, section 4(b)(1)(A) of the Act requires us to make determinations for each species based solely on the best scientific and commercial data available, and not on previous actions taken by the Service. We determined the INRMP for MCAS Miramar (Gene Stout and Associates *et al.* 2011) provides a benefit to *Monardella viminea,* and, therefore, we have determined that lands on MCAS Miramar are exempt from critical habitat under section 4(a)(3)(B) of the Act.

(55) *Comment:* One commenter referenced a proposed development on MCAS Miramar of a U.S. Army Reserve Center upstream from a drainage with *Monardella viminea.* Although a condition was placed on the project that it not change the hydrology, the commenter had little confidence that could be achieved.

Our Response: Previous projects upstream from *Monardella viminea* occurrences have not impacted *M. viminea* individuals or habitat. Surveys reported no negative effects after the 2007 construction of a rifle range in close proximity to *M. viminea* in San Clemente Canyon (Tierra Data 2011, p. 3). As described in the Factor D analysis for *M. viminea* above, the INRMP for MCAS Miramar provides conservation measures for all riparian areas on the base. Therefore, the Service has confidence that conservation measures will continue to be put in place as demonstrated by previous occasions.

(56) *Comment:* One commenter stated that exemption cannot occur if it will result in the extinction of the species. The commenter noted the large percentage of the population on MCAS Miramar, and the recent decline of the species on the base, and noted that the Act provides a mechanism for dealing with emergencies that would require expedited consultation ''under 50 CFR 40205 [sic].''

Our Response: The regulation and the language within the Act that the commenter refers to is the process of determining exclusions from critical habitat, not exemptions. The commenter is correct in that section 4(b)(2) states that exclusions cannot be granted if the Secretary of the Interior determines, ''that the failure to designate such area as critical habitat will result in the extinction of the species concerned.'' There is no regulation 50 CFR 40205, but 50 CFR 402.05 sets forth regulations that concern expedited consultation in the event of emergency circumstances that mandate that need. Further, 50 CFR 424.19 states that exclusion cannot occur if it will result in the extinction of a species.

Section 4(a)(3)(B)(i) of the Act describes exemptions from critical habitat applying to Department of Defense land. The Secretary has determined that the INRMP for MCAS Miramar provides a benefit to this species and that the lands it covers are therefore exempt from critical habitat designation. Sections 4(a)(3)(B)(ii) and (iii) also note that agencies granted an exemption must still consult under section 7(a)(2) of the Act, and that the Department of Defense must comply with section 9, ''including the prohibition preventing extinction and taking of endangered species and threatened species.'' Thus, although military bases can be exempt from critical habitat, the Act has mechanisms in place to prevent extinction.

As discussed in our response to comment 14 above, the reason for the decline of *Monardella viminea* on MCAS Miramar is poorly understood. However, despite that lack of knowledge, we believe that MCAS Miramar is providing conservation measures and protections that are working to prevent extinction of *M. viminea.*

Required Determinations

Regulatory Planning and Review—Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this rule under Executive Order 12866. OMB bases its determination upon the following four criteria:

(1) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(2) Whether the rule will create inconsistencies with other Federal agencies' actions.

(3) Whether the rule will materially affect entitlements, grants, user fees, loan programs or the rights and obligations of their recipients.

(4) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. In this final rule, we certify that the critical habitat designation for *Monardella viminea* will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts on these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (*e.g.,* transportation and construction). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number'' of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities authorized, funded, or carried out by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they authorize, fund, or carry out that may affect *Monardella viminea.* Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities (see *Application of the ''Adverse Modification'' Standard* section).

In our final economic analysis of the critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of *Monardella viminea* and the designation of critical habitat. The analysis is based on the estimated impacts associated with the rulemaking as described in Chapters 3 through 5 and Appendix A of the analysis and evaluates the potential for economic impacts related to transportation and construction.

The final economic analysis for *Monardella viminea* found that there are no businesses operating within critical habitat that meet the definition of small entities (Industrial Economics Inc. 2012, p. A–2). Therefore, the final economic analysis found that no small entities will be affected by the designation of critical habitat for *M. viminea.*

In summary, we considered whether this designation will result in a significant economic effect on a substantial number of small entities. Based on the above reasoning and currently available information, we conclude that this rule will not result in a significant economic impact on a substantial number of small entities. Therefore, we certify that the designation of critical habitat for *Monardella viminea* will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C 801 et seq.)

Under SBREFA, this rule is not a major rule. Our detailed assessment of the economic effects of this designation is described in the final economic analysis. Based on the effects identified in the economic analysis, we believe that this rule will not have an annual effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and will 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. Refer to the final economic analysis for a discussion of the effects of this determination.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared to not taking the regulatory action under consideration.

The economic analysis finds that none of these criteria are relevant to this analysis and that no modifications to future economic activities are anticipated to result from the designation of critical habitat. Thus, based on information in the economic analysis, energy-related impacts associated with *Monardella viminea* conservation activities within critical habitat are not expected. As such, the designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because it will not produce a federal mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. Further, the lands we are designating as critical habitat are owned by private individuals, Padre Dam Municipal Water District, the California Department of Transportation. None of these fit the definition of ''small governmental jurisdiction.'' Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for *Monardella viminea* in a takings implications assessment. As discussed above, the designation of critical habitat affects only Federal actions. Although private parties that receive Federal funding, assistance, or require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. The takings implications assessment concludes that this designation of critical habitat for *M. viminea* does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this rule does not have significant Federalism effects. A federalism impact summary statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this critical habitat designation with appropriate State resource agencies in California. We did not receive any comments from any State resource agencies during the two open comment periods. The designation of critical habitat in areas currently occupied by *Monardella viminea* imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas that contain the physical or biological features essential to the conservation of the species are more clearly defined, and the elements of the features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) will be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the applicable standards set forth in sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the elements of physical or biological features essential to the conservation of *Monardella viminea* within the designated areas to assist the public in understanding the habitat needs of the species.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not

conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

We determined that there are no tribal lands occupied by *Monardella viminea* at the time of listing that contain the features essential for conservation of the species, and no tribal lands unoccupied by *M. viminea* that are essential for the conservation of the species. Therefore, we are not designating critical habitat for *M. viminea* on tribal lands.

References Cited

A complete list of all references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this rulemaking are the staff members of the Carlsbad Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

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 § 17.12(h) by revising the entry for ''*Monardella linoides* ssp. *viminea*'' under ''FLOWERING PLANTS'' in the List of Endangered and Threatened Plants to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*		*
Monardella viminea	Willowy monardella	U.S.A. (CA), Mexico	Lamiaceae	E	649	17.96(a)	NA
*	*	*	*	*	*		*

■ 3. In § 17.96, amend paragraph (a) by revising the critical habitat entry for *Monardella linoides* ssp. *viminea* (willowy monardella) under Family Lamiaceae to read as follows:

§ 17.96 Critical habitat—plants.

(a) *Flowering plants.*

* * * * *

Family Lamiaceae: *Monardella viminea* (willowy monardella)

(1) Critical habitat units are depicted for San Diego County, California, on the map below.

(2) Within these areas, the primary constituent element of the physical and biological features essential to the conservation of *Monardella viminea* is riparian channels with ephemeral drainages and adjacent floodplains:

(i) With a natural hydrological regime, in which:

(A) Water flows only after peak seasonal rainstorms;

(B) High runoff events periodically scour riparian vegetation and redistribute alluvial material to create new stream channels, benches, and sandbars; and

(C) Water flows for usually less than 48 hours after a rain event, without long-term standing water;

(ii) With surrounding vegetation that provides semi-open, foliar cover with:

(A) Little or no herbaceous understory;

(B) Little to no canopy cover;

(C) Open ground cover, less than half of which is herbaceous vegetation cover;

(D) Some shrub cover; and

(E) An association of other plants, including *Eriogonum fasciculatum* (California buckwheat) and *Baccharis sarothroides* (broom baccharis);

(iii) That contain ephemeral drainages that:

(B) Are made up of coarse, rocky, or sandy alluvium; and

(C) Contain terraced floodplains, terraced secondary benches, stabilized sandbars, channel banks, or sandy washes; and

(iv) That have soil with high sand content, typically characterized by sediment and cobble deposits, and further characterized by a high content of coarse, sandy grains and low content of silt and clay.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) *Critical habitat map units.* Data layers defining map units were created

using a base of U.S. Geological Survey 7.5' quadrangle maps. Critical habitat units were then mapped using Universal Transverse Mercator (UTM) zone 11, North American Datum (NAD) 1983 coordinates.

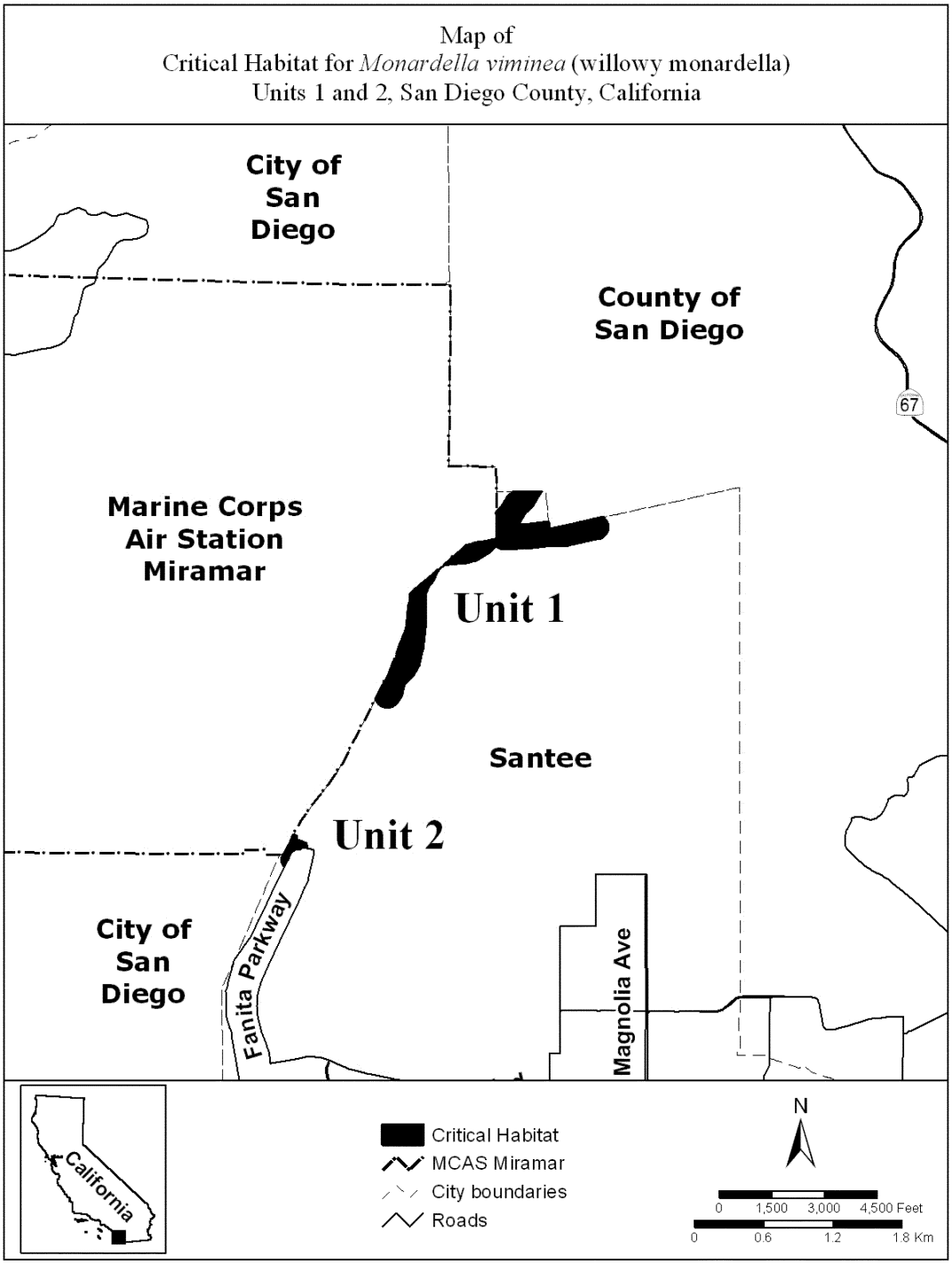
(5) Unit 1: Sycamore Canyon, and Unit 2, West Sycamore Canyon, San Diego County, California.

(i) Unit 1 for *Monardella viminea,* Sycamore Canyon Unit, San Diego County, California. From USGS 1:24,000 quadrangle San Vicente Reservoir, lands bounded by the following UTM NAD83 coordinates (E,N): 501600,3640272; 501581,3640252; 501696,3640253; 501856,3640274; 501861,3640213; 502006,3640245; 502010,3640246; 502330,3640316; 502335,3640312; 502342,3640307; 502348,3640300; 502354,3640294; 502359,3640287; 502363,3640279; 502367,3640271; 502370,3640263; 502372,3640254; 502373,3640246; 502374,3640237; 502374,3640228; 502373,3640220; 502372,3640211; 502370,3640203; 502367,3640195; 502363,3640187; 502359,3640179; 502353,3640172; 502348,3640165; 502342,3640159; 502335,3640154; 502328,3640149; 502320,3640144; 502312,3640141; 502304,3640138; 502296,3640135; 502050,3640081; 502046,3640080; 502030,3640079; 501886,3640076; 501716,3640054; 501704,3640053; 501578,3640052; 501517,3640051; 501460,3640051; 501451,3640051; 501442,3640052; 501433,3640054; 501425,3640057; 501417,3640060; 501409,3640064; 501401,3640069; 501331,3640008; 501315,3639997; 501236,3639953; 501222,3639947; 501215,3639945; 501144,3639925; 501134,3639922; 501123,3639921; 500982,3639912; 500957,3639910; 500973,3639924; 501031,3639974; 501128,3640057; 501149,3640075; 501161,3640078; 501162,3640078; 501242,3640095; 501298,3640107; 501360,3640120; 501388,3640126; 501408,3640130; 501410,3640131; 501407,3640359; 501447,3640402; 501469,3640439; 501495,3640483; 501499,3640490; 501504,3640496; 501509,3640502; 501514,3640507; 501521,3640512; 501527,3640517; 501549,3640531; 501556,3640539; 501603,3640540; 501608,3640540; 501614,3640540; 501792,3640541; 501787,3640534; 501758,3640495; 501737,3640451; 501734,3640444; 501725,3640431; 501695,3640393; 501689,3640387; 501684,3640381; 501677,3640376; 501670,3640371; 501655,3640361; 501614,3640291; 501604,3640277; thence returning to 501600,3640272. Lands bounded by the following UTM NAD83 coordinates (E,N): 500470,3638670; 500462,3638669; 500453,3638669; 500444,3638670; 500436,3638671; 500427,3638673; 500419,3638677; 500411,3638680; 500404,3638685; 500397,3638690; 500390,3638695; 500384,3638701; 500378,3638708; 500373,3638715; 500369,3638723; 500365,3638730; 500365,3638731; 500362,3638739; 500360,3638747; 500360,3638748; 500372,3638771; 500373,3638772; 500409,3638842; 500433,3638889; 500468,3638955; 500498,3639034; 500506,3639052; 500518,3639066; 500534,3639092; 500561,3639193; 500562,3639197; 500607,3639314; 500623,3639355; 500637,3639479; 500646,3639555; 500648,3639573; 500655,3639637; 500657,3639654; 500712,3639701; 500753,3639736; 500764,3639745; 500871,3639837; 500896,3639859; 500881,3639827; 500858,3639781; 500855,3639775; 500845,3639760; 500815,3639724; 500784,3639649; 500790,3639577; 500792,3639546; 500792,3639533; 500792,3639514; 500787,3639424; 500787,3639418; 500759,3639164; 500756,3639148; 500723,3639026; 500721,3639020; 500719,3639013; 500716,3639007; 500712,3639000; 500684,3638955; 500675,3638943; 500674,3638941; 500606,3638863; 500595,3638843; 500583,3638783; 500581,3638776; 500578,3638769; 500576,3638762; 500572,3638755; 500568,3638749; 500564,3638742; 500537,3638708; 500531,3638701; 500525,3638695; 500518,3638689; 500511,3638684; 500504,3638680; 500496,3638676; 500487,3638673; 500482,3638672; 500479,3638671; thence returning to 500470,3638670.

(ii) Unit 2 for *Monardella viminea,* West Sycamore Canyon Unit, San Diego County, California. From USGS 1:24,000 quadrangles Poway and La Mesa, lands bounded by the following UTM NAD83 coordinates (E,N): 499542,3637385; 499559,3637384; 499579,3637426; 499609,3637489; 499642,3637558; 499667,3637544; 499661,3637527; 499661,3637513; 499748,3637481; 499750,3637476; 499754,3637468; 499756,3637459; 499758,3637451; 499759,3637447; 499743,3637451; 499714,3637454; 499703,3637441; 499666,3637441; 499651,3637432; 499620,3637409; 499603,3637382; 499589,3637348; 499572,3637318; 499559,3637293; 499556,3637288; 499554,3637292; 499551,3637300; 499548,3637308; 499546,3637317; 499544,3637325; 499544,3637334; 499544,3637343; 499545,3637351; 499546,3637360; 499549,3637368; 499552,3637379; thence returning to 499542,3637385.

(iii) **NOTE:** Map of Unit 1 and Unit 2, Sycamore Canyon and West Sycamore Canyon, follows:

BILLING CODE 4310–55–P



* * * * *

Dated: February 8, 2012.

Rachel Jacobson,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–3903 Filed 3–5–12; 8:45 am]

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Part III

Commodity Futures Trading Commission

17 CFR Part 162

Securities and Exchange Commission

17 CFR Part 248

Identity Theft Red Flags Rules; Proposed Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 162

RIN 3038–AD14

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 248

[Release No. IC–29969; File No. S7–02–12]

RIN 3235–AL26

Identity Theft Red Flags Rules

AGENCY: Commodity Futures Trading Commission and Securities and Exchange Commission.

ACTION: Joint proposed rules and guidelines.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'') and the Securities and Exchange Commission (''SEC,'' together with the CFTC, the ''Commissions'') are jointly issuing proposed rules and guidelines to implement new statutory provisions enacted by Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act. These provisions amend section 615(e) of the Fair Credit Reporting Act and direct the Commissions to prescribe rules requiring entities that are subject to the Commissions' jurisdiction to address identity theft in two ways. First, the proposed rules and guidelines would require financial institutions and creditors to develop and implement a written identity theft prevention program that is designed to detect, prevent, and mitigate identity theft in connection with certain existing accounts or the opening of new accounts. The Commissions also are proposing guidelines to assist entities in the formulation and maintenance of a program that would satisfy the requirements of the proposed rules. Second, the proposed rules would establish special requirements for any credit and debit card issuers that are subject to the Commissions' jurisdiction, to assess the validity of notifications of changes of address under certain circumstances.

DATES: Comments must be received on or before May 7, 2012.

ADDRESSES: Comments may be submitted by any of the following methods:

CFTC:

- Agency Web site, via its Comments Online Process: Comments may be submitted to *http://comments.cftc.gov*. Follow the instructions for submitting comments on the Internet Web site.
- *Mail:* David A. Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as mail above.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the CFTC to consider information that may be exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the established procedures in 17 CFR 145.9.

The CFTC reserves the right, but shall not have the obligation, to review, pre-screen, filter, redact, refuse, or remove any or all submissions from *www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act, 5 U.S.C. 551, *et seq.*, and other applicable laws, and may be accessible under the Freedom of Information Act, 5 U.S.C. 552.

SEC:

Electronic Comments

- Use the SEC's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number S7–02–12 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

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 S7–02–12.

This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The SEC will post all comments on the SEC's Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for Web site viewing and printing in the SEC'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. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: CFTC: Carl E. Kennedy, Counsel, at Commodity Futures Trading Commission, Office of the General Counsel, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, telephone number (202) 418–6625, facsimile number (202) 418–5524, email *c_kennedy@cftc.gov*; SEC: with regard to investment companies and investment advisers, contact Thoreau Bartmann, Senior Counsel, or Hunter Jones, Assistant Director, Office of Regulatory Policy, Division of Investment Management, (202) 551–6792, or with regard to brokers, dealers, or transfer agents, contact Brice Prince, Special Counsel, or Joseph Furey, Assistant Chief Counsel, Office of Chief Counsel, Division of Trading and Markets, (202) 551–5550, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Commissions are proposing new rules and guidelines on identity theft red flags for entities subject to their respective jurisdiction. The CFTC is proposing to add new subpart C (''Identity Theft Red Flags'') to part 162 of the CFTC's regulations [17 CFR part 162] and the SEC is proposing to add new subpart C (''Regulation S–ID: Identity Theft Red Flags'') to part 248 of the SEC's regulations [17 CFR part 248], under the Fair Credit Reporting Act of 1970 [15 U.S.C. 1681], the Commodity Exchange Act [7 U.S.C. 1], the Securities Exchange Act of 1934 [15 U.S.C. 78], the Investment Company Act of 1940 [15 U.S.C. 80a], and the Investment Advisers Act of 1940 [15 U.S.C. 80b].

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I. Background

The growth and advancement of information technology and electronic communication have made it increasingly easy to collect, maintain and transfer personal information about individuals. Advancements in technology also have led to increasing threats to the integrity and privacy of personal information.[1] During recent decades, the federal government has taken steps to help protect individuals, and to help individuals protect themselves, from the risks of theft, loss, and abuse of their personal information.[2]

The Fair Credit Reporting Act of 1970[3] (''FCRA'') sets standards for the collection, communication, and use of information about consumers by consumer reporting agencies.[4] Congress has amended the FCRA numerous times since 1970 to augment the protections the law provides. For example, the Fair and Accurate Credit Transactions Act of 2003 (''FACT Act'')[5] amended the FCRA to enhance the ability of consumers to combat identity theft.[6] The FACT Act also amended the FCRA to direct certain federal agencies to jointly issue rules and guidelines related to identity theft.[7]

Under the FACT Act's amendments to the FCRA, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, and the Federal Trade Commission (the ''FTC'') (together, the ''Agencies'') were required to issue joint rules and guidelines regarding the detection, prevention, and mitigation of identity theft for entities that are subject to their respective enforcement authority (the ''identity theft red flags rules and guidelines'').[8] The Agencies also were required to prescribe joint rules applicable to issuers of credit and debit cards, to require that such issuers assess the validity of notifications of changes of address under certain circumstances (the ''card issuer rules'').[9] In 2007, the Agencies issued joint final identity theft rules and guidelines, and joint final card issuer rules.[10]

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'').[11] Title X of the Dodd-Frank Act, which is titled the Consumer Financial Protection Act of 2010 (''CFP Act''), established a Bureau of Consumer Financial Protection within the Federal Reserve System and gave this new agency certain rulemaking, enforcement, and supervisory powers over many consumer financial products and services, as well as the entities that sell them. In addition, Title X amended a number of other federal consumer protection laws enacted prior to the Dodd-Frank Act, including the FCRA.

