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The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. APHIS–2011–0028]

RIN 0579–AD61

Importation of Fresh Bananas From the Philippines into the Continental United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the regulations concerning the importation of fruits and vegetables to allow the importation of fresh bananas from the Philippines into the continental United States. As a condition of entry, the bananas will have to be produced in accordance with a systems approach that will include requirements for importation of commercial consignments, monitoring of fruit flies to establish low-prevalence places of production, harvesting only of hard green bananas, and inspection for quarantine pests by the national plant protection organization of the Philippines. The bananas will also have to be accompanied by a phytosanitary certificate with an additional declaration stating that they were grown, packed, and inspected and found to be free of quarantine pests in accordance with the proposed requirements. This action will allow the importation of bananas from the Philippines while continuing to protect against the introduction of plant pests into the United States.

DATES: *Effective Date:* February 7, 2013.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Jones, Regulatory Coordination Specialist, PPQ, RPM, RCC, APHIS, 4700 River Road Unit 39, Riverdale, MD 20737–1231; (301) 851–2289.

SUPPLEMENTARY INFORMATION:

Background

The regulations in ''Subpart–Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–57, referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests within the United States.

On April 16, 2012, we published in the **Federal Register** (77 FR 22510–22514, Docket No. APHIS–2011–0028) a proposal [1] to amend the regulations to allow the importation of bananas from the Philippines into the continental United States. We proposed to allow the importation of bananas from the Philippines into the continental United States only if they were produced in accordance with a systems approach. The proposed systems approach included requirements for:

- Registration, monitoring, and oversight of places of production;
- Trapping for the fruit flies *Bactrocera musae*, *B. occipitalis,* and *B. philippinensis* to establish low-prevalence places of production;
- Covering bananas with pesticide bags during the growing season;
- Harvesting only of hard green bananas;
- Requirements for culling, safeguarding, and identifying the fruit; and
- Inspection by the NPPO of the Philippines for quarantine pests.

We also proposed to require bananas from the Philippines to be accompanied by a phytosanitary certificate with an additional declaration stating that the bananas were grown, packed, and inspected in accordance with the proposed requirements.

On May 30, 2012, we published in the **Federal Register** (77 FR 31829–31830, Docket No. APHIS–2011–0028) a notice [2] of availability of an environmental assessment (EA) entitled ''Importation of Bananas (*Musa* spp.) from the Philippines into the Continental United States'' (April 2012). The EA assesses the potential environmental impacts associated with allowing the importation of fresh bananas from the Philippines into the continental United States.

We solicited comments concerning our proposal for 60 days ending June 15, 2012, and concerning the EA for 30 days ending June 29, 2012. We received four comments by the close of those comment periods. They were from a representative of a State government, an organization of State plant regulatory officials, and private citizens. One of the commenters supported the proposed rule. Another commenter opposed the importation of bananas from the Philippines, but did not present any specific concerns or identify any particular reasons for opposing the importation. The issues raised by the other commenters are discussed below.

One commenter requested that the bananas from the Philippines be inspected carefully at the port of entry for all 16 pests of concern identified in the pest risk assessment (PRA) that accompanied the proposed rule.

Under paragraph (b) of § 319.56–3, all consignments of fruits and vegetables are subject to inspection at the port of entry. Inspectors will monitor for all pests listed in the PRA. In addition, bananas will be inspected at the port of entry to verify that they are at the proper stage of ripeness.

One commenter opposed the importation of bananas from the Philippines, stating that it would increase the risk of accidental or incidental introduction of the fruit flies *B. musae, B. occipitalis,* and *B. philippinensis* into the United States.

APHIS considers the multiple layers of safeguards sufficient to mitigate the risk posed by the fruit flies *B. musae, B. occipitalis,* and *B. philippinensis.* These mitigations are based on those currently used in Central and South America for export of bananas to the United States. APHIS interception records going back to 1983 indicate that there have been no interceptions of fruit flies in commercially produced bananas from Central and South America. Two additional mitigations (fruit fly trapping and population control) were added specifically for the Philippine bananas program to address fruit fly risk. We have determined, for the reasons specified in the risk management document that accompanied the

[1] To view the proposed rule and the comments we received, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0028.*

[2] The notice and EA are also available at the Web address in footnote 1.

proposed rule, that these measures will effectively mitigate the risk of accidental or incidental introduction of the fruit flies or any pest of concern identified in the PRA.

We are making two editorial changes to § 319.56–58 in order to increase the clarity of the requirements. Proposed paragraph (d) stated that during the growing period, if a pesticide bag falls off or is torn, the fruit in that bag may not be exported to the United States. We are adding the words ''that had been'' after ''fruit'' to clarify that the fruit that is no longer in the bag cannot be exported from the Philippines to the United States.

Proposed paragraph (e)(2) stated that harvested bananas must be placed in field cartons or containers that are marked to show the official registration number of the production site. However, paragraph (a)(2) refers to ''places of production'' rather than production sites. Thus, we are amending paragraph (e)(2) to indicate that cartons or containers should be marked with the official registration number of the place of production.