Within Title X, section 1088(a)(8),(10) of the Dodd-Frank Act amended the FCRA by adding the Commissions (CFTC and SEC) to the list of federal agencies required to jointly prescribe and enforce identity theft red flags rules and guidelines and card issuer rules.[12]

[1] *See, e.g., U.S. Government Accountability Office, Information Security: Federal Guidance Needed to Address Control Issues with Implementing Cloud Computing* (May 2010) (available at *http://www.gao.gov/new.items/d10513.pdf*) (discussing information security implications of cloud computing); *Department of Commerce, Internet Policy Task Force, Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework,* at Section I (2010) (available at *http://www.ntia.doc.gov/reports/2010/iptf_privacy_greenpaper_12162010.pdf*) (reviewing recent technological changes that necessitate a new approach to commercial data protection). *See also Fred H. Cate, Privacy in the Information Age,* at 13–16 (1997) (discussing the privacy and data security issues that arose during early increases in the use of digital data).

[2] *See, e.g.,* Report of President's Identity Theft Task Force (Sept. 2008) (available at *http://www.ftc.gov/os/2008/10/081021taskforcereport.pdf*) (documenting governmental efforts to reduce identity theft); Testimony of Edith Ramirez, Commissioner of Federal Trade Commission, on Data Security, before House Subcommittee on Commerce, Manufacturing, and Trade, June 15, 2011 (available at *http://www.ftc.gov/os/testimony/110615datasecurityhouse.pdf*) (describing efforts of the Federal Trade Commission to promote data security).

[3] Public Law 91–508, 84 Stat. 1114 (1970), *codified at* 15 U.S.C. 1681 *et seq.*

[4] The FCRA states that its purpose is ''to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information * * *.'' *Id.*

[5] *See* Public Law 108–159, 117 Stat. 1952 (2003).

[6] The Federal Trade Commission has defined ''identity theft'' as ''a fraud committed or attempted using the identifying information of another person without authority.'' *See* 16 CFR 603.2(a).

[7] Section 114 of the FACT Act.

[8] *See* sections 615(e)(1)(A)–(B) of the FCRA, 15 U.S.C. 1681m(e)(1)(A)—(B). Section 615(e)(1)(A) of the FCRA provides that the Agencies shall jointly ''establish and maintain guidelines for use by each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary.'' Section 615(e)(1)(B) provides that the Agencies shall jointly ''prescribe regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing the guidelines established pursuant to [section 615(e)(1)(A)], to identify possible risks to account holders or customers or to the safety and soundness of the institution or customers.''

[9] Section 615(e)(1)(C) of the FCRA provides that the Agencies shall jointly ''prescribe regulations applicable to card issuers to ensure that, if a card issuer receives notification of a change of address for an existing account, and within a short period of time (during at least the first 30 days after such notification is received) receives a request for an additional or replacement card for the same account, the card issuer may not issue the additional or replacement card, unless the card issuer'' follows certain procedures (including notifying the cardholder at the former address) to assess the validity of the change of address. 15 U.S.C. 1681m(e)(1)(C).

[10] *See* Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 72 FR 63718 (Nov. 9, 2007) (''2007 Adopting Release''). The Agencies' final rules also implemented section 315 of the FACT Act, which required the Agencies to adopt joint rules providing guidance regarding reasonable policies and procedures that a user of consumer reports must employ when a consumer reporting agency sends the user a notice of address discrepancy. *See* 15 U.S.C. 1681c(h). The Dodd-Frank Act does not authorize the Commissions to propose rules under section 315 of the FACT Act, and therefore entities under the authority of the Commissions, for purposes of the identity theft red flags rules and guidelines, will be subject to other agencies' rules on address discrepancies. *See, e.g.,* 16 CFR 641.1 (FTC).

[11] Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act is available at *http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm.*

[12] *See* section 615(e)(1) of the FCRA, 15 U.S.C. 1681m(e)(1). In addition, section 1088(a)(10) of the Dodd-Frank Act added the Commissions to the list of federal administrative agencies responsible for enforcement of rules pursuant to section 621(b) of the FCRA. *See infra* note 19. Section 1100H of the Dodd-Frank Act provides that the Commissions' new enforcement authority (as well as other changes in various agencies' authority under other provisions) becomes effective as of the ''designated transfer date'' to be established by the Secretary of

Continued

Thus, the Dodd-Frank Act provides for the transfer of rulemaking responsibility and enforcement authority to the CFTC and SEC with respect to the entities under their respective jurisdiction. Accordingly, the Commissions are now jointly proposing for public notice and comment identity theft rules and guidelines and card issuer rules.[13] The proposed rules and guidelines [14] are substantially similar to those adopted by the Agencies in 2007.[15] As discussed further below, the Commissions recognize that most of the entities over which they have jurisdiction are likely to be already in compliance with the final rules and guidelines that the Agencies adopted in 2007, to the extent that these entities' activities fall within the scope of the Agencies' final rules and guidelines. The proposed rules and guidelines, if adopted, would not contain new requirements not already in the Agencies' final rules, nor would they expand the scope of those rules to include new entities that were not already previously covered by the Agencies' rules.[16] The proposed rules and guidelines do contain examples and minor language changes designed to help guide entities under the Commissions' jurisdiction in complying with the rules. The Commissions anticipate that the proposed rules, if adopted, may help some entities discern whether and how the identity theft rules and guidelines apply to their circumstances.

II. Explanation of the Proposed Rules and Guidelines

A. Proposed Identity Theft Red Flags Rules

Sections 615(e)(1)(A) and (B) of the FCRA, as amended by the Dodd-Frank Act, require that the Commissions jointly establish and maintain guidelines for ''financial institutions'' and ''creditors'' regarding identity theft, and prescribe rules requiring such institutions and creditors to establish reasonable policies and procedures for the implementation of those guidelines.[17] The Commissions have sought to propose identity theft red flags rules and guidelines that are substantially similar to the Agencies' final identity theft red flags rules and guidelines, and that would provide flexibility and guidance to the entities subject to the Commissions' jurisdiction. To that end, the proposed rules discussed below would specify: (1) Which financial institutions and creditors would be required to develop and implement a written identity theft prevention program (''Program''); (2) the objectives of the Program; (3) the elements that the Program would be required to contain; and (4) the steps financial institutions and creditors would need to take to administer the Program.

1. Which Financial Institutions and Creditors Would Be Required To Have a Program

The ''scope'' subsections of the proposed rules generally set forth the types of entities that would be subject to the Commissions' identity theft red flags rules and guidelines.[18] Under these proposed subsections, the rules would apply to entities over which the Commissions have recently been granted enforcement authority under the FCRA.[19] The Commissions' proposed scope provisions are similar to the scope provisions of the rules adopted by the Agencies.[20]

The CFTC has tailored its proposed ''scope'' subsection, as well as the definitions of ''financial institution'' and ''creditor,'' to describe the entities to which its proposed identity theft red flags rules and guidelines would apply.[21] The CFTC's proposed rule states that it would apply to futures commission merchants (''FCMs''), retail foreign exchange dealers, commodity trading advisors (''CTAs''), commodity pool operators (''CPOs''), introducing brokers (''IBs''), swap dealers, and major swap participants.[22]

The SEC's proposed ''scope'' subsection provides that the proposed rules and guidelines would apply to a financial institution or creditor, as defined by the FCRA, that is:

- A broker, dealer or any other person that is registered or required to be registered under the Securities Exchange Act of 1934 (''Exchange Act'');
- an investment company that is registered or required to be registered under the Investment Company Act of 1940, that has elected to be regulated as a business development company under that Act, or that operates as an employees' securities company under that Act; or
- an investment adviser that is registered or required to be registered under the Investment Advisers Act of 1940.[23]

The entities listed in the proposed scope section are the entities regulated by the SEC that are most likely to be ''financial institutions'' or ''creditors,'' *i.e.,* registered brokers or dealers (''broker-dealers''), investment

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the Treasury, as described in section 1062 of that Act. On September 20, 2010, the Secretary of the Treasury designated July 21, 2011 as the transfer date. *See* Designated Transfer Date, 75 FR 57252 (Sept. 20, 2010).

[13] The CFTC is proposing to add the proposed rules and guidelines in this release as a new subpart C to part 162 of the CFTC's regulations, 17 CFR 162. *See* Business Affiliate Marketing and Disposal of Consumer Information Rules, 76 FR 43879 (July 22, 2011). As a result, the purpose, scope, and definitions in part 162 would apply to the proposed identity theft red flags rules and guidelines, as well as to the proposed card issuer rules. The new subpart C would be titled ''Identity Theft Red Flags.'' The SEC is proposing to add the proposed rules and guidelines in this release as a new subpart C to part 248 of the SEC's regulations. 17 CFR part 248. The new subpart C is titled ''Regulation S–ID: Identity Theft Red Flags.''

[14] For ease of reference, unless the context indicates otherwise, our general use of the term ''rules and guidelines'' in this preamble will refer to both the identity theft red flags rules and guidelines and the card issuer rules.

[15] *See* 15 U.S.C. 1681m(e)(1).

[16] The CFTC notes that the Dodd-Frank Act creates two new entities that must comply with these proposed rules and guidelines: Swap dealers and major swap participants. The CFTC anticipates that to the extent that these new entities currently maintain or offer covered accounts (as discussed below), they also may be in compliance with the Agencies' final rules.

[17] 15 U.S.C. 1681m(e)(1)(A) and (B). Key terms such as financial institution and creditor are defined in the proposed rules and discussed later in this Section.

[18] Proposed § 162.30(a) (CFTC); § 248.201(a) (SEC).

[19] Section 1088(a)(10)(A) of the Dodd-Frank Act amended section 621(b) of the FCRA to add the Commissions to the list of federal agencies responsible for enforcement of the FCRA. As amended, section 621(b) of the FCRA specifically provides that enforcement of the requirements imposed under the FCRA ''with respect to consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of [certain information] shall be enforced under * * *. the Commodity Exchange Act, with respect to a person subject to the jurisdiction of the [CFTC]; [and under] the Federal securities laws, and any other laws that are subject to the jurisdiction of the [SEC], with respect to a person that is subject to the jurisdiction of the [SEC] * * *'' 15 U.S.C. 1681s(b)(1)(F)–(G). *See also* 15 U.S.C. 1681a(f) (defining ''consumer reporting agency'').

[20] *See, e.g.,* 12 CFR 717.90 (stating that the National Credit Union Administration red flags rule ''applies to a financial institution or creditor that is a federal credit union''). The Commissions do not have general regulatory jurisdiction over banks, savings and loan associations, or credit unions that hold a transaction account, although the Commissions may have supervisory authority over specific activities of those persons. For example, the CFTC may have jurisdiction over those persons to the extent that they engage in the trading of, or the provision of advice related to, futures or swaps. Similarly, the SEC may have jurisdiction over these persons to the extent that they engage in the trading of, or the provision of advice related to, securities or security-based swaps.

[21] Proposed § 162.30(a).

[22] The CFTC has determined that the proposed identity theft red flags rules and guidelines would apply to these entities because of the increased likelihood that these entities open or maintain covered accounts, or pose a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft. This approach is consistent with the scope of part 162. *See* 76 FR at 43884.

[23] Proposed § 248.201(a).

companies and investment advisers.[24] The proposed scope section also would include other entities that are registered or are required to register under the Exchange Act. The section would not specifically identify those entities, such as nationally recognized statistical ratings organizations, self-regulatory organizations, and municipal advisors and municipal securities dealers, because, as discussed below, they are unlikely to qualify as ''financial institutions'' or ''creditors'' under the FCRA.[25] The proposed scope section also would not include entities that are not themselves registered with the Commission,[26] even if they register securities under the Securities Act of 1933 or the Exchange Act, or report information under the Investment Advisers Act of 1940.[27]

• The Commissions solicit comment on the ''scope'' section of the proposed identity theft red flags rules.

• Should the SEC's proposed scope section specifically list all of the entities that would be covered by the rule if they were to qualify as financial institutions or creditors under the FCRA? Are the entities specifically listed in the proposed rule the registered entities that are most likely to be financial institutions or creditors under the FCRA? Should the SEC exclude any entities that are listed? Should it include any other entities that are not listed? Should the SEC include entities that register securities with the SEC or that report certain information to the SEC even if the entities themselves do not register with the SEC?

i. Definition of Financial Institution

As discussed above, the Commissions' proposed red flags rules and guidelines would apply to ''financial institutions'' and ''creditors.'' The Commissions are proposing to define the term ''financial institution'' by reference to the definition of the term in section 603(t) of the FCRA.[28] That section defines a financial institution to include certain banks and credit unions, and ''any other person that, directly or indirectly, holds a transaction account (as defined in section 19(b) of the Federal Reserve Act) belonging to a consumer.'' [29] Section 19(b) of the Federal Reserve Act defines a transaction account as ''a deposit or account on which the depositor or account holder is permitted to make withdrawals by negotiable or transferable instrument, payment orders of withdrawal, telephone transfers, or other similar items for the purpose of making payments or transfers to third parties or others.'' [30]

Accordingly, the Commissions are proposing to define ''financial institution'' as having the same meaning as in the FCRA. The CFTC's proposed definition, however, also specifies that the term ''includes any futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, swap dealer, or major swap participant that directly or indirectly holds a transaction account belonging to a customer.'' [31]

The SEC is not proposing to mention specific entities in its definition of ''financial institution'' because the SEC's proposed scope section lists specific entities subject to the SEC's rule.[32] The SEC notes that entities under its jurisdiction that may be financial institutions because they hold customers' transaction accounts would likely include broker-dealers that offer custodial accounts and investment companies that enable investors to make wire transfers to other parties or that offer check-writing privileges. The SEC recognizes that most registered investment advisers are unlikely to hold transaction accounts and thus would not qualify as financial institutions. The proposed definition nonetheless does not exclude investment advisers or any other entities regulated by the SEC because they may hold transaction accounts or otherwise meet the definition of ''financial institution.''

• The Commissions solicit comment on their proposed definitions of financial institution. Should the Commissions provide further guidance on the types of accounts that an entity might hold that would qualify the entity as a financial institution? Should the Commissions tailor the definition in any way to reflect the characteristics of the entities that would be subject to the rule? If so, how? Would defining ''financial institution'' instead in a way that differs from the Agencies' definition compromise the substantial similarity of the red flags rules?

• What type of entities regulated by the Commissions would most likely qualify as financial institutions under the proposed definition?

• Should the SEC's rule omit investment advisers or any other SEC-registered entity from the list of entities covered by the proposed rule?

ii. Definition of Creditor

The Commissions are proposing to define ''creditor'' to reflect a recent statutory definition of the term. In December 2010, President Obama signed into law the Red Flag Program Clarification Act of 2010 (''Clarification Act''), which amended the definition of ''creditor'' in the FCRA for purposes of identity theft red flag rules and guidelines.[33] The Commissions' proposed definition of ''creditor'' would

[24] The SEC's proposed rules would define the scope of the proposed identity theft red flags rules and guidelines, proposed § 248.201(a), differently than Regulation S–AM, the affiliate marketing rule the SEC adopted under FCRA, defines its scope. *See* 17 CFR 248.101(b) (providing that Regulation S–AM applies to any brokers or dealers (other than notice-registered brokers or dealers), any investment companies, and any investment advisers or transfer agents registered with the Commission). Section 214(b) of the FACT Act, pursuant to which the SEC adopted Regulation S–AM, did not specify the types of entities that would be subject to the SEC's rules, and did not state that the affiliate marketing rules should apply to all persons over which the SEC has jurisdiction. By contrast, the Dodd-Frank Act specifies that the SEC's identity theft red flags rules and guidelines should apply to a ''person that is subject to the jurisdiction'' of the SEC. *See* Dodd-Frank Act section 1088(a)(8), (10).

The scope of the SEC's proposed rules also would differ from that of Regulation S–P, 17 CFR part 248, subpart A, the privacy rule the SEC adopted in 2000 pursuant to the Gramm-Leach-Bliley Act. Public Law 106–102 (1999). Regulation S–P was adopted under Title V of that Act, which, unlike the FCRA, limited the SEC's regulatory authority to (i) brokers and dealers, (ii) investment companies, and (iii) investment advisers registered under the Investment Advisers Act of 1940. *See* 15 U.S.C. 6805(a)(3)-(5).

[25] Although the Commission preliminarily believes that municipal advisors and municipal securities dealers are unlikely to qualify as ''financial institutions'' because they are unlikely to maintain transaction accounts for consumers, we welcome comment on this point specifically, as well as on the general issue of whether the list of entities in the proposed scope section should include any other entities.

[26] The Dodd-Frank Act defines a ''person regulated by the [SEC],'' for other purposes of that Act, as certain entities that are registered or required to be registered with the SEC, and certain employees, agents and contractors of those entities. *See* section 1002(21) of the Dodd-Frank Act.

[27] *See* Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, Investment Advisers Act Release No. 3222 (June 22, 2011) [76 FR 39646 (July 6, 2011)] (adopting rules related to investment advisers exempt from registration with the SEC, including ''exempt reporting advisers'').

[28] 15 U.S.C. 1681a(t). *See* proposed § 162.30(b)(7) (CFTC); proposed § 248.201(b)(7) (SEC). The Agencies also defined ''financial institution,'' in their identity theft red flags rules and guidelines, by reference to the FCRA. *See, e.g.,* 16 CFR 681.1(b)(7) (FTC) (''Financial institution has the same meaning as in 15 U.S.C. 1681a(t).'').

[29] 15 U.S.C. 1681a(t).

[30] 12 U.S.C. 461(b)(1)(C). Section 19(b) further states that a transaction account ''includes demand deposits, negotiable order of withdrawal accounts, savings deposits subject to automatic transfers, and share draft accounts.''

[31] *See* proposed § 162.30(b)(7).

[32] *See* proposed § 248.201(a).

[33] Red Flag Program Clarification Act of 2010, Public Law 111–319 (2010) (inserting new section 4 at the end of section 615(e) of the FCRA), *codified at* 15 U.S.C. 1681m(e)(4).

refer to the definition in the FCRA as amended by the Clarification Act.[34]

The FCRA now defines a ''creditor,'' for purposes of the red flags rules and guidelines, as a creditor as defined in the Equal Credit Opportunity Act[35] (''ECOA'') (*i.e.,* a person that regularly extends, renews or continues credit,[36] or makes those arrangements) that ''regularly and in the course of business … advances funds to or on behalf of a person, based on an obligation of the person to repay the funds or repayable from specific property pledged by or on behalf of the person.''[37] The FCRA excludes from this definition a creditor that ''advances funds on behalf of a person for expenses incidental to a service provided by the creditor to that person * * *.''[38] The Clarification Act does not define the extent to which the advancement of funds for expenses would be considered ''incidental'' to services rendered by the creditor. The legislative history does indicate that the Clarification Act was intended to ensure that lawyers, doctors, and other small businesses that may advance funds to pay for services such as expert witnesses, or that may bill in arrears for services provided, should not be considered creditors under the red flags rules and guidelines.[39]

As discussed above, the Commissions propose to define ''creditor'' by reference to its definition in section 615(e)(4) of the FCRA as added by the Clarification Act.[40] The CFTC's proposed definition also would include certain entities (such as FCMs and CTAs) that regularly extend, renew or continue credit or make those credit arrangements.[41] The SEC's proposed definition also would include ''lenders such as brokers or dealers offering margin accounts, securities lending services, and short selling services.''[42] These entities are likely to qualify as ''creditors'' under the proposed definition because the funds that are advanced in these accounts do not appear to be for ''expenses incidental to a service provided.'' The proposed definition of ''creditor'' would not include, however, CTAs or investment advisers because they bill in arrears, *i.e.,* on a deferred basis, if they do not ''advance'' funds to investors and clients.[43]

- The Commissions request comment on their proposed definitions of the terms credit and creditor. Should the proposed terms be tailored to take into account the particular characteristics of the entities regulated by the Commissions? If so, how? Should the Commissions provide further guidance, in the rule text or elsewhere, regarding the types of activities that might qualify an entity as a creditor? Should the Commissions provide guidance regarding the circumstances in which expenses, paid for by advanced funds, are ''incidental'' to services provided?
- Do commenters agree that broker-dealers that offer margin accounts, securities lending services, or short-selling services are likely to qualify as ''creditors'' under the proposed definition? Are there other activities that would likely cause SEC-registered entities to qualify as ''creditors''?
- Are there any other entities under the CFTC's or SEC's jurisdiction that maintain accounts that pose a reasonably foreseeable risk of identity theft and that the Commissions should include as ''creditors'' under the definition?[44]

iii. Definition of Covered Account and Other Terms

Under the proposed rules, entities that adopt red flags Programs would focus their attention on ''covered accounts'' for indicia of possible identity theft. The Commissions propose to define a ''covered account'' as: (i) An account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions; and (ii) any other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers[45] or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.[46] The CFTC's proposed definition includes a margin account as an example of a covered account.[47] The SEC's proposed definition includes a brokerage account with a broker-dealer or an account maintained by a mutual fund (or its agent) that permits wire transfers or other payments to third parties as examples of such an account.[48]

The Commissions are proposing to define ''account'' as a ''continuing relationship established by a person with a financial institution or creditor to obtain a product or service for personal, family, household or business purposes.''[49] The CFTC's proposed definition would specifically include an extension of credit, such as the purchase of property or services involving a deferred payment.[50] The SEC's proposed definition would specifically

[34] *See* proposed § 162.30(b)(5) (CFTC); proposed § 248.201(b)(5) (SEC). The Commissions understand that the Agencies are likely to amend their red flags rules and guidelines to reflect the new definition of ''creditor'' in the FCRA enacted by the Red Flag Program Clarification Act.

[35] Section 702(e) of the ECOA defines ''creditor'' to mean ''any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.'' 15 U.S.C. 1691a(e).

[36] The Commissions are proposing to define ''credit'' by reference to its definition in the FCRA. *See* proposed § 162.30(b)(4) (CFTC); proposed § 248.201(b)(4) (SEC). That definition refers to the definition of credit in the ECOA, which means ''the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.'' The Agencies defined ''credit'' in the same manner in their identity theft red flags rules. *See, e.g.,* 16 CFR 681.1(b)(4) (FTC) (defining ''credit'' as having the same meaning as in 15 U.S.C. 1681a(r)(5), which defines ''credit'' as having the same meaning as in section 702 of the ECOA).

[37] 15 U.S.C. 1681m(e)(4)(A)(iii). The FCRA defines a ''creditor'' also to include a creditor (as defined in the ECOA) that ''regularly and in the ordinary course of business (i) obtains or uses consumer reports, directly or indirectly, in connection with a credit transaction; (ii) furnishes information to consumer reporting agencies * * * in connection with a credit transaction * * *.'' 15 U.S.C. 1681m(e)(4)(A)(i)–(ii).

[38] Section 615(e)(4)(B) of the FCRA, 15 U.S.C. 1681m(e)(4)(B). The definition of ''creditor'' also authorizes the Agencies and the Commissions to include other entities in the definition of ''creditor'' if those entities are determined to offer or maintain accounts that are subject to a reasonably foreseeable risk of identity theft. 15 U.S.C. 1681m(e)(4)(C). The Commissions are not at this time proposing to include other types of entities in the definition of ''creditor'' that are not included in the statutory definition.

[39] *See* 156 Cong. Rec. S8288–9 (daily ed. Nov. 30, 2010) (statements of Senators Thune and Dodd).

[40] *See* proposed § 162.30(b)(5); proposed § 248.201(b)(5).

[41] *See* proposed § 162.30(b)(5).

[42] *See* proposed § 248.201(b)(5).

[43] Investment advisers that bill for their services on a quarterly or other deferred basis might have qualified as ''creditors'' if the term were defined as under section 702 of the Equal Credit Opportunity Act, but they would not qualify as creditors under the definition the Commissions are proposing because they are not ''advanc[ing] funds.''

[44] *See* 15 U.S.C. 1681m(e)(4)(C).

[45] Proposed § 162.30(b)(6) (CFTC) and proposed § 248.201(b)(6) (SEC) would define a ''customer'' to mean a person who has a covered account with a financial institution or creditor. The Commissions propose this definition for two reasons. First, this definition is the same as the definition of ''customer'' in the Agencies' final rules and guidelines. Second, because the definition uses the term ''person,'' it would cover various types of business entities (*e.g.,* small businesses) that could be victims of identity theft. 15 U.S.C. 1681a(b). Although the definition of ''customer'' is broad, a financial institution or creditor would be required to determine which type of accounts its Program will cover, because the proposed identity theft red flags rules and guidelines are risk-based.

[46] Proposed § 162.30(b)(3) (CFTC); proposed § 248.201(b)(3) (SEC).

[47] *See* proposed § 162.30(b)(3)(i).

[48] *See* proposed § 248.201(b)(3)(i).

[49] Proposed § 162.30(b)(1) (CFTC) and proposed § 248.201(b)(1) (SEC).

[50] Proposed § 162.30(b)(1).

include ''a brokerage account, a 'mutual fund' account (*i.e.,* an account with an open-end investment company, which may be maintained by a transfer agent or other service provider), and an investment advisory account.''[51] Both the CFTC's and SEC's proposed definitions would differ from the definitions in the Agencies' final rules and guidelines by not including a ''deposit account.'' Deposit accounts typically are offered by banks in connection with their banking activities, and not by the entities regulated by the Commissions.[52]

The proposed identity theft red flags rules and guidelines would define several other terms as the Agencies defined them in their final rules and guidelines, where appropriate, to avoid needless conflicts among regulations.[53] In addition, terms that are not defined in Regulation S–ID would have the same meaning as in the FCRA.[54]

- The Commissions request comment on the proposed definition of ''covered account.'' Should the Commissions include the proposed examples of covered accounts? Should the definition include additional examples of accounts that may be covered accounts? If so, what other types of examples should be included?
- What other types of accounts that are offered or maintained by financial institutions or creditors subject to the Commissions' enforcement authority may pose a reasonably foreseeable risk of identity theft? Should the Commissions explicitly identify them and include them as examples in the proposed rule?
- Are deposit accounts offered by any of the entities regulated by the Commissions?
- The Commissions request comment on other terms defined in the proposed rules and guidelines.

iv. Determination of Whether a Covered Account Is Offered or Maintained

Under the proposed rules, each financial institution or creditor would be required to periodically determine whether it offers or maintains covered accounts.[55] As a part of this periodic determination, a financial institution or creditor would be required to conduct a risk assessment that takes into consideration: (1) The methods it provides to open its accounts; (2) the methods it provides to access its accounts; and (3) its previous experiences with identity theft.[56] Under the proposed rules, a financial institution or creditor should consider whether, for example, a reasonably foreseeable risk of identity theft may exist in connection with accounts it offers or maintains that may be opened or accessed remotely or through methods that do not require face-to-face contact, such as through the Internet or by telephone. In addition, if financial institutions or creditors offer or maintain accounts that have been the target of identity theft, they should factor those experiences into their determination. The Commissions anticipate that entities would maintain records concerning their periodic determinations.[57]

The Commissions acknowledge that some financial institutions or creditors regulated by the Commissions may engage only in transactions with businesses where the risk of identity theft is minimal. In these instances, the financial institution or creditor may determine after a preliminary risk assessment that it does not need to develop and implement a Program,[58] or that it may develop and implement a Program that applies only to a limited range of its activities, such as certain accounts or types of accounts.[59] Under the proposed rules, a financial institution or creditor that initially determines that it does not need to have a Program would be required to periodically reassess whether it must develop and implement a Program in light of changes in the accounts that it offers or maintains and the various other factors set forth in proposed § 162.30(c) (CFTC) and proposed § 248.201(c) (SEC).

- The Commissions request comment regarding the proposed requirement to periodically determine whether a financial institution or creditor offers or maintains covered accounts. Do the proposed rules provide adequate guidance for making the periodic determinations? Should the rules specifically require the documentation of such determinations?

2. The Objectives of the Program

The proposed rules would provide that each financial institution or creditor that offers or maintains one or more covered accounts must develop and implement a written Program designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account.[60] These proposed provisions also would require that each Program be appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities. Thus, the proposed rules are designed to be scalable, by permitting Programs that take into account the operations of smaller institutions.

- The Commissions request comment on the proposed objectives of the Program.

3. The Elements of the Program

The proposed rules set out the four elements that financial institutions and creditors would be required to include

[51] Proposed § 248.201(b)(1).

[52] *See, e.g.,* Uniform Commercial Code § 9–102(a)(29) (''Deposit account' means a demand, time, savings, passbook, or similar account maintained with a bank.'').

[53] *See, e.g.,* proposed § 162.30(b)(10) (CFTC); proposed § 248.201(b)(10) (SEC) (definition of ''Red Flag'').

[54] *See* proposed § 248.201(b)(12)(vi) (SEC). The Agencies defined ''identity theft'' in their identity theft red flags rules and guidelines by referring to a definition previously adopted by the FTC. *See, e.g.,* 12 CFR 334.90(b)(8) (FDIC). The FTC defined ''identity theft'' as ''a fraud committed or attempted using the identifying information of another person without authority.'' *See* 16 CFR 603.2(a) The FTC also has defined ''identifying information,'' a term used in its definition of ''identity theft.'' *See* 16 CFR 603.2(b). The Commissions are proposing to define the terms ''identifying information'' and ''identity theft'' by including the same definition of the terms as they appear in 16 CFR 603.2. *See* proposed § 162.30(b)(8) and (9) (CFTC); proposed § 248.201(b)(8) and (9) (SEC).

[55] Proposed § 162.30(c) (CFTC) and proposed § 248.201(c) (SEC). As discussed above, the proposed rules would define a ''covered account'' as (i) an account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a brokerage account with a broker-dealer or an account maintained by a mutual fund (or its agent) that permits wire transfers or other payments to third parties; and (ii) any other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks. Proposed § 162.30(b)(3) (CFTC); proposed § 248.201(b)(3) (SEC).

[56] Proposed § 162.30(c) (CFTC) and proposed § 248.201(c) (SEC).

[57] *See, e.g., Frequently Asked Questions: Identity Theft Red Flags and Address Discrepancies* at I.1, available at *http://www.ftc.gov/os/2009/06/090611redflagsfaq.pdf.*

[58] For example, an FCM that would otherwise be subject to the proposed identity theft red flags rules and guidelines and that handles accounts only for large, institutional investors might make a risk-based determination that because it is subject to a low risk of identity theft, it does not need to develop and implement a Program. Similarly, a money market fund that would otherwise be subject to the proposed red flags rules but that permits investments only by other institutions and separately verifies and authenticates transaction requests might make such a risk-based determination that it need not develop a Program.

[59] Even a Program limited in scale, however, would need to comply with all of the provisions of the proposed rules and guidelines. *See, e.g.,* proposed § 162.30(d)–(f) (CFTC) and proposed § 248.201(d)–(f) (SEC) (Program requirements).

[60] *See* proposed § 162.30(d)(1) (CFTC) and proposed § 248.201(d)(1) (SEC).

in their Programs.[61] These elements are identical to the elements required under the Agencies' final identity theft red flag rules.[62]

First, the proposed rule would require financial institutions and creditors to develop Programs that include reasonable policies and procedures to identify relevant red flags [63] for the covered accounts that the financial institution or creditor offers or maintains, and incorporate those red flags into its Program.[64] Rather than singling out specific red flags as mandatory or requiring specific policies and procedures to identify possible red flags, this first element would provide financial institutions and creditors with flexibility in determining which red flags are relevant to their businesses and the covered accounts they manage over time. The list of factors that a financial institution or creditor should consider (as well as examples) are included in section II of the proposed guidelines, which are appended to the proposed rules.[65] Given the changing nature of identity theft, the Commissions believe that this element would allow financial institutions or creditors to respond and adapt to new forms of identity theft and the attendant risks as they arise.

Second, the proposed rule would require financial institutions and creditors to have reasonable policies and procedures to detect red flags that have been incorporated into the Program of the financial institution or creditor.[66] This element would not provide a specific method of detection. Instead, section III of the proposed guidelines provides examples of various means to detect red flags.[67]

Third, the proposed rule would require financial institutions and creditors to have reasonable policies and procedures to respond appropriately to any red flags that are detected.[68] This element would incorporate the requirement that a financial institution or creditor assess whether the red flags detected evidence a risk of identity theft and, if so, determine how to respond appropriately based on the degree of risk. Section IV of the proposed guidelines sets out a list of aggravating factors and examples that a financial institution or creditor should consider in determining the appropriate response.[69]

Finally, the proposed rule would require financial institutions and creditors to have reasonable policies and procedures to ensure that the Program (including the red flags determined to be relevant) is updated periodically, to reflect changes in risks to customers and to the safety and soundness of the financial institution or creditor from identity theft.[70] As discussed above, financial institutions and creditors would be required to determine which red flags are relevant to their businesses and the covered accounts they manage. The Commissions are proposing a periodic update, rather than immediate or continuous updates, to be parallel with the final identity theft red flags rules of the Agencies and to avoid unnecessary regulatory burdens. Section V of the proposed guidelines provides a set of factors that should cause a financial institution or creditor to update its Program.[71]

- The Commissions request comment on whether the proposed four elements of the Program would provide effective protection against identity theft and whether any additional elements should be included.
- The Commissions anticipate that a financial institution or creditor that adopts a Program could integrate the policies and procedures with other policies and procedures it has adopted pursuant to other legal requirements, such as compliance [72] and safeguards rules.[73] Should the Commissions provide guidance on how financial institutions or creditors could integrate identity theft policies and procedures with other policies and procedures?

4. Administration of the Program

The Commissions are proposing to provide direction to financial institutions and creditors regarding the administration of Programs to enhance the effectiveness of those Programs. Accordingly, the proposed rule would prescribe the steps that financial institutions and creditors would have to take to administer a Program.[74] These sections would provide that each financial institution or creditor that is required to implement a Program must provide for the continued administration of the Program and meet four additional requirements.

First, the proposed rules would require that a financial institution or creditor obtain approval of the initial written Program from either its board of directors or an appropriate committee of the board of directors.[75] This proposed requirement highlights the responsibility of the board of directors and senior management in approving a Program. This requirement would not mandate that a board be responsible for the day-to-day operations of the Program. The proposed rules provide that the board or appropriate committee must approve only the initial written Program. This provision is designed to enable a financial institution or creditor to update its Program in a timely manner. After the initial approval, at the discretion of the entity, the board, a committee, or senior management may update the Program.

Second, the proposed rules would provide that financial institutions and creditors must involve the board of directors, an appropriate committee thereof, or a designated employee at the level of senior management in the oversight, development, implementation, and administration of the Program.[76] The proposed rules would provide discretion to a financial institution or creditor to determine who would be responsible for the oversight, development, implementation, and administration of the Program in

[61] *See* proposed § 162.30(d)(2) (CFTC) and proposed § 248.201(d)(2) (SEC).

[62] *See* 2007 Adopting Release, *supra* note 10, at 63726–63730.

[63] Proposed § 162.30(b)(10) (CFTC) and proposed § 248.201(b)(10) (SEC) define ''red flags'' to mean a pattern, practice, or specific activity that indicates the possible existence of identity theft.

[64] *See* proposed § 162.30(d)(2)(i) (CFTC) and proposed § 248.201(d)(2)(i) (SEC). The board of directors, appropriate committee thereof, or designated employee may determine that a Program designed by a parent, subsidiary, or affiliated entity is also appropriate for use by the financial institution or creditor. However, the board (or designated employee) must conduct an independent review to ensure that the Program is suitable and complies with the requirements of the red flags rules and guidelines. *See* 2007 Adopting Release, *supra* note 10.

[65] The factors and examples are discussed below in Section II.B.2.

[66] *See* proposed § 162.30(d)(2)(ii) (CFTC) and proposed § 248.201(d)(2)(ii) (SEC).

[67] These examples are discussed below in Section II.B.3.

[68] *See* proposed § 162.30(d)(2)(iii) (CFTC) and proposed § 248.201(d)(2)(iii) (SEC).

[69] The aggravating factors and examples are discussed below in Section II.B.4.

[70] *See* proposed § 162.30(d)(2)(iv) (CFTC) and proposed § 248.201(d)(2)(iv) (SEC).

[71] These factors are discussed below in Section II.B.5.

[72] *See* rule 38a–1 under the Investment Company Act, 17 CFR 270.38a–1; rule 206(4)–7 under the Investment Advisers Act, 17 CFR 275.206(4)–7.

[73] Regulation S–P, 17 CFR 248.30 (applicable to broker-dealers, investment companies, and investment advisers).

[74] *See* proposed § 162.30(e) (CFTC) and proposed § 248.201(e) (SEC).

[75] *See* proposed § 162.30(e)(1) (CFTC) and proposed § 248.201(e)(1) (SEC). Proposed § 162.30(b)(2) (CFTC) and proposed § 248.201(b)(2) (SEC) define the term ''board of directors'' to include: (i) in the case of a branch or agency of a non-U.S-based financial institution or creditor, the managing official in charge of that branch or agency; and (ii) in the case of a financial institution or creditor that does not have a board of directors, a designated senior management employee.

[76] *See* proposed § 162.30(e)(2) (CFTC) and proposed § 248.201(e)(2) (SEC). Section VI of the proposed guidelines elaborates on the proposed provision.

allowing the board of directors to delegate these functions. The Commissions appreciate that boards of directors have many responsibilities and that it generally is not feasible for a board to involve itself in these functions on a daily basis. A designated management official who is responsible for the oversight of a broker-dealer's, investment company's or investment adviser's Program may also be the entity's chief compliance officer.[77]

Third, the proposed rules would provide that financial institutions and creditors must train staff, as necessary, to effectively implement their Programs.[78] The Commissions believe that proper training would enable relevant staff to address the risk of identity theft. For example, staff would be trained to detect red flags with regard to new and existing accounts, such as discrepancies in identification presented by a person opening an account. Staff also would need to be trained to mitigate identity theft, for example, by recognizing when an account should not be opened.

Finally, the proposed rules would provide that financial institutions and creditors must exercise appropriate and effective oversight of service provider arrangements.[79] The Commissions believe that it is important that the proposed rules address service provider arrangements so that financial institutions and creditors would remain legally responsible for compliance with the proposed rules, irrespective of whether such institutions and creditors outsource their identity theft red flags detection, prevention, and mitigation operations to a third-party service provider.[80] The proposed rules do not prescribe a specific manner in which appropriate and effective oversight of service provider arrangements must occur. Instead, the proposed requirement would provide flexibility to financial institutions and creditors in maintaining their service provider arrangements, while making clear that such institutions and creditors would still be required to fulfill their legal compliance obligations.[81] Section VI(c) of the proposed guidelines specifies what a financial institution or creditor could do so that the activity of the service provider is conducted in accordance with reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft.[82]

• The Commissions solicit comment on whether the proposed four steps to administer the Program are appropriate and whether any additional or alternate steps should be included.

B. Proposed Guidelines

As amended by the Dodd-Frank Act, section 615(e)(1)(A) of the FCRA provides that the Commissions must jointly ''establish and maintain guidelines for use by each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary.'' [83] Accordingly, the Commissions are jointly proposing guidelines in an appendix to the proposed rules that are intended to assist financial institutions and creditors in the formulation and maintenance of a Program that would satisfy the requirements of those proposed rules. These guidelines are substantially similar to the guidelines adopted by the Agencies. The changes we are proposing to make to the Agencies' guidelines are designed to tailor the guidelines to the circumstances of the entities within the Commissions' regulatory jurisdiction, such as by modifying the examples provided by the guidelines. We believe this approach would meet the Commissions' obligation under section 615(e)(1)(A) of the FCRA to jointly establish and maintain guidelines for financial institutions and creditors.

The proposed rules would explain the relationship of the proposed rules to the proposed guidelines.[84] In particular, they would require each financial institution or creditor that is required to implement a Program to consider the guidelines. The proposed guidelines set forth policies and procedures that financial institutions and creditors would be required to consider and use, if appropriate. Although a financial institution or creditor could determine that a particular guideline is not appropriate for its circumstances, its Program would need to contain reasonable policies and procedures to fulfill the requirements of the proposed rules. As discussed above, the proposed guidelines are substantially similar to the final guidelines issued by the Agencies. In the Commissions' view, the proposed guidelines would provide financial institutions and creditors with flexibility to determine ''how best to develop and implement the required policies and procedures.'' [85]

The proposed guidelines are organized into seven sections and a supplement. Each section in the proposed guidelines corresponds with the provisions in the proposed rules.

• The Commissions request comment on all sections, including Supplement A, of the proposed guidelines described below.

1. Section I of the Proposed Guidelines—Identity Theft Prevention Program

As noted above, proposed § 162.30(d)(1) (CFTC) and proposed § 248.201(d)(1) (SEC) would require each financial institution or creditor that offers or maintains one or more covered accounts to develop and maintain a program that is designed to detect, prevent, and mitigate identity theft. Section I of the proposed guidelines corresponds with these provisions. Section I of the proposed guidelines makes clear that a covered entity may incorporate into its Program, as appropriate, its existing policies, procedures, and other arrangements that control reasonably foreseeable risks to customers or to the safety and soundness of the financial institution or creditor from identity theft. An example of such existing policies, procedures, and other arrangements may include other policies, procedures, and arrangements that the financial institution or creditor has developed to prevent fraud or otherwise ensure compliance with applicable laws and regulations. The Commissions believe that this section of the proposed guidelines would allow financial institutions and creditors to minimize cost and time burdens associated with the development and implementation of

[77] *See, e.g.,* rule 38a–1(a)(4) under the Investment Company Act (description of chief compliance officer), 17 CFR 270.38a–1(a)(4); rule 206(4)–7(c) under the Investment Advisers Act, 17 CFR 275.206(4)–7 (same).

[78] *See* proposed § 162.30(e)(3) (CFTC) and proposed § 248.201(e)(3) (SEC).

[79] *See* proposed § 162.30(e)(4) (CFTC) and proposed § 248.201(e)(4) (SEC). Proposed § 162.30(b)(11) (CFTC) and proposed § 248.201(b)(11) (SEC) would define the term ''service provider'' to mean a person that provides a service directly to the financial institution or creditor.

[80] For example, a financial institution or creditor that uses a service provider to open accounts on its behalf, could reserve for itself the responsibility to verify the identity of a person opening a new account, may direct the service provider to do so, or may use another service provider to verify identity. Ultimately, however, the financial institution or creditor would remain responsible for ensuring that the activity is being conducted in compliance with a Program that meets the requirements of the proposed identity theft red flags rules and guidelines.

[81] These legal compliance obligations would include the maintenance of records in connection with any service provider arrangements.

[82] Section VI(c) of the proposed guidelines is discussed below in Section II.B.6.

[83] 15 U.S.C. 1681m(e)(1)(A).

[84] *See* proposed § 162.30(f) (CFTC) and proposed § 248.201(f) (SEC).

[85] *See* H.R. Rep. No. 108–263 at 43, Sept. 4, 2003 (accompanying H.R. 2622); S. Rep. No. 108–166 at 13, Oct. 17, 2003 (accompanying S. 1753).

new policies, procedures, and arrangements by leveraging existing policies, procedures, and arrangements and avoiding unnecessary duplication.

• The Commissions request comment on this section of the proposed guidelines.

2. Section II of the Proposed Guidelines—Identifying Relevant Red Flags

As recently amended by the Dodd-Frank Act, section 615(e)(2)(A) of the FCRA provides that, in developing identity theft red flags guidelines as required by the FCRA, the Commissions must identify patterns, practices, and specific forms of activity that indicate the possible existence of identity theft. Section II of the proposed guidelines would identify those patterns, practices and forms of activity. Section II(a) of the proposed guidelines sets out several risk factors that a financial institution or creditor would be required to consider in identifying relevant red flags for covered accounts, as appropriate: (1) The types of covered accounts it offers or maintains; (2) the methods it provides to open its covered accounts; (3) the methods it provides to access its covered accounts; and (4) its previous experiences with identity theft. Thus, for example, red flags relevant to margin accounts may differ from those relevant to advisory accounts, and those applicable to consumer accounts may differ from those applicable to business accounts. Red flags relevant to accounts that may be opened or accessed remotely may differ from those relevant to accounts that require face-to-face contact. In addition, under the proposed guidelines, a financial institution or creditor should consider identifying as relevant those red flags that directly relate to its previous experiences with identity theft.

Section II(b) of the proposed guidelines sets out examples of sources from which financial institutions and creditors should derive relevant red flags. This proposed section provides that a financial institution or creditor should incorporate relevant red flags from such sources as: (1) Incidents of identity theft that the financial institution or creditor has experienced; (2) methods of identity theft that the financial institution or creditor has identified that reflect changes in identity theft risks; and (3) applicable regulatory guidance (*i.e.,* guidance received from regulatory authorities). As discussed above in Section II.B, this proposed section would not require financial institutions and creditors to incorporate relevant red flags strictly from these three sources. Instead, the section would require that financial institutions and creditors consider them when developing a Program.

As noted above, the proposed rules would not identify specific red flags that financial institutions or creditors must include in their Programs.[86] Instead, under the proposed guidelines, a Program would be required to identify and incorporate relevant red flags that are appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities. Section II(c) of the proposed guidelines identifies five categories of red flags that financial institutions and creditors must consider including in their Programs:

• Alerts, notifications, or other warnings received from consumer reporting agencies or service providers, such as fraud detection services;

• Presentation of suspicious documents, such as documents that appear to have been altered or forged;

• Presentation of suspicious personal identifying information, such as a suspicious address change;

• Unusual use of, or other suspicious activity related to, a covered account; and

• Notice from customers, victims of identity theft, law enforcement authorities, or other persons regarding possible identity theft in connection with covered accounts held by the financial institution or creditor.

In Supplement A to the proposed guidelines, the Commissions include a non-comprehensive list of examples of red flags from each of these categories that a financial institution or creditor may experience.[87]

• The Commissions request comment on this section of the proposed guidelines. Are there specific, additional red flags associated with the types of institutions subject to the Commissions' jurisdiction that the Commissions should identify?

• Would the five categories of red flags discussed in the proposed guidelines provide flexible and adequate guidance for financial institutions and creditors that they can use to develop a Program?

3. Section III of the Proposed Guidelines—Detecting Red Flags

As noted above, the proposed rules would provide that a financial institution or creditor must have reasonable policies and procedures to detect red flags in its Program.[88] Section III of the proposed guidelines would provide examples of policies and procedures that a financial institution or creditor must consider including in its Program for the purpose of detecting red flags. These would include (1) in the case of the opening of a covered account, obtaining identifying information about, and verifying the identity of, the person opening the account, and (2) in the case of existing covered accounts, authenticating customer identities, monitoring transactions, and verifying the validity of change of address requests. Entities that are currently subject to the Agencies' final identity theft red flag rules and guidelines,[89] the federal customer identification program (''CIP'') rules [90] or other Bank Secrecy Act rules,[91] the Federal Financial Institutions Examination Council's guidance on authentication,[92] or the Federal Information Processing Standards [93] may already be engaged in detecting red flags.

In developing the proposed rules and guidelines, the Commissions sought to minimize the burdens that would be imposed on entities that may be in compliance with existing similar laws. These entities may wish to integrate the policies and procedures already developed for purposes of complying with these rules and standards into their Programs. However, such policies and procedures may need to be supplemented. For example, the CIP rules were written to implement section 326 [94] of the USA PATRIOT Act,[95] an Act directed towards facilitating the prevention, detection and prosecution of international money laundering and the financing of terrorism. Certain types of ''accounts,'' ''customers,'' and

[86] *See* proposed § 162.30(d) (CFTC) and § 248.201(d) (SEC).

[87] These examples are discussed below in Section II.B.8.

[88] *See* proposed § 162.30(d)(2)(ii) (CFTC) and proposed § 248.201(d)(2)(ii) (SEC).

[89] *See* 2007 Adopting Release, *supra* note 10.

[90] *See, e.g.,* 31 CFR 1023.220 (broker-dealers), 1024.220 (mutual funds), and 1026.220 (futures commission merchants and introducing brokers). The CIP regulations implement section 326 of the USA PATRIOT Act, codified at 31 U.S.C. 5318(l).

[91] *See, e.g.,* 31 CFR 103.130 (anti-money laundering programs for mutual funds).

[92] *See* ''Authentication in an Internet Banking Environment,'' Oct. 12, 2005, available at: *http://www.ffiec.gov/press/pr101205.htm.*

[93] The Federal Information Processing Standards are issued by the National Institute of Standards and Technology (''NIST'') after approval by the Secretary of Commerce pursuant to section 5131 of the Information Technology Management Reform Act of 1996, Public Law 104–106, 110 Stat. 702, Feb. 10, 1996, and the Federal Information Security Management Act of 2002, 44 U.S.C. 3541, *et seq.* NIST manages and publishes the most current Federal Information Processing Standards at: *http://csrc.nist.gov/publications/PubsFIPS.html.*

[94] 31 U.S.C. 5318(*l*).

[95] Public Law 107–56 (2001).

products are exempted or treated specially in the CIP rules because they pose a lower risk of money laundering or terrorist financing. Such special treatment may not be appropriate to accomplish the broader objective of detecting, preventing, and mitigating identity theft. Accordingly, the Commissions would expect that, if the proposed rules are adopted, all financial institutions and creditors would evaluate the adequacy of existing policies and procedures, and develop and implement risk-based policies and procedures that detect red flags in an effective and comprehensive manner.

• The Commissions request comment on this section of the proposed guidelines. Should the Commission provide further guidance on the integration of or differentiation between identity theft red flags programs and other existing procedures?

4. Section IV of the Proposed Guidelines—Preventing and Mitigating Identity Theft

As noted above, the proposed rules would require that a Program include reasonable policies and procedures to respond appropriately to red flags that are detected.[96] Section IV of the proposed guidelines states that a Program's policies and procedures should include a list of appropriate responses to the red flags that a financial institution or creditor has detected, that are commensurate with the degree of risk posed by each red flag.[97] In determining an appropriate response, under the proposed guidelines, a financial institution or creditor would be required to consider aggravating factors that may heighten the risk of identity theft, such as a data security incident that results in unauthorized access to a customer's account records held by the financial institution, creditor, or third party, or notice that a customer has provided information related to a covered account held by the financial institution or creditor to someone fraudulently claiming to represent the financial institution or creditor, or to a fraudulent Internet Web site.

Section IV of the proposed guidelines also provides several examples of appropriate responses, such as monitoring a covered account for evidence of identity theft, contacting the customer, and changing any passwords, security codes, or other security devices that permit access to a covered account.[98] The Commissions are proposing to include the same list of examples presented in the Agencies' final guidelines, because, upon review, the Commissions believe the list is comprehensive, relevant to entities regulated by the Commissions, and designed to enhance consistency of regulations and Programs.

• The Commissions seek comment on this section of the proposed guidelines. Should the Commission revise the guidelines to add, modify, or delete any examples?

5. Section V of the Proposed Guidelines—Updating the Identity Theft Prevention Program

As discussed above, the proposed rules would require each financial institution or creditor to periodically update its Program (including the relevant red flags) to reflect changes in risks to its customers or to the safety and soundness of the financial institution or creditor from identity theft.[99] Section V of the proposed guidelines would include a list of factors on which a financial institution or creditor could base the updates to its Program: (a) The experiences of the financial institution or creditor with identity theft; (b) changes in methods of identity theft; (c) changes in methods to detect, prevent, and mitigate identity theft; (d) changes in the types of accounts that the financial institution or creditor offers or maintains; and (e) changes in the business arrangements of the financial institution or creditor, including mergers, acquisitions, alliances, joint ventures, and service provider arrangements.

• The Commissions request comment on this section of the proposed guidelines. Should the Commissions provide any further guidance regarding the updating of Programs?

6. Section VI of the Proposed Guidelines—Methods for Administering the Identity Theft Prevention Program

Section VI of the proposed guidelines would provide additional guidance for financial institutions and creditors to consider in administering their identity theft Programs.[100] These proposed guideline provisions are identical to those prescribed by the Agencies in their final guidelines, which were modeled on sections of the Federal Information Processing Standards.[101]

i. Oversight of Identity Theft Prevention Program

Section VI(a) of the proposed guidelines would state that oversight by the board of directors, an appropriate committee of the board, or a designated senior management employee should include: (1) Assigning specific responsibility for the Program's implementation; (2) reviewing reports prepared by staff regarding compliance by the financial institution or creditor with the proposed rules; and (3) approving material changes to the Program as necessary to address changing identity theft risks.

ii. Reporting to the Board of Directors

Section VI(b) of the proposed guidelines states that staff of the financial institution or creditor responsible for development, implementation, and administration of its Program should report to the board of directors, an appropriate committee of the board, or a designated senior management employee, at least annually, on compliance by the financial institution or creditor with the proposed rules. In addition, section VI(b) of the proposed guidelines provides that the report should address material matters related to the Program and evaluate several issues, such as: (i) The effectiveness of the policies and procedures of the financial institution or creditor in addressing the risk of identity theft in connection with the opening of covered accounts and with respect to existing covered accounts; (ii) service provider arrangements; (iii) significant incidents involving identity theft and management's response; and (iv) recommendations for material changes to the Program.

iii. Oversight of Service Provider Arrangements

Section VI(c) of the proposed guidelines would provide that whenever

[96] *See* proposed § 162.30(d)(2)(iii) (CFTC) and proposed § 248.201(d)(2)(iii) (SEC).

[97] A financial institution or creditor, in order to respond appropriately, would have to assess whether the red flags indicate risk of identity theft, and must have a reasonable basis for concluding that a red flag does not demonstrate a risk of identity theft.

[98] Other examples of appropriate responses provided in the proposed guidelines are: Reopening a covered account with a new account number; not opening a new covered account; closing an existing covered account; not attempting to collect on a covered account or not selling a covered account to a debt collector; notifying law enforcement; and determining that no response is warranted under the particular circumstances. The final proposed example—no response—might be appropriate, for example, when a financial institution or creditor has a reasonable basis for concluding that the red flags do not evidence a risk of identity theft.

[99] *See* proposed § 162.30(d)(2)(iv) (CFTC) and proposed § 248.201(d)(2)(iv) (SEC).

[100] *See* proposed § 162.30(e) (CFTC) and proposed § 248.201(e) (SEC) (administration of Programs).

[101] *See supra* note 93 (brief explanation of the Federal Information Processing Standards).

a financial institution or creditor engages a service provider to perform an activity in connection with one or more covered accounts, the financial institution or creditor should take steps to ensure that the activity of the service provider is conducted in accordance with reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft. The Commissions believe that these guidelines would make clear that a service provider that provides services to multiple financial institutions and creditors may do so in accordance with its own program to prevent identity theft, as long as the service provider's program meets the requirements of the proposed identity theft red flags rules.

Section VI(c) of the proposed guidelines would also include, as an example of how a financial institution or creditor may comply with this provision, that a financial institution or creditor could require the service provider by contract to have policies and procedures to detect relevant red flags that may arise in the performance of the service provider's activities, and either report the red flags to the financial institution or creditor, or to take appropriate steps to prevent or mitigate identity theft. In those circumstances, the Commissions would expect that the contractual arrangements would include the provision of sufficient documentation by the service provider to the financial institution or creditor to enable it to assess compliance with the identity theft red flags rules.

- The Commissions request comment on section VI of the proposed guidelines.
- The SEC anticipates that information about compliance with an entity's Program could be included in any periodic reports submitted by the entity's chief compliance officer to its board of directors. The SEC requests comment on whether such reports are an appropriate means for reporting information to the board about the entity's compliance with its identity theft Program.

7. Section VII of the Proposed Guidelines—Other Applicable Legal Requirements

Section VII of the proposed guidelines would identify other applicable legal requirements that financial institutions and creditors should keep in mind when developing, implementing, and administering their Programs. Specifically, section VII of the proposed guidelines identifies section 351 of the USA PATRIOT Act, which sets out the requirements for financial institutions that must file ''Suspicious Activity Reports'' in accordance with applicable law and regulation.[102] In addition, section VII of the proposed guidelines identifies the following three requirements under the FCRA, which a financial institution or creditor should keep in mind: (1) Implementing any requirements under section 605A(h) of the FCRA, 15 U.S.C. 1681c–1(h), regarding the circumstances under which credit may be extended when the financial institution or creditor detects a fraud or active duty alert;[103] (2) implementing any requirements for furnishers of information to consumer reporting agencies under section 623 of the FCRA, 15 U.S.C. 1681s–2, for example, to correct or update inaccurate or incomplete information, and to not report information that the furnisher has reasonable cause to believe is inaccurate; and (3) complying with the prohibitions in section 615 of the FCRA, 15 U.S.C. 1681m, regarding the sale, transfer, and placement for collection of certain debts resulting from identity theft.

- The Commissions request comment on this section of the proposed guidelines.

8. Proposed Supplement A to the Guidelines

Proposed Supplement A to the proposed guidelines provides illustrative examples of red flags that financial institutions and creditors would be required to consider incorporating into their Program, as appropriate. These proposed examples are substantially similar to the examples identified in the Agencies' final guidelines, to enhance consistency. The proposed examples are organized under the five categories of red flags that are set forth in section II(c) of the proposed guidelines:

- Alerts, notifications, or warnings from a consumer reporting agency;
- Suspicious documents;
- Suspicious personal identifying information;
- Unusual use of, or suspicious activity related to, the covered account; and
- Notice from others regarding possible identity theft in connection with covered accounts held by the financial institution or creditor.[104]

The Commissions recognize that some of the examples of red flags may be more reliable indicators of identity theft, while others are more reliable when detected in combination with other red flags. It is the Commissions' intention that Supplement A to the proposed guidelines be flexible and allow a financial institution or creditor to tailor the red flags it chooses for its Program to its own operations. Although the proposed rules would not require a financial institution or creditor to justify to the Commissions its failure to include in its Program a specific red flag from the list of examples, a financial institution or creditor would have to account for the overall effectiveness of its Program, and ensure that the Program is appropriate to the entity's size and complexity, and to the nature and scope of its activities.

- The Commissions request comment on Supplement A to the proposed guidelines. Are there any additional examples of red flags that the Supplement should include? For instance, should the Supplement include examples of fraud by electronic mail, such as when a financial institution or creditor receives an urgent request to wire money from a covered account to a remote account from an email address that may have been compromised?[105]

C. Proposed Card Issuer Rules

Section 615(e)(1)(C) of the FCRA now provides that the CFTC and SEC must ''prescribe regulations applicable to card issuers to ensure that, if a card issuer receives a notification of a change of address for an existing account, and within a short period of time (during at least the first 30 days after such notification is received) receives a request for an additional or replacement card for the same account, the card issuer may not issue the additional or

[102] 31 U.S.C. 5318(g).

[103] Section 603(q)(2) of the FCRA defines the terms ''fraud alert'' and ''active duty alert'' as ''a statement in the file of a consumer that—(A) notifies all prospective users of a consumer report relating to the consumer that the consumer may be a victim of fraud, including identity theft, or is an active duty military consumer, as applicable; and (B) is presented in a manner that facilitates a clear and conspicuous view of the statement described in subparagraph (A) by any person requesting such consumer report.'' 15 U.S.C. 1681a(q)(2).

[104] *See supra* Section II.B.2.

[105] The Federal Bureau of Investigation (''FBI'') and other organizations recently issued alerts that warned of thefts of customer money through emails from compromised customer email accounts. *See* FBI and Internet Crime Complaint Center, *Fraud Alert Involving Email Intrusions to Facilitate Wire Transfers Overseas, available at http://www.ic3.gov/media/2012/EmailFraudWireTransferAlert.pdf*; FINRA, Regulatory Notice 12–05, *Customer Account Protection, Verification of Emailed Instructions to Transmit or Withdraw Assets from Customer Accounts, available at http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p125462.pdf* (January, 2012); FINRA Investor Alert, *Email Hack Attack? Be Sure to Notify Brokerage Firms and Other Financial Institutions, available at http://www.finra.org/Investors/ProtectYourself/InvestorAlerts/FraudsAndScams/P125460.*

replacement card,'' unless the card issuer applies certain address validation procedures discussed below.[106] Congress singled out this scenario involving card issuers as being a possible indicator of identity theft. Accordingly, the Commissions are proposing the card issuer rules in conjunction with the identity theft red flags rules.

The Commissions are proposing rules that would set out the duties of card issuers regarding changes of address, which would be similar to the final card issuer rules adopted by the Agencies.[107] The proposed rules would provide that the card issuer rules apply only to a person that issues a debit or credit card (''card issuer'') and that is subject to the jurisdiction of either Commission.[108]

The CFTC is not aware of any entities subject to its jurisdiction that issue debit or credit cards. The CFTC notes that several of the CFTC regulated-entities that are identified as falling within the scope of the proposed card issuer rules (*e.g.,* FCMs, IBs, CPOs, CTAs, etc.) do not typically engage in the type of activities that are the subject of such rules and guidelines. As a matter of practice, it is highly unlikely that these CFTC regulated-entities would issue debit or credit cards. In fact, there are statutory provisions, regulations, or other laws that expressly prohibit some of these entities from engaging in many of these activities. For example, the Commodity Exchange Act (''CEA'') and the CFTC's regulations expressly prohibit an IB from extending credit in connection with their primary business activities.[109] With respect to FCMs, while the CEA permits an FCM to extend credit to customers in lieu of accepting money, securities, or property for the purposes of collecting margin on a commodity interest, the CFTC's regulations prohibit an FCM from doing so.[110] Lastly, the National Futures Association's (''NFA'') rules prohibit its members registered as CPOs from making loans to limited partners using interests in the partnerships as collateral.[111]

- The CFTC requests comment on the extent to which the proposed card issuer rules would affect the business operations of entities that would fall under the CFTC's jurisdiction.

The SEC understands that a number of entities under its jurisdiction issue cards in partnership with affiliated or unaffiliated banks and financial institutions. Generally, these cards are issued by the partner bank, and not by the entity under the SEC's jurisdiction. For example, a broker-dealer may offer automated teller machine (ATM) access to a customer account through a debit card, but the debit card would generally be issued by a partner bank and not by the broker-dealer itself. The SEC therefore expects that few, if any, entities under its jurisdiction would be subject to the proposed card issuer rules. Nonetheless, the SEC is proposing the card issuer rules below so that any entity under its jurisdiction that does issue cards provides appropriate identity theft protection.

- The SEC requests comment on the extent to which the proposed card holder rules may affect the entities under its jurisdiction. Do any SEC-regulated entities issue cards? What types of arrangements are used to establish the card-issuing partnership between SEC-regulated entities and issuing banks? Would the proposed card issuer rules affect those arrangements?

1. Definition of ''Cardholder'' and Other Terms

Section 615(e)(1)(C) of the FCRA uses the term ''cardholder'' but does not define the term. The legislative history on this provision indicates that ''issuers of credit cards and debit cards who receive a consumer request for an additional or replacement card for an existing account'' may assess the validity of the request by notifying ''the cardholder.'' [112] The proposed rules provide that the term ''cardholder'' means a consumer [113] who has been issued a credit or debit card.[114] Both ''credit card'' and ''debit card'' are defined in section 603(r) of the FCRA.[115] ''Credit card'' is defined by reference to section 103 of the Truth in Lending Act.[116] ''Debit card'' is defined as any card issued by a financial institution to a consumer for use in initiating an electronic fund transfer from the account of a consumer at such financial institution for the purpose of transferring money between accounts or obtaining money, property, labor, or services.[117] The term ''clear and conspicuous'' is defined in § 162.2(b) of the CFTC's regulations and in the SEC's proposed § 248.202(b)(2) to mean reasonably understandable and designed to call attention to the nature and significance of the information presented in the notice. The proposed definitions of ''cardholder'' and ''clear and conspicuous'' are identical to the definitions in the Agencies' final card issuer rules because, upon review, the Commissions believe that the definitions are comprehensive, likely to be relevant to any entities regulated by the Commissions under these proposed rules, and designed to enhance consistency and comparability of regulations and Programs.[118]

- The Commissions' proposed definition of ''cardholder'' refers to the definition of ''credit card'' and ''debit card'' in section 603(r) of the FCRA. Should the proposed definition instead separately define ''credit card'' and ''debit card''?

2. Address Validation Requirements

Section 615(e) of the FCRA provides the address validation requirements and methods, and the proposed rules would set out the address validation rules to reflect those requirements and methods.[119] These sections would require a card issuer to establish and implement reasonable written policies

[106] 15 U.S.C. 1681m(e)(1)(C).

[107] *See* § 162.32 (CFTC) and § 248.202 (SEC).

[108] *See supra* Section II.A.1.

[109] *See* 7 U.S.C. 1(a)(31) (An IB is defined as any person that ''is engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery, security futures product, [* * *] swap,'' any foreign exchange transaction, any retail commodity transaction, any authorized commodity option, or any authorized leverage transaction, ''and does not accept money securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.''); *see also* 17 CFR 1.57(c) (prohibiting IBs from, among other things, extending credit in lieu of accepting money, securities or property to margin, guarantee or secure any trades or contracts of customers) and 17 CFR 1.56(b) (prohibiting IBs from representing that they will guarantee any person against loss with respect to any commodity interest in any account carried by an FCM for or on behalf of any person).

[110] *See* 17 CFR 1.56(b) (prohibiting FCMs from representing that they will guarantee any person against loss with respect to any commodity interest in any account carried by an FCM for or on behalf of any person).

[111] *See* NFA Rule 2–45, available at *http://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=RULE%202–45&Section=4*, which provides that ''[n]o Member CPO may permit a commodity pool to use any means to make a direct or indirect loan or advance of pool assets to the CPO or any other affiliated person or entity.''

[112] 149 Cong. Rec. E2513 (daily ed. Dec. 8, 2003) (statement of Rep. Oxley).

[113] A ''consumer'' means an individual person, as defined in section 603(c) of the FCRA and § 162.2(f) of the CFTC's regulations. *See* 15 U.S.C. 1681a(c) and 76 FR at 43885. As mentioned above, the rules proposed by the CFTC in this release would be a part of part 162 of the CFTC's regulations, and therefore, all definitions in part 162 would apply to these rules. *See* 76 FR at 43884–6. The SEC is proposing to define all terms that are not defined in subpart C (including the term ''consumer'') to have the same meaning as defined in the FCRA. *See* proposed § 248.202(b)(3).

[114] *See* proposed § 162.32(b) (CFTC) and proposed § 248.202(b) (SEC).

[115] 15 U.S.C. 1681.

[116] 15 U.S.C. 1601.

[117] 15 U.S.C. 1681a(r)(3).

[118] *See* 2007 Adopting Release, *supra* note 10, at 63733.

[119] *See* proposed § 162.32(c) (CFTC) and proposed § 248.202(c) (SEC).

and procedures to assess the validity of a change of address if it (1) receives notification of a change of address for a consumer's debit or credit card account and (2) within a short period of time afterwards (during at least the first 30 days after it receives such notification), receives a request for an additional or replacement card for the same account. Under these circumstances, the proposed rules would prohibit the card issuer from issuing an additional or replacement card until, in accordance with its reasonable policies and procedures, it uses one of two methods to assess the validity of the change of address. Under the first method, the card issuer must notify the cardholder of the request either at the cardholder's former address,[120] or by any other means of communication that the card issuer and the cardholder have previously agreed to use.[121] In addition, the card issuer must provide the cardholder with a reasonable means of promptly reporting incorrect address changes. Under the second method, the card issuer would be required to otherwise assess the validity of the change of address in accordance with the policies and procedures the card issuer has established pursuant to the proposed rules.[122]

The proposed rules would provide card issuers with an alternative time period in which to assess the validation of a cardholder's address.[123] Specifically, this section provides that the card issuer would be able to satisfy the requirements of proposed § 162.32(c) (CFTC) and proposed § 248.202(c) (SEC) if it validates an address pursuant to the methods in proposed § 162.32(c)(1) or (c)(2) (CFTC) and proposed § 248.202(c)(1) or (c)(2) (SEC) when it receives an address change notification, before it receives a request for an additional or replacement card. The proposed rules would not require a card issuer that issues an additional or replacement card to validate an address whenever it receives a request for such a card; section 615(e)(1)(C) of the FCRA (and proposed § 162.32(c) (CFTC) and proposed § 248.202(c) (SEC)) would require the validation of an address only when the card issuer also has received a notification of a change in address. The Commissions believe, however, that a card issuer that does not validate an address when it receives an address change notification may find it prudent to validate the address before issuing an additional or replacement card, even when it receives a request for such a card more than 30 days after the notification of address change. Ultimately, the Commissions expect card issuers to exercise diligence commensurate with (*i.e.,* augmented by) their own experiences with identity theft.

- The Commissions request comment on the proposed address validation requirements for card issuers.

3. Form of Notice

To highlight the important and urgent nature of notice that a consumer receives from a card issuer, the Commissions are proposing to require that any written or electronic notice that the card issuer provides under this section would be required to be clear and conspicuous and be provided separately from its regular correspondence with the cardholder.[124] This proposed requirement would be consistent with the requirement in the Agencies' final card issuer rules because, upon review, the Commissions believe the requirement is comprehensive, relevant to any entities regulated by the Commissions under these proposed rules, and designed to enhance consistency and comparability of regulations and Programs.

- The Commissions request comment on the proposed requirements regarding the form of notice that must be sent to card holders.

D. Proposed Effective and Compliance Dates

The Commissions propose to make the rules and guidelines effective 30 days after the date of publication of final rules in the **Federal Register**. Financial institutions and creditors subject to the Commissions' enforcement authority should already be in compliance with the red flags rules of the FTC or the other Agencies. Newly formed entities under the Commissions' enforcement authority likely comply with the existing rules of the FTC or the other Agencies. The rules and guidelines that the Commissions are proposing today are substantially similar to the existing rules of the Agencies and should not require significant changes to financial institution or creditor policies or operations. As a result, the Commissions do not expect that entities subject to their enforcement authority should have difficulty in complying with the proposed rules and guidelines immediately, and are not proposing a delayed compliance date.

- The Commissions request comment on the proposed effective and compliance dates for the proposed rules and guidelines. Should there be a delayed effective or compliance date? If so, what should the delay be (*e.g.,* 30, 60, or 90 days, or longer)?

III. Related Matters

A. Cost-Benefit Considerations (CFTC) and Economic Analysis (SEC) CFTC

Section 15(a) of the CEA [125] requires the CFTC to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing an order. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

The proposed rules and guidelines are broken down into two categories of requirements. First, the proposed identity theft red flag rules and guidelines found in proposed § 162.30, and second, the proposed card issuer rules found in proposed § 162.32. A Section 15(a) analysis of each category is set out immediately below.

1. Cost Benefit Considerations of Proposed Identity Theft Red Flag Rules and Guidelines

As noted above, the proposed identity theft red flags rules and guidelines would require financial institutions and creditors that are subject to CFTC's enforcement authority under the FCRA [126] and that offer or maintain covered accounts to develop, implement, and administer a written Program. Each Program must be designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. In addition, each Program must be appropriately tailored to the size and complexity of the financial institution or creditor and

[120] *See* 15 U.S.C. 1681m(e)(1)(C)(i).

[121] *See* 15 U.S.C. 1681m(e)(1)(C)(ii).

[122] *See* proposed § 162.32(c) (CFTC) and proposed § 248.202(c) (SEC).

[123] *See* proposed § 162.32(d) (CFTC) and proposed § 248.202(d) (SEC).

[124] *See* proposed § 162.32(e) (CFTC) and proposed § 248.202(e) (SEC). As noted above, ''clear and conspicuous'' would mean reasonably understandable and designed to call attention to the nature and significance of the information presented in the notice. *See supra* Section II.C.1. *See also* § 162.2(b) (CFTC) and proposed § 248.202(b)(2) (SEC).

[125] 7 U.S.C. 19(a)

[126] As stated above, section 1088(a)(10) of the Dodd-Frank Act amended section 621(b) of the FCRA to add the Commissions to the list of federal agencies responsible for administrative enforcement of the FCRA. *See* Public Law 111–203 (2010).

the nature and scope of its activities. There are various steps that a financial institution or creditor must take in order to comply with the requirements under the proposed identity theft red flags rules, including training staff, providing annual reports to board of directors, and when applicable, monitoring the use of third-party service providers.

As discussed above, the Dodd-Frank Act shifted enforcement authority over CFTC-regulated entities that are subject to section 615(e) of the FCRA from the FTC to the CFTC. Section 615(e) of the FCRA, as amended by the Dodd-Frank Act, requires that the CFTC, jointly with the Agencies and the SEC, adopt identity theft red flags rules and guidelines. To carry out this requirement, the CFTC is proposing § 162.30, which is substantially similar to the identity theft red flags rules and guidelines adopted by the Agencies in 2007.

Proposed § 162.30 would shift oversight of identity theft rules and guidelines of CFTC-regulated entities from the FTC to the CFTC. These entities should already be in compliance with the FTC's existing rules and guidelines, which the FTC began enforcing on December 31, 2010. Because proposed § 162.30 is substantially similar to those existing rules and guidelines, these entities should not bear any new costs in coming into compliance with proposed § 162.30. The new regulation does not contain new requirements, nor does it expand the scope of the rules to include new entities that were not already previously covered by the Agencies' rules. The new regulation does contain examples and minor language changes designed to help guide entities under the CFTC's jurisdiction in complying with the rules.

In the analysis for the Paperwork Reduction Act of 1995 (''PRA'') below, the staff identified certain initial and ongoing hour burdens and associated time costs related to compliance with proposed § 162.30. However, these costs are not new costs, but are current costs associated with compliance with the Agencies' existing rules. CFTC-regulated entities will incur these hours and costs regardless of whether the CFTC adopts proposed § 162.30. These hours and costs would be transferred from the Agencies' PRA allotment to the CFTC. No new costs should result from the adoption of proposed § 160.30.

These existing costs related to proposed § 162.30 would include, for newly formed CFTC-regulated entities, the one-time cost for financial institutions and creditors to conduct initial assessments of covered accounts, create a Program, obtain board approval of the Program, and train staff.[127] The existing costs would also include the ongoing cost to periodically review and update the program, report periodically on the Program, and conduct periodic assessments of covered accounts.[128]

The benefits related to adoption of proposed § 160.30, which already exist in connection with the Agencies' red flags rules and guidelines, would include a reduction in the risk of identity theft for investors (consumers) and cardholders, and a reduction in the risk of losses due to fraud for financial institutions and creditors. It is not practicable for the CFTC to determine with precision the dollar value associated with the benefits that will inure to the public from this proposed rules and guidelines, as the quantity or value of identity theft deterred or prevented is not knowable. The Commission, however, recognizes that the cost of any given instance of identity theft may be substantial to the individual involved. Joint adoption of identity theft red flags rules in a form that is substantially similar to the Agencies' identity theft red flags rules and guidelines might also benefit financial institutions and creditors because entities regulated by multiple federal agencies could comply with a single set of standards, which would reduce potential compliance costs. As is true of the Agencies' rules and guidelines, the CFTC has designed proposed § 162.30 to provide financial institutions and creditors significant flexibility in developing and maintaining a Program that is tailored to the size and complexity of their business and the nature of their operations, as well as in satisfying the address verification procedures.

Accordingly, as previously discussed, proposed § 162.30 should not result in any significant new costs or benefits, because it generally reflects a statutory transfer of enforcement authority from the FTC to the CFTC, does not include any significant new requirements, and does not include new entities that were not previously covered by the Agencies' rules.

Section 15(a) Analysis. As stated above, the CFTC is required to consider costs and benefits of proposed CFTC action in light of (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. These rules protect market participants and the public by preventing identity theft, an illegal act that may be costly to them in both time and money.[129] Because,

[127] CFTC staff estimates that the one-time burden of compliance would include 2 hours to conduct initial assessments of covered accounts, 25 hours to develop and obtain board approval of a Program, and 4 hours to train staff. CFTC staff estimates that, of the 31 hours incurred, 12 hours would be spent by internal counsel at an hourly rate of $354, 17 hours would be spent by administrative assistants at an hourly rate of $66, and 2 hours would be spent by the board of directors as a whole, at an hourly rate of $4000, for a total cost of $13,370 per entity for entities that need to come into compliance with proposed subpart C to Part 162. This estimate is based on the following calculations: $354 × 12 hours = $4,248; $66 × 17 = $1,122; $4,000 × 2 = $8,000; $4,248 + $1,122 + $8,000 = $13,370.

As discussed in the PRA analysis, CFTC staff estimates that there are 702 CFTC-regulated entities that newly form each year and that would fall within the definitions of financial institution or creditor. Of these 702 entities, 54 entities would maintain covered accounts. *See infra* note 153 and text following note 153. CFTC staff estimates that 2 hours of internal counsel's time would be spent conducting an initial assessment to determine whether they have covered accounts and whether they are subject to the proposed rule (or 702 entities). The cost associated with this determination is $497,016 based on the following calculation: $354 × 2 = $708; $708 × 702 = $497,016. CFTC staff estimates that 54 entities would bear the remaining specified costs for a total cost of $683,748 (54 × $12,662 = $683,748). *See* SIFMA ''Office Salaries in the Securities Industry 2011.

Staff also estimates that in response to Dodd-Frank, there will be approximately 125 newly registered SDs and MSPs. Staff believes that each of these SDs and MSPs will be a financial institution or creditor with covered accounts. The additional cost of these SDs and MSPs is $1,596,250 (125 × $12,770 = $1,596,250).

[128] CFTC staff estimates that the ongoing burden of compliance would include 2 hours to conduct periodic assessments of covered accounts, 2 hours to periodically review and update the Program, and 4 hours to prepare and present an annual report to the board, for a total of 8 hours. CFTC staff estimates that, of the 8 hours incurred, 7 hours would be spent by internal counsel at an hourly rate of $354 and 1 hour would be spent by the board of directors as a whole, at an hourly rate of $4,000, for a total hourly cost of $6,500. This estimate is based on the following calculations rounded to two significant digits: $354 × 7 hours = $2,478; $4,000 × 1 hour = $4,000; $2,478 + $4,000 = $6,478 ≈ $6,500.

As discussed in the PRA analysis, CFTC staff estimates that 3,124 existing CFTC-regulated entities would be financial institutions or creditors, of which 268 maintain covered accounts. CFTC staff estimates that 2 hours of internal counsel's time would be spent conducting periodic assessments of covered accounts and that all financial institutions or creditors subject to the proposed rule (or 3,124 entities) would bear this cost for a total cost of $2,200,000 based on the following calculations rounded to two significant digits: $354 × 2 = $708; $708 × 3,124 = $2,211,792 ≈ $2,200,000. CFTC staff estimates that 268 entities would bear the remaining specified ongoing costs for a total cost of $1,500,000 (268 × $5,770 = $1,546,360 ≈ $1,500,000).

[129] According to the Javelin 2011 Identity Fraud Survey Report, consumer costs (the average out-of-pocket dollar amount victims pay) increased in 2010. *See Javelin 2011 Identity Fraud Survey Report* (2011). The report attributed this increase to new account fraud, which showed longer periods of misuse and detection and therefore more dollar

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however, these proposed rules and guidelines create no new requirements—rather, as explained above, the CFTC is adopting rules that reflect requirements already in place—their cost and benefits have no incremental impact on the five section 15(a) factors. Customers of CFTC-registrants will continue to benefit from these proposed rules and guidelines in the same way they have benefited from the rules as they were administered by the Agencies.

2. Cost Benefit Considerations of Card Issuer Rules

With respect to specific types of identity theft, section 615(e) of the FCRA identified the scenario involving debit and credit card issuers as being a possible indicator of identity theft. Accordingly, the proposed card issuer rules in this release set out the duties of card issuers regarding changes of address. The proposed card issuer rules will apply only to a person that issues a debit or credit card and that is subject to the CFTC's jurisdiction. The proposed card issuer rules require a card issuer to comply with certain address validation procedures in the event that such issuer receives a notification of a change of address for an existing account from a cardholder, and within a short period of time (during at least the first 30 days after such notification is received) receives a request for an additional or replacement card for the same account. The card issuer may not issue the additional or replacement card unless it complies with those procedures. The procedures include: (1) Notifying the cardholder of the request in writing or electronically either at the cardholder's former address, or by any other means of communication that the card issuer and the cardholder have previously agreed to use; or (2) assessing the validity of the change of address in accordance with established policies and procedures.

Proposed § 162.32 would shift oversight of card issuer rules of CFTC-regulated entities from the FTC to the CFTC. These entities should already be in compliance with the FTC's existing card issuer rules, which the FTC began enforcing on December 31, 2010. Because proposed § 162.32 is substantially similar to those existing card issuer rules, these entities should not bear any new costs in coming into compliance. The new regulation does not contain new requirements, nor does it expand the scope of the rules to include new entities that were not already previously covered by the Agencies' card issuer rules.

The existing costs related to proposed § 162.32 would include the cost for card issuers to establish policies and procedures that assess the validity of a change of address notification submitted shortly before a request for an additional card and, before issuing an additional or replacement card, either notify the cardholder at the previous address or through another previously agreed-upon form of communication, or alternatively assess the validity of the address change through existing policies and procedures. As discussed in the PRA analysis, CFTC staff does not expect that any CFTC-regulated entities would be subject to the requirements of proposed § 162.32.

The benefits related to adoption of proposed § 162.32, which already exist in connection with the Agencies' card issuer rules, would include a reduction in the risk of identity theft for cardholders, and a reduction in the risk of losses due to fraud for card issuers. However, it is not practicable for the CFTC to determine with precision the dollar value associated with the benefits that will inure to the public from these proposed card issuer rules. As is true of the Agencies' card issuer rules, the CFTC has designed proposed § 162.32 to provide card issuers significant flexibility in developing and maintaining a Program that is tailored to the size and complexity of their business and the nature of their operations.

Accordingly, as previously discussed, the proposed card issuer rules should not result in any significant new costs or benefits, because they generally reflect a statutory transfer of enforcement authority from the FTC to the CFTC, do not include any significant new requirements, and do not include new entities that were not previously covered by the Agencies' rules.

Section 15(a) Analysis. As stated above, the CFTC is required to consider costs and benefits of proposed CFTC action in light of (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. These proposed rules and guidelines protect market participants and the public by preventing identity theft, an illegal act that may be costly to them in both time and money.[130] Because, however, these rules create no new requirements—rather, as explained above, the CFTC is adopting rules that reflect requirements already in place—their cost and benefits have no incremental impact on the five section 15(a) factors. Customers of CFTC-registrants will continue to benefit from these proposed rules and guidelines in the same way they have benefited from the rules as they were administered by the Agencies.

3. Questions

- The CFTC requests comment on all aspects of this cost-benefit analysis, including identification, quantification, and assessment of any costs and benefits, whether or not discussed in the above analysis. The CFTC encourages commenters to identify, discuss, analyze, and supply relevant data regarding any additional costs and benefits.
- The CFTC requests comment on the accuracy of the cost estimates in each section of this analysis, and requests that commenters provide data that may be relevant to these cost estimates, including quantification.

In addition, the CFTC seeks estimates and views regarding these costs and benefits for all affected entities, including small entities, as well as any other costs or benefits that may result from the adoption of proposed subpart C to Part 162.

SEC:

The SEC is sensitive to the costs and benefits imposed by its rules. Proposed Regulation S–ID would require financial institutions and creditors that are subject to the SEC's enforcement authority under the FCRA[131] and that offer or maintain covered accounts to develop, implement, and administer a written identity theft prevention Program. A financial institution or creditor would have to design its Program to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. In addition, a financial institution or creditor would have to appropriately tailor its Program to its size and complexity, and to the nature and scope of its activities. There are various steps that a financial institution or creditor would have to take in order to comply with the requirements under the proposed identity theft red flags rules, including training staff, providing annual reports to board of directors, and, when applicable, monitoring the use of third-party service providers.

Section 615(e)(1)(C) of the FCRA singles out change of address

losses associated with it than any other type of fraud. Notwithstanding the increase in cost, the report stated that the number of identity theft victims has decreased in recent years. *Id.*

[130] *See id.*

[131] *See supra* note 19.

notifications sent to credit and debit card issuers as a possible indicator of identity theft, and requires the SEC to prescribe regulations concerning such notifications. Accordingly, the proposed card issuer rules in this release set out the duties of card issuers regarding changes of address. The proposed card issuer rules would apply only to SEC-regulated entities that issue credit or debit cards.[132] The proposed card issuer rules would require a card issuer to comply with certain address validation procedures in the event that such issuer receives a notification of a change of address for an existing account from a cardholder, and within a short period of time (during at least the first 30 days after it receives such notification) receives a request for an additional or replacement card for the same account. The card issuer may not issue the additional or replacement card unless it complies with those procedures. The procedures include: (1) Notifying the cardholder of the request either at the cardholder's former address, or by any other means of communication that the card issuer and the cardholder have previously agreed to use; or (2) assessing the validity of the change of address in accordance with established policies and procedures.

As discussed above, the Dodd-Frank Act shifted enforcement authority over SEC-regulated entities that are subject to section 615(e) of the FCRA from the FTC to the SEC. Section 615(e) of the FCRA, as amended by the Dodd-Frank Act, requires that the SEC, jointly with the Agencies and the CFTC, adopt identity theft red flags rules and guidelines. To carry out this requirement, the SEC is proposing Regulation S–ID, which is substantially similar to the identity theft red flags rules and guidelines adopted by the Agencies in 2007.

Proposed Regulation S–ID would shift oversight of identity theft rules and guidelines of SEC-regulated entities from the FTC to the SEC. These entities should already be in compliance with the FTC's existing rules and guidelines, which the FTC began enforcing on December 31, 2010. Because proposed Regulation S–ID is substantially similar to those existing rules and guidelines, these entities should not bear any new costs in coming into compliance with proposed Regulation S–ID. The new regulation does not contain new requirements, nor does it expand the scope of the rules to include new entities that were not already previously covered by the Agencies' rules. The new regulation does contain examples and minor language changes designed to help guide entities under the SEC's jurisdiction in complying with the rules.

In the analysis for the Paperwork Reduction Act of 1995 (''PRA'') below, the staff identified certain initial and ongoing hour burdens and associated time costs related to compliance with proposed Regulation S–ID.[133] However, these costs are not new costs, but are current costs associated with compliance with the Agencies' existing rules. SEC-regulated entities will incur these hours and costs regardless of whether the SEC adopts proposed Regulation S–ID. These hours and costs would be transferred from the Agencies' PRA allotment to the SEC. No new costs should result from the adoption of proposed Regulation S–ID.

These existing costs related to § 248.201 of proposed Regulation S–ID would include, for newly formed SEC-regulated entities, the incremental one-time cost for financial institutions and creditors to conduct initial assessments of covered accounts, create a Program, obtain board approval of the Program, and train staff.[134] The existing costs would also include the incremental ongoing cost to periodically review and update the program, report periodically on the Program, and conduct periodic assessments of covered accounts.[135] The existing costs related to § 248.202 of proposed Regulation S–ID would include the incremental cost for card issuers to establish policies and procedures that assess the validity of a change of address notification submitted shortly before a request for an additional card and, before issuing an additional or replacement card, either notify the cardholder at the previous address or through another previously agreed-upon form of communication, or alternatively assess the validity of the address change through existing policies and procedures. As discussed in the PRA analysis, SEC staff does not expect that any SEC-regulated entities would be subject to the requirements of § 248.202 of proposed Regulation S–ID.

The benefits related to adoption of Regulation S–ID, which already exist in connection with the Agencies' red flags rules and guidelines, would include a reduction in the risk of identity theft for investors (consumers) and cardholders, and a reduction in the risk of losses due to fraud for financial institutions and creditors. Joint adoption by the Commissions of identity theft red flags rules in a form that is substantially similar to the Agencies' identity theft red flags rules and guidelines might also benefit financial institutions and creditors because entities regulated by multiple federal agencies could comply with a single set of standards, which would reduce potential compliance costs. As is true of the Agencies' rules and guidelines, the SEC has designed proposed Regulation S–ID to provide financial institutions, creditors, and card issuers significant flexibility in developing and maintaining a Program that is tailored to the size and complexity of their business and the

[132] *See* proposed § 248.202(a) (defining scope of proposed rule).

[133] Unless otherwise stated, all cost estimates for personnel time are derived from SIFMA's Management & Professional Earnings in the Securities Industry 2010, modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

[134] SEC staff estimates that the incremental one-time burden of compliance would include 2 hours to conduct initial assessments of covered accounts, 25 hours to develop and obtain board approval of a Program, and 4 hours to train staff. SEC staff estimates that, of the 31 hours incurred, 12 hours would be spent by internal counsel at an hourly rate of $354, 17 hours would be spent by administrative assistants at an hourly rate of $66, and 2 hours would be spent by the board of directors as a whole, at an hourly rate of $4000, for a total cost of $13,370 per entity for entities that need to come into compliance with proposed Regulation S–ID. This estimate is based on the following calculations: $354 × 12 hours = $4248; $66 × 17 = $1,122; $4000 × 2 = $8000; $4248 + $1,122 + $8000 = $13,370.

As discussed in the PRA analysis, SEC staff estimates that there are 1327 SEC-regulated entities that newly form each year and would be financial institutions or creditors, of which 465 would maintain covered accounts. *See infra* note 153 and following text. SEC staff estimates that 2 hours of internal counsel's time would be spent conducting an initial assessment of covered accounts and that all newly formed financial institutions or creditors subject to the proposed rule (or 1327 entities) would bear this cost for a total cost of $939,516 based on the following calculation: $354 × 2 = $708; $708 × 1327 = $939,516. SEC staff estimates that 465 entities would bear the remaining specified costs for a total cost of $5,887,830 (465 × $12,662 = $5,887,830).

[135] SEC staff estimates that the incremental ongoing burden of compliance would include 2 hours to conduct periodic assessments of covered accounts, 2 hours to periodically review and update the Program, and 4 hours to prepare and present an annual report to the board, for a total of 8 hours. SEC staff estimates that, of the 8 hours incurred, 7 hours would be spent by internal counsel at an hourly rate of $354 and 1 hour would be spent by the board of directors as a whole, at an hourly rate of $4000, for a total hourly cost of $6478. This estimate is based on the following calculations: $354 × 7 hours = $2478; $4000 × 1 hour = $4000; $2478 + $4000 = $6478.

As discussed in the PRA analysis, SEC staff estimates that 7978 existing SEC-regulated entities would be financial institutions or creditors under the proposal and 7180 of these entities maintain covered accounts. *See infra* note 156 and following text. SEC staff estimates that 2 hours of internal counsel's time would be spent conducting periodic assessments of covered accounts and that all financial institutions or creditors subject to the proposed rule (or 7978 entities) would bear this cost for a total cost of $5,648,424 based on the following calculations: $354 × 2 = $708; $708 × 7978 = $5,648,424. SEC staff estimates that 7180 entities would bear the remaining specified ongoing costs for a total cost of $41,428,600 (7180 × $5770 = $41,428,600).

nature of their operations, as well as in satisfying the address verification procedures.

Accordingly, as previously discussed, proposed Regulation S–ID should not result in any significant new costs or benefits, because it generally reflects a statutory transfer of enforcement authority from the FTC to the SEC, does not include any significant new requirements, and does not include new entities that were not previously covered by the Agencies' rules.

- The SEC requests comment on all aspects of this cost-benefit analysis, including identification and assessment of any costs and benefits not discussed in this analysis. The SEC encourages commenters to identify, discuss, analyze, and supply relevant data regarding any additional costs and benefits.
- The SEC requests comment on the accuracy of the cost estimates in each section of this analysis, and requests that commenters provide data that may be relevant to these cost estimates.
- In addition, the SEC seeks estimates and views regarding these costs and benefits for all affected entities, including small entities, as well as any other costs or benefits that may result from the adoption of proposed Regulation S–ID.

B. Analysis of Effects on Efficiency, Competition, and Capital Formation

Section 3(f) of the Securities Exchange Act and section 2(c) of the Investment Company Act require the SEC, whenever it engages in rulemaking and must consider or determine if an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. In addition, section 23(a)(2) of the Exchange Act requires the SEC, when proposing rules under the Exchange Act, to consider the impact the proposed rules may have upon competition. Section 23(a)(2) of the Exchange Act prohibits the SEC from adopting any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.[136]

As discussed in the cost benefit analysis above, proposed Regulation S–ID would carry out the requirement in the Dodd-Frank Act that the SEC adopt rules and guidelines governing identity theft protections, pursuant to section 615(e) of the FCRA with regard to entities that are subject to the SEC's jurisdiction. This requirement was designed to transfer regulatory oversight of identity theft rules and guidelines of SEC-regulated entities from the FTC to the SEC. Proposed Regulation S–ID is substantially similar to the identity theft red flags rules and guidelines adopted by the FTC and other regulatory agencies in 2007, and does not contain new requirements. The entities covered by proposed Regulation S–ID should already be in compliance with existing rules and guidelines, which the FTC began to enforce on December 31, 2010.

For the reasons discussed above, proposed Regulation S–ID should not have an effect on efficiency, competition, or capital formation because it does not include new requirements and does not include new entities that were not previously covered by the Agencies' rules.

- The SEC seeks comment on the potential impact of the proposed rules on efficiency, competition, and capital formation. For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), the SEC also requests information regarding the potential effect of the proposed rules on the U.S. economy on an annual basis. Commenters are requested to provide empirical data to support their views.

C. Paperwork Reduction Act

CFTC:

Provisions of proposed §§ 162.30 and 162.32 would result in new collection of information requirements within the meaning of the PRA. The CFTC, therefore, is submitting this proposal to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. OMB has not yet assigned a control number to the new collection. The title for this collection of information is ''Part 162 Subpart C—Identity Theft.'' If adopted, responses to this new collection of information would be mandatory.

1. Information Provided by Reporting Entities/Persons

Under proposed part 162, subpart C, CFTC regulated entities—which presently would include approximately 268 CFTC registrants[137] plus 125 new CFTC registrants pursuant to Title VII of the Dodd-Frank Act[138]—may be required to design, develop and implement reasonable policies and procedures to identify relevant red flags, and potentially notifying cardholders of identity theft risks. In addition, CFTC-regulated entities would be required to: (i) Collect information and keep records for the purpose of ensuring that their Programs met requirements to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account; (ii) develop and implement reasonable policies and procedures to identify, detect and respond to relevant red flags, as well as periodic reports related to the Program; and (iii) from time to time, notify cardholders of possible identity theft with respect to their accounts, as well as assess the validity of those accounts.

These burden estimates assume that CFTC-regulated entities already comply with the identity theft red flags rules and guidelines jointly adopted by the FTC with the Agencies, as of December 31, 2010. Consequently, these entities may already have in place many of the customary protections addressing identity theft and changes of address proposed by these regulations.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a federal agency. Because compliance with rules and guidelines jointly adopted by the FTC with the Agencies may have occurred, the CFTC estimates the time and cost burdens of complying with proposed part 162 to be both one-time and ongoing burdens. However, any initial or one-time burdens associated with compliance with proposed part

[136] *See infra* Section IV (setting forth statutory authority under, among other things, the Exchange Act and Investment Company Act for proposed rules).

[137] *See* the NFA's Internet Web site at: *http://www.nfa.futures.org/NFA-registration/NFA-membership-and-dues.HTML* for the most up-to-date number of CFTC regulated entities. For the purposes of the PRA calculation, CFTC staff used the number of registered FCMs, CTAs, CPOs IBs and RFEDs on the NFA's Internet Web site as of October 31, 2011. The NFA's site states that there are 3,663 CFTC registrants as of September 30, 2011. Of this total, there are 111 FCMs, 1,441 IBs, 1,054 CTAs, 1,035 CPOs, and 14 RFEDs. CFTC staff has observed that approximately 50 percent of all CPOs are dually registered as CTAs. Based on this observation, CFTC has determined that the total number of entities is 3,124 (518 CPOs that are also registered as CTAs). With respect to RFEDs, CFTC staff also has observed that all entities registering as RFEDs also register as FCMs.

Of the total 3,124 entities, all of the FCMs are likely to qualify as financial institutions or creditors carrying covered accounts, 10 percent of CTAs and CPOs are likely to qualify as financial institutions or creditors carrying covered accounts and none of the IBs are likely to qualify as a financial institution or creditor carrying covered accounts, for a total of 268 financial institutions or creditors that would bear the initial one-time burden of compliance with the CFTC's proposed identity theft rules and guidelines and proposed card issuer rules.

[138] CFTC staff estimates that 125 swap dealers and major swap participants will register with the CFTC following the issuance of final rules under the Dodd-Frank Act further defining the terms ''swap dealers'' and ''major swap participants'' and setting forth a registration regime for these entities. The CFTC estimates the number of MSPs to be quite small, at six or fewer.

162 would apply only to newly formed entities, and the ongoing burden to all CFTC-regulated entities.

i. Initial Burden

The CFTC estimates that the one-time burden of compliance with proposed part 162 for its regulated entities with covered accounts would be: (i) 25 hours to develop and obtain board approval of a Program, (ii) 4 hours for staff training, and (iii) 2 hours to conduct an initial assessment of covered accounts, totaling 31 hours. Of the 31 hours, the CFTC estimates that 15 hours would involve internal counsel, 14 hours expended by administrative assistants, and 2 hours by the board of directors in total, for those newly-regulated entities.

The CFTC estimates that approximately 702 FCMs, CTAs and CPOs [139] would need to conduct an initial assessment of covered accounts. As noted above, the CFTC estimates that approximately 125 newly registered SDs and MSPs would need to conduct an initial assessment of covered accounts. The total number of newly registered CFTC registrants would be 827 entities. Each of these 827 entities would need to conduct an initial assessment of covered accounts, for a total of 1,654 hours.[140] Of these 827 entities, CFTC staff estimates that approximately 179 of these entities may maintain covered accounts. Accordingly, the CFTC estimates the one-time burden for these 179 entities to be 5,549 hours,[141] for a total burden among newly registered entities of 7,203 hours.[142]

The CFTC requests comments on these estimates of numbers of persons affected and the total hours involved.

ii. Ongoing Burden

The CFTC staff estimates that the ongoing compliance burden associated with proposed part 162 would include: (i) 2 hours to periodically review and update the Program, review and preserve contracts with service providers, and review and preserve any documentation received from such providers (ii) 4 hours to prepare and present an annual report to the board, and (iii) 2 hours to conduct periodic assessments to determine if the entity offers or maintains covered accounts, for a total of 8 hours. The CFTC staff estimates that of the 8 hours expended, 7 hours would be spent by internal counsel and 1 hour would be spent by the board of directors as a whole.

The CFTC estimates that approximately 3,249 persons may maintain covered accounts, and that they would be required to periodically review their accounts to determine if they comply with these proposed rules, for a total of 76,498 hours for these entities.[143] Of these 3,249 persons, the CFTC estimates that approximately 393 maintain covered accounts, and thus would need to incur the additional burdens related to complying with the rule, for a total of 2,358.[144] The total ongoing burden for all CFTC registrants is 11,256.[145]

2. Information Collection Comments

The CFTC invites the public and other federal agencies to comment on any aspect of the burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the CFTC solicits comments in order to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the CFTC, including whether the information will have practical utility; (ii) evaluate the accuracy of the CFTC's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395–6566 or by email at *OIRAsubmissions@omb.eop.gov.* Please provide the CFTC with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the Addresses section of this notice of proposed rules and guidelines for comment submission instructions to the CFTC. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting RegInfo.gov. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is most assured of being fully effective if received by OMB (and the CFTC) within 30 days after publication of this notice of proposed rulemaking.

SEC:

Provisions of proposed §§ 248.201 and 248.202 would result in new collection of information requirements within the meaning of the PRA. The SEC therefore is submitting this proposal to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. OMB has not yet assigned a control number to the new collection. The title for this collection of information is ''Part 248, Subpart C—Regulation S–ID.'' 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. If the rules are adopted, responses to the new collection of information provisions would be mandatory, and the information, when provided to the Commission in connection with staff examinations or investigations, would be kept confidential to the extent permitted by law.

1. Description of the Collections

Under proposed Regulation S–ID, SEC-regulated entities would be required to develop and implement reasonable policies and procedures to identify, detect and respond to relevant red flags and, in the case of entities that issue credit or debit cards, to assess the validity of, and communicate with cardholders regarding, address changes. Proposed § 248.201 of Regulation S–ID would include the following ''collections of information'' by SEC-regulated entities that are financial institutions or creditors if the entity maintains covered accounts: (1) Creation and periodic updating of a

[139] Based on a review of new registrations typically filed with the CFTC each year, CFTC staff estimates that approximately, 7 FCMs, 225 IBs, 400 CTAs, and 140 CPOs are newly formed each year, for a total of 772 entities. CFTC staff also has observed that approximately 50 percent of all CPOs are duly registered as CTAs. Based on this observation, CFTC has determined that the total number of newly formed financial institutions and creditors is 702 (772—70 CPOs that are also registered as CTAs). With respect to RFEDs, CFTC staff has observed that all entities registering as RFEDs also register as FCMs. Each of these 702 financial institutions or creditors would bear the initial one-time burden of compliance with the proposed identity theft rules and guidelines and proposed card issuer rules.

Of the total 702 newly formed entities, staff estimates that all of the FCMs are likely to carry covered accounts, 10 percent of CTAs and CPOs are likely to carry covered accounts, and none of the IBs are likely to carry covered accounts, for a total of 54 newly formed financial institutions or creditors carrying covered accounts that would be required to conduct an initial one-time burden of compliance with subpart C or Part 162.

[140] This estimate is based on the following calculation: 827 entities × 2 hours = 1,654 hours.

[141] This estimate is based on the following calculation: 179 entities × 31 hours = 5,549 hours.

[142] This estimate is based on the following calculation: 1,654 hours for all newly registered CFTC registrants + 7,203 hours for the one-time burden of newly registered entities with covered accounts.

[143] This estimate is based on the following calculation: 3,249 entities × hours = 6,498 hours.

[144] This estimate is based on the following calculation: 393 entities × 6 hours = 2,358 hours.

[145] This estimate is based on the following calculation: 6,498 hours + 2,358 hours = 8,856 hours.

Program that is approved by the board of directors; (2) periodic staff reporting on compliance with the identify theft red flags rules and guidelines, as required to be considered by section VI of the proposed guidelines; and (3) training of staff to implement the Program. Proposed § 248.202 of Regulation S–ID would include the following ''collections of information'' by any SEC-regulated entities that are credit or debit card issuers: (1) Establishment of policies and procedures that assess the validity of a change of address notification if a request for an additional card on the account follows soon after the address change, (2) notification of a cardholder, before issuance of an additional or replacement card, at the previous address or through some other previously agreed-upon form of communication, or alternatively, assessment of the validity of the address change request through the entity's established policies and procedures.

SEC staff expects that SEC-regulated entities that would comply with the collections of information required by proposed Regulation S–ID should already be fully in compliance with the identity theft red flags rules and guidelines that the FTC jointly adopted with the Agencies and began enforcing on December 31, 2010. The requirements of those rules and guidelines are substantially similar and comparable to the requirements of proposed Regulation S–ID.[146]

In addition, SEC staff understands that most SEC-regulated entities that are financial institutions or creditors would likely already have in place many of the protections regarding identity theft and changes of address that the proposed regulations would require because they are usual and customary business practices that they engage in to minimize losses from fraud. Furthermore, SEC staff believes that many of them are likely to have already effectively implemented most of the proposed requirements as a result of having to comply (or an affiliate having to comply) with other, existing regulations and guidance, such as the Customer Identification Program regulations implementing section 326 of the USA PATRIOT Act,[147] the Federal Information Processing Standards that implement section 501(b) of the Gramm-Leach-Bliley Act (GLBA),[148] section 216 of the FACT Act,[149] and guidance issued by the Agencies or the Federal Financial Institutions Examination Council regarding information security, authentication, identity theft, and response programs.[150]

As a result, SEC staff estimates of time and cost burdens here represent the incremental one-time burden of complying with proposed Regulation S–ID for newly formed SEC-regulated entities, and the incremental ongoing costs of compliance for all SEC-regulated entities.[151] SEC staff estimates also attribute all burdens to covered entities, which are entities directly subject to the requirements of the proposed rulemaking. A covered entity that outsources activities to an affiliate or a third-party service provider is, in effect, reallocating to that affiliate or service provider the burden that it would otherwise have carried itself. Under these circumstances, the burden is, by contract, shifted from the covered entity to the service provider, but the total amount of burden is not increased. Thus, affiliate and third-party service provider burdens are already included in the burden estimates provided for covered entities. The time and cost estimates made here are based on conversations with industry representatives and on a review of the estimates made in the regulatory analyses of the identity theft red flags rules and guidelines previously issued by the Agencies.

2. Proposed § 248.201 (Duties Regarding the Detection, Prevention, and Mitigation of Identity Theft)

The collections of information required by proposed § 248.201 would apply to SEC-regulated entities that are financial institutions or creditors.[152] As stated above, SEC staff expects that all existing SEC-regulated entities would already have incurred one-time burdens associated with compliance with proposed Regulation S–ID because they should already be in compliance with the substantially identical requirements of the Agencies' red flags rules and guidelines. Therefore, any initial or one-time burdens associated with compliance with § 248.201 of proposed Regulation S–ID would apply only to newly formed entities. The ongoing burden would apply to all SEC-regulated entities that are financial institutions or creditors.

i. Initial Burden

SEC staff estimates that the incremental one-time burden of compliance with proposed § 248.201 for SEC-regulated financial institutions and creditors with covered accounts would be: (i) 25 hours to develop and obtain board approval of a Program, (ii) 4 hours to train staff, and (iii) 2 hours to conduct an initial assessment of covered accounts, for a total of 31 hours. SEC staff estimates that, of the 31 hours incurred, 12 hours would be spent by internal counsel, 17 hours would be spent by administrative assistants, and 2 hours would be spent by the board of directors as a whole for entities that need to come into compliance with proposed Regulation S–ID.

SEC staff estimates that approximately 517 SEC-regulated financial institutions and creditors are newly formed each year.[153] Each of these 517 entities would need to conduct an initial assessment of covered accounts, for a total of 1034 hours.[154] Of these, SEC staff estimates that approximately 90% (or 465) maintain covered accounts. Accordingly, SEC staff estimates that the total one-time burden for the 465 entities would be 14,415 hours, and the total one-time burden for all SEC

[146] *See* 2007 Adopting Release, *supra* note 10; ''FTC Extends Enforcement Deadline for Identity Theft Red Flags Rule'' at *http://www.ftc.gov/opa/2010/05/redflags.shtm.*

[147] 31 U.S.C. 5318(l) (requiring verification of the identity of persons opening new accounts).

[148] 15 U.S.C. 6801.

[149] 15 U.S.C. 1681w.

[150] *See* 2007 Adopting Release, *supra* note 10, at nn. 55–57 (describing applicable regulations and guidance).

[151] Based on discussions with industry representatives and a review of applicable law, SEC staff expects that, of the SEC-regulated entities that fall within the scope of proposed Regulation S–ID, most broker-dealers, many investment companies (including almost all open-end investment companies and employees' securities companies (''ESCs'')), and some registered investment advisers would likely qualify as financial institutions or creditors. SEC staff expects that most other SEC-regulated entities described in the scope section of proposed Regulation S–ID, such as transfer agents, NRSROs, SROs, and clearing agencies are unlikely to be financial institutions or creditors as defined in the proposed rule, and therefore we do not include these entities in our estimates.

[152] Proposed § 248.201(a).

[153] Based on a review of new registrations typically filed with the SEC each year, SEC staff estimates that approximately 900 investment advisers, 300 broker dealers, 117 open-end investment companies and 10 employees' securities companies typically apply for registration with the SEC or otherwise are newly formed each year, for a total of 1327 entities that would be financial institutions or creditors. The staff estimate of 900 investment advisers is made in light of the recently adopted amendments to rules under the Investment Advisers Act that carry out requirements of the Dodd-Frank Act to transfer oversight of certain investment advisers from the SEC to state regulators and to require certain investment advisers to private funds to register with the SEC. *See* Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. 3221 (June 22, 2011) [76 FR 42950 (July 19, 2011)]. Of these, SEC staff estimates that all of the investment companies and broker-dealers are likely to qualify as financial institutions or creditors, and 10% (or 90) of investment advisers are likely to also qualify, for a total of 517 total newly formed financial institutions or creditors that would bear the initial one-time burden of compliance with proposed Regulation S–ID.

[154] This estimate is based on the following calculation: 517 entities × 2 hours = 1034 hours.

regulated entities would be 15,449 hours.[155]

• The SEC requests comments on these estimates. Is the estimate that 90% of all financial institutions and creditors maintain covered accounts correct?

ii. Ongoing Burden

SEC staff estimates that the incremental ongoing burden of compliance with proposed § 248.201 would include: (i) 2 hours to periodically review and update the Program, review and preserve contracts with service providers, and review and preserve any documentation received from service providers, (ii) 4 hours to prepare and present an annual report to the board, and (iii) 2 hours to conduct periodic assessments to determine if the entity offers or maintains covered accounts, for a total of 8 hours. SEC staff estimates that of the 8 hours incurred, 7 hours would be spent by internal counsel and 1 hour would be spent by the board of directors as a whole.

SEC staff estimates that there are 7978 SEC regulated entities that are either financial institutions or creditors, and that all of these would be required to periodically review their accounts to determine if they offer or maintain covered accounts, for a total of 15,956 hours for these entities.[156] Of these 7978 entities, SEC staff estimates that approximately 90 percent, or 7180, maintain covered accounts, and thus would need to bear the additional burdens related to complying with the rule.[157] Accordingly, SEC staff estimates that the total ongoing burden for the 7180 entities to be 43,080 hours, and the total ongoing burden for all SEC-regulated entities as a whole to be 59,036 hours.[158]

• SEC staff requests comments on these estimates.

3. Proposed § 248.202 (Duties of Card Issuers Regarding Changes of Address)

The collections of information required by proposed § 248.202 would apply only to SEC-regulated entities that issue credit or debit cards.[159] SEC staff understands that SEC-regulated entities generally do not issue credit or debit cards, but instead partner with other entities, such as banks, that issue cards on their behalf. These partner entities, which are not regulated by the SEC, are already subject to substantially similar change of address obligations pursuant to the Agencies' identity theft red flags rules and guidelines. In addition, SEC staff understands that card issuers already assess the validity of change of address requests and, for the most part, have automated the process of notifying the cardholder or using other means to assess the validity of changes of address. Therefore, implementation of this requirement would pose no further burden.

SEC staff does not expect that any SEC-regulated entities would be subject to the information collection requirements of proposed § 248.202. Accordingly, SEC staff estimates that there will be no hourly or cost burden for SEC-regulated entities related to proposed § 248.202.[160]

• SEC staff requests comment on this estimate. Are there any SEC-regulated entities that issue credit or debit cards? If so, what incremental time or cost burden would be imposed by proposed § 248.202 of Regulation S–ID?

4. Request for Comment

The SEC requests comment on the accuracy of the estimates provided in this description of collections of information. Pursuant to 44 U.S.C. 3506(c)(2)(B), the SEC solicits comments in order to: (i) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the SEC, including whether the information will have practical utility; (ii) evaluate the accuracy of the SEC's estimate of the burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons wishing to submit comments on the collection of information requirements of the proposed amendments should direct them to the Office of Management and Budget, Attention Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Room 10102, New Executive Office Building, Washington, DC 20503, and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090, with reference to File No. S7–02–12. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this release; therefore a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication of this release. Requests for materials submitted to OMB by the SEC with regard to these collections of information should be in writing, refer to File No. S7–02–12, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street NE., Washington, DC 20549–0213.

D. Regulatory Flexibility Act

CFTC:

The Regulatory Flexibility Act (''RFA'')[161] requires that federal agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[162] The regulations proposed by the CFTC shall affect FCMs, retail foreign exchange dealers, IBs, CTAs, CPOs, swap dealers, and major swap participants. The CFTC has determined

[155] These estimates are based on the following calculations: 465 entities × 31 hours = 14,415 hours; 14,415 hours + 1034 hours = 15,449 hours.

[156] Based on a review of entities that the SEC regulates, SEC staff estimates that, as of the end of December 2010, there are approximately 5063 broker-dealers, 1790 active open-end investment companies and 150 employees' securities companies. In light of recently adopted amendments to rules under the Investment Advisers Act that carry out requirements of the Dodd-Frank Act to transfer oversight of certain investment advisers from the SEC to state regulators and to require certain investment advisers to private funds to register with the SEC, SEC staff estimates that, when these amendments become effective, there will be approximately 9750 investment advisers registered with the SEC. *See supra* note 153. Of these, SEC staff estimates that all of the broker-dealers, open-end investment companies and employees' securities companies are likely to qualify as financial institutions or creditors, and 10% (or 975) of investment advisers are likely to qualify, for a total of 7978 total financial institutions or creditors that would bear the ongoing burden of compliance with proposed Regulation S–ID. The SEC staff estimates that the other types of entities that are covered by the scope of the SEC's proposed rule would not be financial institutions or creditors that maintain covered accounts. *See* proposed § 248.201(a). This estimate is based on the following calculation: (7978 entities × 2 hours = 15,956 hours).

[157] If a financial institution or creditor does not maintain covered accounts, there would be no ongoing annual burden for purposes of the PRA.

[158] These estimates are based on the following calculations: (7180 entities × 6 hours = 43,080 hours; 43,080 hours + 15,956 hours = 59,036 hours).

[159] Proposed § 248.202(a).

[160] When the Agencies adopted their red flags rules, they estimated that it would require approximately 4 hours to develop policies and procedures to assess the validity of changes of address, and that there would be no burden associated with notifying cardholders because all entities already have such a process in place. *See* 2007 Adopting Release, *supra* note 10, at text following n.57. SEC staff estimates that if any SEC-regulated entities do issue cards, the burden for complying with proposed § 248.202 would be comparable to the Agencies' estimates.

[161] *See* 5 U.S.C. 601 et seq.

[162] *See* 5 U.S.C. 601 et seq.

that the requirements on financial institutions and creditors, and card issuers set forth in the proposed identity theft red flags rules and guidelines and the proposed card issuer rules, respectively, will not have a significant economic impact on a substantial number of small entities because many of these entities are already complying with the final rules and guidelines of the Agencies. Moreover, the CFTC believes that the proposed rules and guidelines include a great deal of flexibility to assist its regulated entities in complying with such rules and guidelines.

Notwithstanding this determination, the CFTC previously determined that FCMs and CPOs are not small entities for the purposes of the RFA.[163] Similarly, in another proposed rulemaking promulgated under the Dodd-Frank Act, the CFTC determined that swap dealers and major swap participants are not, in fact, ''small entities'' for the purposes of the RFA.[164]

Accordingly, the Chairman, on behalf of the CFTC, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules and guidelines will not have a significant impact on a substantial number of small entities.

• The CFTC invites public comments on its certification.

SEC:

The SEC's Initial Regulatory Flexibility Analysis (''IRFA'') has been prepared in accordance with 5 U.S.C. 603. It relates to the SEC's proposed identity theft red flags rules and guidelines in proposed Regulation S–ID under section 615(e)(1)(C) of the FCRA.[165]

1. Reasons for, and Objectives of, the Proposed Actions

The FACT Act, which amended FCRA, was enacted in part to help prevent the theft of consumer information. The statute contains several provisions relating to the detection, prevention, and mitigation of identity theft. Section 1088(a) of the Dodd-Frank Act amended section 615(e) of the FCRA by adding the SEC (and CFTC) to the list of federal agencies required to prescribe rules related to the detection, prevention, and mitigation of identity theft. The SEC is proposing rules to implement the statutory directives in section 615(e) of the FCRA, which require the SEC to prescribe identity theft regulations jointly with other agencies.

Section 615(e) requires the SEC to prescribe regulations that require financial institutions and creditors to establish policies and procedures to implement guidelines established by the SEC that address identity theft with respect to account holders and customers. Section 615(e) also requires the SEC to adopt regulations applicable to credit and debit card issuers to implement policies and procedures to assess the validity of change of address requests.

2. Legal Basis

The SEC is proposing Regulation S–ID under the authority set forth in 15 U.S.C. 78q, 78q–1, 78*o*–4, 78*o*–5, 78w, 80a–30, 80a–37, 80b–4, 80b–11, 1681m(e), 1681s(b), 1681s–3 and note, 1681w(a)(1), 6801–6809, and 6825; Public Law 111–203, sec. 1088(a)(8), (a)(10), and sec. 1088(b).

3. Small Entities Subject to the Rule

For purposes of the RFA, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year. SEC staff estimates that approximately 122 investment companies of the 1790 total registered on Form N–1A meet this definition.[166]

Under SEC rules, for purposes of the Advisers Act and the RFA, an investment adviser generally is a small entity if it: (i) Has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[167] Based on information in filings submitted to the SEC, 570 of the approximately 11,500 investment advisers registered with the SEC are small entities.[168]

For purposes of the RFA, a broker-dealer is a small business if it had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to rule 17a–5(d) of the Exchange Act or, if not required to file such statements, a broker-dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter) and if it is not an affiliate of an entity that is not a small business.[169] SEC staff estimates that approximately 879 broker-dealers meet this definition.[170]

4. Reporting, Recordkeeping, and Other Compliance Requirements

Section 615(e) of the FCRA, as amended by section 1088 of the Dodd-Frank Act, requires the SEC to prescribe regulations that require financial institutions and creditors to establish reasonable policies and procedures to implement guidelines established by the SEC and other federal agencies that address identity theft with respect to account holders and customers. Section 248.201 of proposed Regulation S–ID would implement this mandate by requiring a covered financial institution or creditor to create an Identity Theft Prevention Program that detects, prevents, and mitigates the risk of identity theft applicable to its accounts.

Section 615(e) also requires the SEC to adopt regulations applicable to credit and debit card issuers to implement policies and procedures to assess the validity of change of address requests. Section 248.202 of proposed Regulation S–ID would implement this requirement by requiring credit and debit card issuers to establish reasonable policies and procedures to assess the validity of a change of address if it receives notification of a change of address for a credit or debit card account and within a short period of time afterwards (within 30 days or more), the issuer receives a

[163] *See* the CFTC's previous determinations for FCMs and CPOs at 47 FR 18618, 18619 (Apr. 30, 1982).

[164] *See* Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 FR 81519 (Dec. 28, 2010), in which the CFTC reasoned that swap dealers will be subject to minimum capital and margin requirements and are expected to comprise the largest global financial firms. As a result, swap dealers are not likely to be small entities for the purposes of the RFA. In addition, the CFTC reasoned that major swap participants, by statutory definition, maintain substantial positions in swaps or maintain outstanding swap positions that create substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets. Based on this analysis, the CFTC concluded that major swap participants are not likely to be small entities for the purposes of the RFA.

[165] 15 U.S.C. 1681m(e).

[166] This information is based on staff analysis of information from filings on Form N–SAR and from databases compiled by third-party information providers, including Lipper Inc.

[167] Rule 0–7(a).

[168] This information is based on data from the Investment Adviser Registration Depository.

[169] 17 CFR 240.0–10.

[170] This estimate is based on information provided in FOCUS Reports filed with the Commission. There are approximately 5063 broker-dealers registered with the Commission.

request for an additional or replacement card for the same account.

Because all SEC-regulated entities, including small entities, should already be in compliance with the substantially similar red flags rules and guidelines that the FTC began enforcing on December 31, 2010, proposed Regulation S–ID should not impose new compliance, recordkeeping, or reporting burdens. If for any reason an SEC-regulated small entity is not already in compliance with the existing red flags rules and guidelines issued by the Agencies, the burden of compliance with proposed Regulation S–ID should be minimal because entities already engage in various activities to minimize losses due to fraud as part of their usual and customary business practices. In particular, the rule will direct many of these entities to consolidate their existing policies and procedures into a written Program and may require some additional staff training. Accordingly, the impact of the proposed requirements would be merely incremental and not significant.

The SEC has estimated the costs of proposed Regulation S–ID for all entities (including small entities) in the PRA and cost benefit analyses included in this release. No new classes of skills would be required to comply with proposed Regulation S–ID. SEC staff does not anticipate that small entities would face unique or special burdens when complying with proposed Regulation S–ID.

5. Duplicative, Overlapping, or Conflicting Federal Rules

SEC staff has not identified any federal rules that duplicate, overlap, or conflict with the proposed rule or rule or form amendments.

6. Significant Alternatives

The Regulatory Flexibility Act directs the SEC to consider significant alternatives that would accomplish our stated objective, while minimizing any significant economic impact on small issuers. In connection with proposed Regulation S–ID, the SEC considered the following alternatives: (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance requirements under the proposal for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the proposal, or any part thereof, for small entities.

The proposed rules would require financial institutions and creditors to create an identity theft prevention Program and report to the board of directors, a committee of the board, or senior management at least annually on compliance with the regulations. Credit and debit card issuers would be required to respond to a change of address request by notifying the cardholder or using other means to assess the validity of a change of address.

The standards in proposed Regulation S–ID are flexible, and take into account a covered entity's size and sophistication, as well as the costs and benefits of alternative compliance methods. An identity theft prevention Program under proposed Regulation S–ID would be tailored to the risk of identity theft in a financial institution or creditor's covered accounts, thereby permitting small entities whose accounts pose a low risk of identity theft to avoid much of the costs of compliance. Because small entities maintain covered accounts that pose a risk of identity theft for consumers just as larger entities do, we do not believe that providing an exemption from proposed Regulation S–ID for small entities would comply with the intent of section 615(e), and could subject consumers with covered accounts at small entities to a higher risk of identity theft.

Pursuant to the mandate of section 615(e) of the FCRA, as amended by section 1088 of the Dodd-Frank Act, the SEC and the CFTC are proposing identity theft red flags rules and guidelines jointly, and they would be substantially similar and comparable to the identity theft red flags rules and guidelines previously adopted by the Agencies. Providing a new exemption for small entities, or further consolidating or simplifying the regulations for small entities could result in significant differences between the identity theft red flags rules proposed by the Commissions and the rules adopted by the Agencies. Because all SEC-regulated entities, including small entities, should already be in compliance with the substantially similar red flags rules and guidelines that the FTC began enforcing on December 31, 2010, SEC staff does not expect that small entities would need a delayed effective or compliance date.

- The SEC seeks comment and information on any need for alternative compliance methods that, consistent with the statutory requirements, would reduce the economic impact of the rule on such small entities, including whether to delay the rule's effective date to provide additional time for small business compliance.

7. General Request for Comment

The SEC requests comments regarding this analysis. It requests comment on the number of small entities that would be subject to the proposed rules and guidelines and whether the proposed rules and guidelines would have any effects that have not been discussed. The SEC requests that commenters describe the nature of any effects on small entities subject to the rules and provide empirical data to support the nature and extent of such effects. It also requests comment on the compliance burdens and how they would affect small entities.

IV. Statutory Authority and Text of Proposed Amendments

The CFTC is proposing to amend Part 162 under the authority set forth in sections 1088(a)(8), 1088(a)(10) and 1088(b) of the Dodd-Frank Act, Public Law 111–203, 124 Stat. 1376 (2010) and; sections 615(e) [15 U.S.C 1681m(e)], 621(b) [15 U.S.C 1681s(b)], 624 [15 U.S.C 1681s–3 and note], 628 [15 U.S.C. 1681w(a)(1)] of the Fair Credit Reporting Act.

The SEC is proposing Regulation S–ID under the authority set forth in Section 1088(a)(8) of the Dodd-Frank Act,[171] Section 615(e) of the FCRA,[172] Sections 17 and 36 of the Exchange Act,[173] Sections 31 and 38 of the Investment Company Act,[174] and Sections 204 and 211 of the Investment Advisers Act.[175]

List of Subjects

17 CFR Part 162

Cardholders, Card issuers, Commodity pool operators, Commodity trading advisors, Confidential business information, Consumer reports, Credit, Creditors, Consumer, Customer, Fair and Accurate Credit Transactions Act, Fair Credit Reporting Act, Financial institutions, Futures commission merchants, Gramm-Leach-Bliley Act, Identity theft, Introducing brokers, Major swap participants, Privacy, Red flags, Reporting and recordkeeping requirements, Retail foreign exchange dealers, Self-regulatory organizations, Service provider, Swap dealers.

17 CFR Part 248

Affiliate marketing, Brokers, Cardholders, Card issuers, Confidential

[171] Public Law 111–203, Section 1088(a)(8), 124 Stat. 1376 (2010).

[172] 15 U.S.C. 1681m(e).

[173] 15 U.S.C. 78q and 78mm.

[174] 15 U.S.C. 80a–30 and 80a–37.

[175] 15 U.S.C. 80b-4 and 80b-11.

business information, Consumer reports, Credit, Creditors, Dealers, Fair and Accurate Credit Transactions Act, Fair Credit Reporting Act, Financial institutions, Gramm-Leach-Bliley Act, Identity theft, Investment advisers, Investment companies, Privacy, Reporting and recordkeeping requirements, Securities, Security measures, Self-regulatory organizations, Transfer agents.

Text of Proposed Rules

Commodity Futures Trading Commission

For the reasons stated above in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR part 162 as follows:

PART 162—PROTECTION OF CONSUMER INFORMATION UNDER THE FAIR CREDIT REPORTING ACT

1. The authority citation for part 162 continues to read as follows:

Authority: Sec. 1088, Pub. L. 111–203; 124 Stat. 1376 (2010).

2. Add subpart C to part 162 read as follows:

Subpart C—Identity Theft Red Flags

Sec.
162.22–162.29 [Reserved]
162.30 Duties regarding the detection, prevention, and mitigation of identity theft.
162.31 [Reserved]
162.32 Duties of card issuers regarding changes of address.

Subpart C—Identity Theft Red Flags

§§ 162.22–162.29 [Reserved]

§ 162.30 Duties regarding the detection, prevention, and mitigation of identity theft.

(a) *Scope of this subpart.* This section applies to financial institutions or creditors that are subject to administrative enforcement of the FCRA by the Commission pursuant to Sec. 621(b)(1) of the FCRA, 15 U.S.C. 1681s(b)(1).

(b) *Special definitions for this subpart.* For purposes of this section, and Appendix B, the following definitions apply:

(1) Account means a continuing relationship established by a person with a financial institution or creditor to obtain a product or service for personal, family, household or business purposes. Account includes an extension of credit, such as the purchase of property or services involving a deferred payment.

(2) The term *board of directors* includes:

(i) In the case of a branch or agency of a foreign bank, the managing official in charge of the branch or agency; and

(ii) In the case of any other creditor that does not have a board of directors, a designated senior management employee.

(3) *Covered account* means:

(i) An account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a margin account; and

(ii) Any other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.

(4) *Credit* has the same meaning in Section 603(r)(5) of the FCRA, 15 U.S.C. 1681a(r)(5).

(5) *Creditor* has the same meaning as in 15 U.S.C. 1681m(e)(4), and includes any futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, swap dealer, or major swap participant that regularly extends, renews, or continues credit; regularly arranges for the extension, renewal, or continuation of credit; or in acting as an assignee of an original creditor, participates in the decision to extend, renew, or continue credit.

(6) *Customer* means a person that has a covered account with a financial institution or creditor.

(7) *Financial institution* has the same meaning as in 15 U.S.C. 1681a(t) and includes any futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, swap dealer, or major swap participant that directly or indirectly holds a transaction account belonging to a consumer.

(8) *Identifying information* means any name or number that may be used, alone or in conjunction with any other information, to identify a specific person, including any—

(i) Name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(ii) Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(iii) Unique electronic identification number, address, or routing code; or

(iv) Telecommunication identifying information or access device (as defined in 18 U.S.C. 1029(e)).

(9) *Identity theft* means a fraud committed or attempted using the identifying information of another person without authority.

(10) *Red Flag* means a pattern, practice, or specific activity that indicates the possible existence of identity theft.

(11) *Service provider* means a person that provides a service directly to the financial institution or creditor.

(c) *Periodic identification of covered accounts.* Each financial institution or creditor must periodically determine whether it offers or maintains covered accounts. As a part of this determination, a financial institution or creditor shall conduct a risk assessment to determine whether it offers or maintains covered accounts described in paragraph (b)(3)(ii) of this section, taking into consideration:

(1) The methods it provides to open its accounts;

(2) The methods it provides to access its accounts; and

(3) Its previous experiences with identity theft.

(d) *Establishment of an Identity Theft Prevention Program.* (1) Program requirement. Each financial institution or creditor that offers or maintains one or more covered accounts must develop and implement a written Identity Theft Prevention Program that is designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. The Identity Theft Prevention Program must be appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities.

(2) *Elements of the Identity Theft Prevention Program.* The Identity Theft Prevention Program must include reasonable policies and procedures to:

(i) Identify relevant Red Flags for the covered accounts that the financial institution or creditor offers or maintains, and incorporate those Red Flags into its Identity Theft Prevention Program;

(ii) Detect Red Flags that have been incorporated into the Identity Theft Prevention Program of the financial institution or creditor;

(iii) Respond appropriately to any Red Flags that are detected pursuant to paragraph (d)(2)(ii) of this section to prevent and mitigate identity theft; and

(iv) Ensure the Identity Theft Prevention Program (including the Red Flags determined to be relevant) is updated periodically, to reflect changes in risks to customers and to the safety

and soundness of the financial institution or creditor from identity theft.

(e) *Administration of the Identity Theft Prevention Program.* Each financial institution or creditor that is required to implement an Identity Theft Prevention Program must provide for the continued administration of the Identity Theft Prevention Program and must:

(1) Obtain approval of the initial written Identity Theft Prevention Program from either its board of directors or an appropriate committee of the board of directors;

(2) Involve the board of directors, an appropriate committee thereof, or a designated employee at the level of senior management in the oversight, development, implementation and administration of the Identity Theft Prevention Program;

(3) Train staff, as necessary, to effectively implement the Identity Theft Prevention Program; and

(4) Exercise appropriate and effective oversight of service provider arrangements.

(f) *Guidelines.* Each financial institution or creditor that is required to implement an Identity Theft Prevention Program must consider the guidelines in appendix B of this part and include in its Identity Theft Prevention Program those guidelines that are appropriate.

§ 162.31 [Reserved]

§ 162.32 Duties of card issuers regarding changes of address.

(a) *Scope.* This section applies to a person described in § 162.30(a) of this part that issues a debit or credit card (card issuer).

(b) *Definition of cardholder.* For purposes of this section, a cardholder means a consumer who has been issued a credit or debit card.

(c) *Address validation requirements.* A card issuer must establish and implement reasonable policies and procedures to assess the validity of a change of address if it receives notification of a change of address for a consumer's debit or credit card account and, within a short period of time afterwards (during at least the first 30 days after it receives such notification), the card issuer receives a request for an additional or replacement card for the same account. Under these circumstances, the card issuer may not issue an additional or replacement card, until, in accordance with its reasonable policies and procedures and for the purpose of assessing the validity of the change of address, the card issuer:

(1)(i) Notifies the cardholder of the request:

(A) At the cardholder's former address; or

(B) By any other means of communication that the card issuer and the cardholder have previously agreed to use; and

(ii) Provides to the cardholder a reasonable means of promptly reporting incorrect address changes; or

(2) Otherwise assesses the validity of the change of address in accordance with the policies and procedures the card issuer has established pursuant to § 162.30 of this part.

(d) *Alternative timing of address validation.* A card issuer may satisfy the requirements of paragraph (c) of this section if it validates an address pursuant to the methods in paragraph (c)(1) or (2) of this section when it receives an address change notification, before it receives a request for an additional or replacement card.

(e) *Form of notice.* Any written or electronic notice that the card issuer provides under this paragraph must be clear and conspicuous and provided separately from its regular correspondence with the cardholder.

3. Add Appendix B to part 162 to read as follows:

Appendix B to Part 162—Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation

Section 162.30 of this part requires each financial institution or creditor that offers or maintains one or more covered accounts, as defined in § 162.30(b)(3) of this part, to develop and provide for the continued administration of a written Identity Theft Prevention Program to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. These guidelines are intended to assist financial institutions and creditors in the formulation and maintenance of an Identity Theft Prevention Program that satisfies the requirements of § 162.30 of this part.

I. The Identity Theft Prevention Program

In designing its Identity Theft Prevention Program, a financial institution or creditor may incorporate, as appropriate, its existing policies, procedures, and other arrangements that control reasonably foreseeable risks to customers or to the safety and soundness of the financial institution or creditor from identity theft.

II. Identifying Relevant Red Flags

(a) *Risk factors.* A financial institution or creditor should consider the following factors in identifying relevant Red Flags for covered accounts, as appropriate:

(1) The types of covered accounts it offers or maintains;

(2) The methods it provides to open its covered accounts;

(3) The methods it provides to access its covered accounts; and

(4) Its previous experiences with identity theft.

(b) *Sources of Red Flags.* Financial institutions and creditors should incorporate relevant Red Flags from sources such as:

(1) Incidents of identity theft that the financial institution or creditor has experienced;

(2) Methods of identity theft that the financial institution or creditor has identified that reflect changes in identity theft risks; and

(3) Applicable supervisory guidance.

(c) *Categories of Red Flags.* The Identity Theft Prevention Program should include relevant Red Flags from the following categories, as appropriate. Examples of Red Flags from each of these categories are appended as Supplement A to this Appendix B.

(1) Alerts, notifications, or other warnings received from consumer reporting agencies or service providers, such as fraud detection services;

(2) The presentation of suspicious documents;

(3) The presentation of suspicious personal identifying information, such as a suspicious address change;

(4) The unusual use of, or other suspicious activity related to, a covered account; and

(5) Notice from customers, victims of identity theft, law enforcement authorities, or other persons regarding possible identity theft in connection with covered accounts held by the financial institution or creditor.

III. Detecting Red Flags

The Identity Theft Prevention Program's policies and procedures should address the detection of Red Flags in connection with the opening of covered accounts and existing covered accounts, such as by:

(a) Obtaining identifying information about, and verifying the identity of, a person opening a covered account; and

(b) Authenticating customers, monitoring transactions, and verifying the validity of change of address requests, in the case of existing covered accounts.

IV. Preventing and Mitigating Identity Theft

The Identity Theft Prevention Program's policies and procedures should provide for appropriate responses to the Red Flags the financial institution or creditor has detected that are commensurate with the degree of risk posed. In determining an appropriate response, a financial institution or creditor should consider aggravating factors that may heighten the risk of identity theft, such as a data security incident that results in unauthorized access to a customer's account records held by the financial institution or creditor, or third party, or notice that a customer has provided information related to a covered account held by the financial institution or creditor to someone fraudulently claiming to represent the financial institution or creditor or to a fraudulent Internet Web site. Appropriate responses may include the following:

(a) Monitoring a covered account for evidence of identity theft;

(b) Contacting the customer;

(c) Changing any passwords, security codes, or other security devices that permit access to a covered account;

(d) Reopening a covered account with a new account number;

(e) Not opening a new covered account;

(f) Closing an existing covered account;

(g) Not attempting to collect on a covered account or not selling a covered account to a debt collector;

(h) Notifying law enforcement; or

(i) Determining that no response is warranted under the particular circumstances.

V. Updating the Identity Theft Prevention Program

Financial institutions and creditors should update the Identity Theft Prevention Program (including the Red Flags determined to be relevant) periodically, to reflect changes in risks to customers or to the safety and soundness of the financial institution or creditor from identity theft, based on factors such as:

(a) The experiences of the financial institution or creditor with identity theft;

(b) Changes in methods of identity theft;

(c) Changes in methods to detect, prevent, and mitigate identity theft;

(d) Changes in the types of accounts that the financial institution or creditor offers or maintains; and

(e) Changes in the business arrangements of the financial institution or creditor, including mergers, acquisitions, alliances, joint ventures, and service provider arrangements.

VI. Methods for Administering the Identity Theft Prevention Program

(a) *Oversight of Identity Theft Prevention Program.* Oversight by the board of directors, an appropriate committee of the board, or a designated senior management employee should include:

(1) Assigning specific responsibility for the Identity Theft Prevention Program's implementation;

(2) Reviewing reports prepared by staff regarding compliance by the financial institution or creditor with § 162.30 of this part; and

(3) Approving material changes to the Identity Theft Prevention Program as necessary to address changing identity theft risks.

(b) *Reports*—(1) *In general.* Staff of the financial institution or creditor responsible for development, implementation, and administration of its Identity Theft Prevention Program should report to the board of directors, an appropriate committee of the board, or a designated senior management employee, at least annually, on compliance by the financial institution or creditor with § 162.30 of this part.

(2) *Contents of report.* The report should address material matters related to the Identity Theft Prevention Program and evaluate issues such as: The effectiveness of the policies and procedures of the financial institution or creditor in addressing the risk of identity theft in connection with the opening of covered accounts and with respect to existing covered accounts; service provider arrangements; significant incidents involving identity theft and management's response; and recommendations for material changes to the Identity Theft Prevention Program.

(c) *Oversight of service provider arrangements.* Whenever a financial institution or creditor engages a service provider to perform an activity in connection with one or more covered accounts the financial institution or creditor should take steps to ensure that the activity of the service provider is conducted in accordance with reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft. For example, a financial institution or creditor could require the service provider by contract to have policies and procedures to detect relevant Red Flags that may arise in the performance of the service provider's activities, and either report the Red Flags to the financial institution or creditor, or to take appropriate steps to prevent or mitigate identity theft.

VII. Other Applicable Legal Requirements

Financial institutions and creditors should be mindful of other related legal requirements that may be applicable, such as:

(a) For financial institutions and creditors that are subject to 31 U.S.C. 5318(g), filing a Suspicious Activity Report in accordance with applicable law and regulation;

(b) Implementing any requirements under 15 U.S.C. 1681c–1(h) regarding the circumstances under which credit may be extended when the financial institution or creditor detects a fraud or active duty alert;

(c) Implementing any requirements for furnishers of information to consumer reporting agencies under 15 U.S.C. 1681s–2, for example, to correct or update inaccurate or incomplete information, and to not report information that the furnisher has reasonable cause to believe is inaccurate; and

(d) Complying with the prohibitions in 15 U.S.C. 1681m on the sale, transfer, and placement for collection of certain debts resulting from identity theft.

Supplement A to Appendix B

In addition to incorporating Red Flags from the sources recommended in Section II(b) of the Guidelines in Appendix B of this part, each financial institution or creditor may consider incorporating into its Identity Theft Prevention Program, whether singly or in combination, Red Flags from the following illustrative examples in connection with covered accounts:

Alerts, Notifications or Warnings From a Consumer Reporting Agency

1. A fraud or active duty alert is included with a consumer report.

2. A consumer reporting agency provides a notice of credit freeze in response to a request for a consumer report.

3. A consumer reporting agency provides a notice of address discrepancy, as defined in Sec. 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)).

4. A consumer report indicates a pattern of activity that is inconsistent with the history and usual pattern of activity of an applicant or customer, such as:

a. A recent and significant increase in the volume of inquiries;

b. An unusual number of recently established credit relationships;

c. A material change in the use of credit, especially with respect to recently established credit relationships; or

d. An account that was closed for cause or identified for abuse of account privileges by a financial institution or creditor.

Suspicious Documents

5. Documents provided for identification appear to have been altered or forged.

6. The photograph or physical description on the identification is not consistent with the appearance of the applicant or customer presenting the identification.

7. Other information on the identification is not consistent with information provided by the person opening a new covered account or customer presenting the identification.

8. Other information on the identification is not consistent with readily accessible information that is on file with the financial institution or creditor, such as a signature card or a recent check.

9. An application appears to have been altered or forged, or gives the appearance of having been destroyed and reassembled.

Suspicious Personal Identifying Information

10. Personal identifying information provided is inconsistent when compared against external information sources used by the financial institution or creditor. For example:

a. The address does not match any address in the consumer report; or

b. The Social Security Number (SSN) has not been issued, or is listed on the Social Security Administration's Death Master File.

11. Personal identifying information provided by the customer is not consistent with other personal identifying information provided by the customer. For example, there is a lack of correlation between the SSN range and date of birth.

12. Personal identifying information provided is associated with known fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

a. The address on an application is the same as the address provided on a fraudulent application; or

b. The phone number on an application is the same as the number provided on a fraudulent application.

13. Personal identifying information provided is of a type commonly associated with fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

a. The address on an application is fictitious, a mail drop, or a prison; or

b. The phone number is invalid, or is associated with a pager or answering service.

14. The SSN provided is the same as that submitted by other persons opening an account or other customers.

15. The address or telephone number provided is the same as or similar to the address or telephone number submitted by an unusually large number of other persons opening accounts or by other customers.

16. The person opening the covered account or the customer fails to provide all required personal identifying information on an application or in response to notification that the application is incomplete.

17. Personal identifying information provided is not consistent with personal identifying information that is on file with the financial institution or creditor.

18. For financial institutions or creditors that use challenge questions, the person opening the covered account or the customer cannot provide authenticating information beyond that which generally would be available from a wallet or consumer report.

Unusual Use of, or Suspicious Activity Related to, the Covered Account

19. Shortly following the notice of a change of address for a covered account, the institution or creditor receives a request for a new, additional, or replacement means of accessing the account or for the addition of an authorized user on the account.

20. A new revolving credit account is used in a manner commonly associated with known patterns of fraud. For example:

a. The majority of available credit is used for cash advances or merchandise that is easily convertible to cash (e.g., electronics equipment or jewelry); or

b. The customer fails to make the first payment or makes an initial payment but no subsequent payments.

21. A covered account is used in a manner that is not consistent with established patterns of activity on the account. There is, for example:

a. Nonpayment when there is no history of late or missed payments;

b. A material increase in the use of available credit;

c. A material change in purchasing or spending patterns;

d. A material change in electronic fund transfer patterns in connection with a deposit account; or

e. A material change in telephone call patterns in connection with a cellular phone account.

22. A covered account that has been inactive for a reasonably lengthy period of time is used (taking into consideration the type of account, the expected pattern of usage and other relevant factors).

23. Mail sent to the customer is returned repeatedly as undeliverable although transactions continue to be conducted in connection with the customer's covered account.

24. The financial institution or creditor is notified that the customer is not receiving paper account statements.

25. The financial institution or creditor is notified of unauthorized charges or transactions in connection with a customer's covered account.

Notice From Customers, Victims of Identity Theft, Law Enforcement Authorities, or Other Persons Regarding Possible Identity Theft in Connection With Covered Accounts Held by the Financial Institution or Creditor

26. The financial institution or creditor is notified by a customer, a victim of identity theft, a law enforcement authority, or any other person that it has opened a fraudulent account for a person engaged in identity theft.

Securities and Exchange Commission

For the reasons stated above in the preamble, the Securities and Exchange Commission proposes to amend 17 CFR part 248 as follows:

PART 248—REGULATIONS S–P, S–AM, AND S–ID

4. The authority citation for part 248 is revised to read as follows:

Authority: 15 U.S.C. 78q, 78q–1, 78*o*–4, 78*o*–5, 78w, 80a–30, 80a-37, 80b–4, 80b–11, 1681m(e), 1681s(b), 1681s–3 and note, 1681w(a)(1), 6801–6809, and 6825; Pub. L. 111–203, sec. 1088(a)(8), (a)(10), and sec. 1088(b).

5. Revise the heading for part 248 to read as set forth above.

6. Add subpart C to part 248 to read as follows:

Subpart C—Regulation S–ID: Identity Theft Red Flags

Sec.

248.201 Duties regarding the detection, prevention, and mitigation of identity theft.
248.202 Duties of card issuers regarding changes of address.
Appendix A to Subpart C of Part 248—Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation

Subpart C—Regulation S–ID: Identity Theft Red Flags

§ 248.201 Duties regarding the detection, prevention, and mitigation of identity theft.

(a) *Scope.* This section applies to a *financial institution* or *creditor,* as defined in the Fair Credit Reporting Act (15 U.S.C. 1681), that is:

(1) A broker, dealer or any other person that is registered or required to be registered under the Securities Exchange Act of 1934;

(2) An investment company that is registered or required to be registered under the Investment Company Act of 1940, that has elected to be regulated as a business development company under that Act, or that operates as an employees' securities company under that Act; or

(3) An investment adviser that is registered or required to be registered under the Investment Advisers Act of 1940.

(b) *Definitions.* For purposes of this subpart, and Appendix A of this subpart, the following definitions apply:

(1) *Account* means a continuing relationship established by a person with a financial institution or creditor to obtain a product or service for personal, family, household or business purposes. Account includes a brokerage account, a *mutual fund* account (*i.e.,* an account with an open-end investment company), and an investment advisory account.

(2) The term *board of directors* includes:

(i) In the case of a branch or agency of a non U.S. based financial institution or creditor, the managing official of that branch or agency; and

(ii) In the case of a financial institution or creditor that does not have a board of directors, a designated employee at the level of senior management.

(3) *Covered account* means:

(i) An account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a brokerage account with a broker-dealer or an account maintained by a mutual fund (or its agent) that permits wire transfers or other payments to third parties; and

(ii) Any other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.

(4) *Credit* has the same meaning as in 15 U.S.C. 1681a(r)(5).

(5) *Creditor* has the same meaning as in 15 U.S.C. 1681m(e)(4), and includes lenders such as brokers or dealers offering margin accounts, securities lending services, and short selling services.

(6) *Customer* means a person that has a covered account with a financial institution or creditor.

(7) *Financial institution* has the same meaning as in 15 U.S.C. 1681a(t).

(8) *Identifying information* means any name or number that may be used, alone or in conjunction with any other information, to identify a specific person, including any—

(i) Name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(ii) Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(iii) Unique electronic identification number, address, or routing code; or

(iv) Telecommunication identifying information or access device (as defined in 18 U.S.C. 1029(e)).

(9) *Identity theft* means a fraud committed or attempted using the identifying information of another person without authority.

(10) *Red Flag* means a pattern, practice, or specific activity that indicates the possible existence of identity theft.

(11) *Service provider* means a person that provides a service directly to the financial institution or creditor.

(12) *Other definitions.*

(i) *Broker* has the same meaning as in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)).

(ii) *Commission* means the Securities and Exchange Commission.

(iii) *Dealer* has the same meaning as in section 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(5)).

(iv) *Investment adviser* has the same meaning as in section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(11)).

(v) *Investment company* has the same meaning as in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), and includes a separate series of the investment company.

(vi) Other terms not defined in this subpart have the same meaning as in the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(c) *Periodic Identification of Covered Accounts.* Each financial institution or creditor must periodically determine whether it offers or maintains covered accounts. As a part of this determination, a financial institution or creditor must conduct a risk assessment to determine whether it offers or maintains covered accounts described in paragraph (b)(3)(ii) of this section, taking into consideration:

(1) The methods it provides to open its accounts;

(2) The methods it provides to access its accounts; and

(3) Its previous experiences with identity theft.

(d) *Establishment of an Identity Theft Prevention Program*—(1) *Program requirement.* Each financial institution or creditor that offers or maintains one or more covered accounts must develop and implement a written Identity Theft Prevention Program (Program) that is designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. The Program must be appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities.

(2) *Elements of the Program.* The Program must include reasonable policies and procedures to:

(i) Identify relevant Red Flags for the covered accounts that the financial institution or creditor offers or maintains, and incorporate those Red Flags into its Program;

(ii) Detect Red Flags that have been incorporated into the Program of the financial institution or creditor;

(iii) Respond appropriately to any Red Flags that are detected pursuant to paragraph (d)(2)(ii) of this section to prevent and mitigate identity theft; and

(iv) Ensure the Program (including the Red Flags determined to be relevant) is updated periodically, to reflect changes in risks to customers and to the safety and soundness of the financial institution or creditor from identity theft.

(e) *Administration of the Program.* Each financial institution or creditor that is required to implement a Program must provide for the continued administration of the Program and must:

(1) Obtain approval of the initial written Program from either its board of directors or an appropriate committee of the board of directors;

(2) Involve the board of directors, an appropriate committee thereof, or a designated employee at the level of senior management in the oversight, development, implementation and administration of the Program;

(3) Train staff, as necessary, to effectively implement the Program; and

(4) Exercise appropriate and effective oversight of service provider arrangements.

(f) *Guidelines.* Each financial institution or creditor that is required to implement a Program must consider the guidelines in Appendix A to this subpart and include in its Program those guidelines that are appropriate.

§ 248.202 Duties of card issuers regarding changes of address.

(a) *Scope.* This section applies to a person described in § 248.201(a) that issues a credit or debit card (card issuer).

(b) *Definitions.* For purposes of this section:

(1) *Cardholder* means a consumer who has been issued a *credit card* or *debit card* as defined in 15 U.S.C. 1681a(r).

(2) *Clear and conspicuous* means reasonably understandable and designed to call attention to the nature and significance of the information presented.

(3) Other terms not defined in this subpart have the same meaning as in the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(c) *Address validation requirements.* A card issuer must establish and implement reasonable written policies and procedures to assess the validity of a change of address if it receives notification of a change of address for a consumer's debit or credit card account and, within a short period of time afterwards (during at least the first 30 days after it receives such notification), the card issuer receives a request for an additional or replacement card for the same account. Under these circumstances, the card issuer may not issue an additional or replacement card, until, in accordance with its reasonable policies and procedures and for the purpose of assessing the validity of the change of address, the card issuer:

(1) (i) Notifies the cardholder of the request:

(A) At the cardholder's former address; or

(B) By any other means of communication that the card issuer and the cardholder have previously agreed to use; and

(ii) Provides to the cardholder a reasonable means of promptly reporting incorrect address changes; or

(2) Otherwise assesses the validity of the change of address in accordance with the policies and procedures the card issuer has established pursuant to § 248.201 of this part.

(d) *Alternative timing of address validation.* A card issuer may satisfy the requirements of paragraph (c) of this section if it validates an address pursuant to the methods in paragraph (c)(1) or (c)(2) of this section when it receives an address change notification, before it receives a request for an additional or replacement card.

(e) *Form of notice.* Any written or electronic notice that the card issuer provides under this paragraph must be clear and conspicuous and be provided separately from its regular correspondence with the cardholder.

Appendix A to Subpart C of Part 248—Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation

Section 248.201 of this part requires each financial institution and creditor that offers or maintains one or more covered accounts, as defined in § 248.201(b)(3) of this part, to develop and provide for the continued administration of a written Program to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. These guidelines are intended to assist financial institutions and creditors in the formulation and maintenance of a Program that satisfies the requirements of § 248.201 of this part.

I. The Program

In designing its Program, a financial institution or creditor may incorporate, as appropriate, its existing policies, procedures, and other arrangements that control reasonably foreseeable risks to customers or to the safety and soundness of the financial institution or creditor from identity theft.

II. Identifying Relevant Red Flags

(a) *Risk Factors.* A financial institution or creditor should consider the following factors in identifying relevant Red Flags for covered accounts, as appropriate:

(1) The types of covered accounts it offers or maintains;

(2) The methods it provides to open its covered accounts;

(3) The methods it provides to access its covered accounts; and

(4) Its previous experiences with identity theft.

(b) *Sources of Red Flags.* Financial institutions and creditors should incorporate relevant Red Flags from sources such as:

(1) Incidents of identity theft that the financial institution or creditor has experienced;

(2) Methods of identity theft that the financial institution or creditor has identified that reflect changes in identity theft risks; and

(3) Applicable regulatory guidance.

(c) *Categories of Red Flags.* The Program should include relevant Red Flags from the following categories, as appropriate. Examples of Red Flags from each of these categories are appended as Supplement A to this Appendix A.

(1) Alerts, notifications, or other warnings received from consumer reporting agencies or service providers, such as fraud detection services;

(2) The presentation of suspicious documents;

(3) The presentation of suspicious personal identifying information, such as a suspicious address change;

(4) The unusual use of, or other suspicious activity related to, a covered account; and

(5) Notice from customers, victims of identity theft, law enforcement authorities, or other persons regarding possible identity theft in connection with covered accounts held by the financial institution or creditor.

III. Detecting Red Flags

The Program's policies and procedures should address the detection of Red Flags in connection with the opening of covered accounts and existing covered accounts, such as by:

(a) Obtaining identifying information about, and verifying the identity of, a person opening a covered account, for example, using the policies and procedures regarding identification and verification set forth in the Customer Identification Program rules implementing 31 U.S.C. 5318(*l*) (31 CFR 1023.220 (broker-dealers) and 1024.220 (mutual funds)); and

(b) Authenticating customers, monitoring transactions, and verifying the validity of change of address requests, in the case of existing covered accounts.

IV. Preventing and Mitigating Identity Theft

The Program's policies and procedures should provide for appropriate responses to the Red Flags the financial institution or creditor has detected that are commensurate with the degree of risk posed. In determining an appropriate response, a financial institution or creditor should consider aggravating factors that may heighten the risk of identity theft, such as a data security incident that results in unauthorized access to a customer's account records held by the financial institution, creditor, or third party, or notice that a customer has provided information related to a covered account held by the financial institution or creditor to someone fraudulently claiming to represent the financial institution or creditor or to a fraudulent Web site. Appropriate responses may include the following:

(a) Monitoring a covered account for evidence of identity theft;

(b) Contacting the customer;

(c) Changing any passwords, security codes, or other security devices that permit access to a covered account;

(d) Reopening a covered account with a new account number;

(e) Not opening a new covered account;

(f) Closing an existing covered account;

(g) Not attempting to collect on a covered account or not selling a covered account to a debt collector;

(h) Notifying law enforcement; or

(i) Determining that no response is warranted under the particular circumstances.

V. Updating the Program

Financial institutions and creditors should update the Program (including the Red Flags determined to be relevant) periodically, to reflect changes in risks to customers or to the safety and soundness of the financial institution or creditor from identity theft, based on factors such as:

(a) The experiences of the financial institution or creditor with identity theft;

(b) Changes in methods of identity theft;

(c) Changes in methods to detect, prevent, and mitigate identity theft;

(d) Changes in the types of accounts that the financial institution or creditor offers or maintains; and

(e) Changes in the business arrangements of the financial institution or creditor, including mergers, acquisitions, alliances, joint ventures, and service provider arrangements.

VI. Methods for Administering the Program

(a) *Oversight of Program.* Oversight by the board of directors, an appropriate committee of the board, or a designated employee at the level of senior management should include:

(1) Assigning specific responsibility for the Program's implementation;

(2) Reviewing reports prepared by staff regarding compliance by the financial institution or creditor with § 248.201 of this part; and

(3) Approving material changes to the Program as necessary to address changing identity theft risks.

(b) *Reports*—(1) *In general.* Staff of the financial institution or creditor responsible for development, implementation, and administration of its Program should report to the board of directors, an appropriate committee of the board, or a designated employee at the level of senior management, at least annually, on compliance by the financial institution or creditor with § 248.201 of this part.

(2) *Contents of report.* The report should address material matters related to the Program and evaluate issues such as: The effectiveness of the policies and procedures of the financial institution or creditor in addressing the risk of identity theft in connection with the opening of covered accounts and with respect to existing covered accounts; service provider arrangements; significant incidents involving identity theft and management's response; and recommendations for material changes to the Program.

(c) *Oversight of service provider arrangements.* Whenever a financial institution or creditor engages a service provider to perform an activity in connection with one or more covered accounts the financial institution or creditor should take steps to ensure that the activity of the service provider is conducted in accordance with reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft. For example, a financial institution or creditor could require the service provider by contract to have policies and procedures to detect relevant Red Flags that may arise in the performance of the service provider's activities, and either report the Red Flags to the financial institution or creditor, or to take appropriate steps to prevent or mitigate identity theft.

VII. Other Applicable Legal Requirements

Financial institutions and creditors should be mindful of other related legal requirements that may be applicable, such as:

(a) For financial institutions and creditors that are subject to 31 U.S.C. 5318(g), filing a Suspicious Activity Report in accordance with applicable law and regulation;

(b) Implementing any requirements under 15 U.S.C. 1681c–1(h) regarding the circumstances under which credit may be extended when the financial institution or creditor detects a fraud or active duty alert;

(c) Implementing any requirements for furnishers of information to consumer reporting agencies under 15 U.S.C. 1681s–2, for example, to correct or update inaccurate or incomplete information, and to not report information that the furnisher has reasonable cause to believe is inaccurate; and

(d) Complying with the prohibitions in 15 U.S.C. 1681m on the sale, transfer, and placement for collection of certain debts resulting from identity theft.

Supplement A to Appendix A

In addition to incorporating Red Flags from the sources recommended in section II.b. of the Guidelines in Appendix A to this subpart, each financial institution or creditor may consider incorporating into its Program, whether singly or in combination, Red Flags from the following illustrative examples in connection with covered accounts:

Alerts, Notifications or Warnings From a Consumer Reporting Agency

1. A fraud or active duty alert is included with a consumer report.

2. A consumer reporting agency provides a notice of credit freeze in response to a request for a consumer report.

3. A consumer reporting agency provides a notice of address discrepancy, as referenced in Sec. 605(h) of the Fair Credit Reporting Act (15 U.S.C. 1681c(h)).

4. A consumer report indicates a pattern of activity that is inconsistent with the history

and usual pattern of activity of an applicant or customer, such as:

a. A recent and significant increase in the volume of inquiries;

b. An unusual number of recently established credit relationships;

c. A material change in the use of credit, especially with respect to recently established credit relationships; or

d. An account that was closed for cause or identified for abuse of account privileges by a financial institution or creditor.

Suspicious Documents

5. Documents provided for identification appear to have been altered or forged.

6. The photograph or physical description on the identification is not consistent with the appearance of the applicant or customer presenting the identification.

7. Other information on the identification is not consistent with information provided by the person opening a new covered account or customer presenting the identification.

8. Other information on the identification is not consistent with readily accessible information that is on file with the financial institution or creditor, such as a signature card or a recent check.

9. An application appears to have been altered or forged, or gives the appearance of having been destroyed and reassembled.

Suspicious Personal Identifying Information

10. Personal identifying information provided is inconsistent when compared against external information sources used by the financial institution or creditor. For example:

a. The address does not match any address in the consumer report; or

b. The Social Security Number (SSN) has not been issued, or is listed on the Social Security Administration's Death Master File.

11. Personal identifying information provided by the customer is not consistent with other personal identifying information provided by the customer. For example, there is a lack of correlation between the SSN range and date of birth.

12. Personal identifying information provided is associated with known fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

a. The address on an application is the same as the address provided on a fraudulent application; or

b. The phone number on an application is the same as the number provided on a fraudulent application.

13. Personal identifying information provided is of a type commonly associated with fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

a. The address on an application is fictitious, a mail drop, or a prison; or

b. The phone number is invalid, or is associated with a pager or answering service.

14. The SSN provided is the same as that submitted by other persons opening an account or other customers.

15. The address or telephone number provided is the same as or similar to the address or telephone number submitted by an unusually large number of other persons opening accounts or by other customers.

16. The person opening the covered account or the customer fails to provide all required personal identifying information on an application or in response to notification that the application is incomplete.

17. Personal identifying information provided is not consistent with personal identifying information that is on file with the financial institution or creditor.

18. For financial institutions and creditors that use challenge questions, the person opening the covered account or the customer cannot provide authenticating information beyond that which generally would be available from a wallet or consumer report.

Unusual Use of, or Suspicious Activity Related to, the Covered Account

19. Shortly following the notice of a change of address for a covered account, the institution or creditor receives a request for a new, additional, or replacement means of accessing the account or for the addition of an authorized user on the account.

20. A covered account is used in a manner that is not consistent with established patterns of activity on the account. There is, for example:

a. Nonpayment when there is no history of late or missed payments;

b. A material increase in the use of available credit;

c. A material change in purchasing or spending patterns; or

d. A material change in electronic fund transfer patterns in connection with a deposit account.

21. A covered account that has been inactive for a reasonably lengthy period of time is used (taking into consideration the type of account, the expected pattern of usage and other relevant factors).

22. Mail sent to the customer is returned repeatedly as undeliverable although transactions continue to be conducted in connection with the customer's covered account.

23. The financial institution or creditor is notified that the customer is not receiving paper account statements.

24. The financial institution or creditor is notified of unauthorized charges or transactions in connection with a customer's covered account.

Notice From Customers, Victims of Identity Theft, Law Enforcement Authorities, or Other Persons Regarding Possible Identity Theft in Connection With Covered Accounts Held by the Financial Institution or Creditor

25. The financial institution or creditor is notified by a customer, a victim of identity theft, a law enforcement authority, or any other person that it has opened a fraudulent account for a person engaged in identity theft.

Dated: February 28, 2012.

By the Commodity Futures Trading Commission.

David A. Stawick,

Secretary of the Commodity Futures Trading Commission.

Dated: February 28, 2012.

By the Securities and Exchange Commission.

Elizabeth M. Murphy,

Secretary of the Securities and Exchange Commission.

[FR Doc. 2012–5157 Filed 3–5–12; 8:45 am]

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FEDERAL REGISTER

Vol. 77 Tuesday,

No. 44 March 6, 2012

Part IV

The President

Proclamation 8781—Read Across America Day, 2012

Federal Register
Vol. 77, No. 44
Tuesday, March 6, 2012

Presidential Documents

Title 3—

The President

Proclamation 8781 of March 2, 2012

Read Across America Day, 2012

By the President of the United States of America

A Proclamation

From infancy through adulthood, reading enriches the human experience and illuminates the path to learning, opportunity, and success. By sharing the beauty and power of books with our children, we make a vital investment not only in their future, but also in an America that leads the world in educating its people. As we celebrate Read Across America Day in our homes, schools, and libraries, let us recommit to empowering every child with a strong start and a passion for the written word.

The journey to literacy begins early and continues throughout childhood. Parents and caregivers can play an essential role in developing fundamental skills by reading aloud regularly, helping children explore new words and concepts, and instilling enthusiasm for language and storytelling. These first lessons help pave the way for a love of reading that can last a lifetime. As children move from the living room to the classroom, teachers, librarians, and families use books to reinforce reading proficiency and build critical thinking skills that provide the foundation for a world-class education. By working together to give our sons and daughters the tools for achievement, we lay the groundwork for growth and prosperity that will stand the test of time.

On Read Across America Day, we also celebrate the birthday of Theodor Seuss Geisel—an author whose fanciful wordplay and whimsical tales continue to delight young readers around the world. Dr. Seuss's stories evoke the unlimited potential for imagination and inspiration on the printed page, and they remind us of the countless ways reading enhances our lives. Today, we reaffirm our commitment to raising a generation of avid learners and bringing an outstanding education within reach for every child.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim March 2, 2012, as Read Across America Day. I call upon children, families, educators, librarians, public officials, and all the people of the United States to observe this day with appropriate programs, ceremonies, and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of March, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-sixth.

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