Therefore, for the reasons given in the proposed rule, we are adopting the proposed rule as a final rule, with the two editorial changes discussed above.

Note: In our April 2012 proposed rule, we proposed to add the conditions governing the importation of bananas from the Philippines as § 319.56–57. In this final rule, those conditions are added as § 319.56–58.

Effective Date

This is a substantive rule that relieves restrictions and, pursuant to the provisions of 5 U.S.C. 553, may be made effective less than 30 days after publication in the **Federal Register**.

Immediate implementation of this rule is necessary to provide relief to those persons who are adversely affected by restrictions we no longer find warranted. Making this rule effective immediately will allow interested producers and others in the marketing chain to benefit from the availability of bananas from an additional source. Therefore, the Administrator of the Animal and Plant Health Inspection Service has determined that this rule should be effective upon publication in the **Federal Register**.

Executive Order 12866 and Regulatory Flexibility Act

This final rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. The analysis is summarized below. Copies of the full analysis are available on the Regulations.gov Web site (see footnote 1 in this document for a link to Regulations.gov) or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

The analysis examines impacts for U.S. small entities if fresh bananas are imported from the Philippines into the continental United States. Commercial production of bananas in the United States takes place in Hawaii, where most if not all of the banana farms are small entities. These producers will be little affected by the final rule given the large quantity of bananas already imported by the United States and the relatively small quantity expected to be imported from the Philippines. The United States is clearly a minor producer but a major importer of bananas. Compared to the volume of current imports, the quantity of bananas expected to be imported from the Philippines is negligible. In addition, bananas from the Philippines will not be allowed entry into Hawaii.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12988

This final rule allows bananas to be imported into the United States from the Philippines. State and local laws and regulations regarding bananas imported under this rule will be preempted while the fruit is in foreign commerce. Fresh fruits are generally imported for immediate distribution and sale to the consuming public, and remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. No retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

National Environmental Policy Act

An EA and finding of no significant impact have been prepared for this final rule. The environmental assessment provides a basis for the conclusion that the importation of bananas from the Philippines into the continental United States, under the conditions specified in this rule, will not have a significant impact on the quality of the human environment. Based on the finding of no significant impact, the Administrator of the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

The EA and finding of no significant impact were prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*); (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508); (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

The EA and finding of no significant impact may be viewed on the Regulations.gov Web site.[3] Copies of the environmental assessment and finding of no significant impact are also available for public inspection at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect copies are requested to call ahead on (202) 799–7039 to facilitate entry into the reading room. In addition, copies may be obtained by writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), the information collection or recordkeeping requirements included in this final rule, which were filed under 0579–0394, have been submitted for approval to the Office of Management and Budget (OMB). When OMB notifies us of its decision, if approval is denied, we will publish a document in the **Federal Register** providing notice of what action we plan to take.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

[3] The EA and finding of no significant impact are available at the Web address in footnote 1.

List of Subjects in 7 CFR Part 319

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we are amending 7 CFR part 319 as follows:

PART 319—FOREIGN QUARANTINE NOTICES

■ 1. The authority citation for part 319 continues to read as follows:

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.

■ 2. A new § 319.56–58 is added to read as follows:

§ 319.56–58 Bananas from the Philippines.

Bananas (*Musa* spp., which include *M. acuminate* cultivars and *M. acuminate* x *M. balbisiana* hybrids) may be imported into the continental United States from the Philippines only under the conditions described in this section. These conditions are designed to prevent the introduction of the following quarantine pests: *Bactrocera musae* (Tryon), *Bactrocera occipitalis* (Bezzi), and *Bactrocera philippinensis* (Drew and Hancock), fruit flies; *Ceroplastes rubens* (Maskell), the red wax scale; *Coccus viridis* (Green), the green scale; *Sybra alternans* (Wiedemann), a longhorned beetle; *Dymicoccus neobrevipes* (Beardsley), the gray pineapple mealybug; *Geococcus coffeae* (Green), the coffee root mealybug; *Maconellicoccus hirsutus* (Green), the hibiscus mealybug; *Planococcus lilacinus* (Cockerell), the coffee mealybug; *Planococcus minor* (Maskell), the pacific mealybug; *Pseudococcus cryptus* (Hempel), the cryptic mealybug; *Rastrococcus invadens* (Williams), the mango mealybug; and *Rastrococcus spinosus* (Robinson), the Philippine mango mealybug.

(a) *General requirements.* (1) The national plant protection organization (NPPO) of the Philippines must provide an operational workplan to APHIS that details the activities that the NPPO of the Philippines will, subject to APHIS' approval of the workplan, carry out to meet the requirements of this section.

(2) Bananas must be grown at places of production that are registered with the NPPO of the Philippines and that meet the requirements of this section. Registration must be renewed annually.

(3) Bananas must be packed for export to the United States in packinghouses that meet the requirements of this section.

(4) Bananas from the Philippines may be imported in commercial consignments only.

(b) *Monitoring and oversight.* (1) The NPPO of the Philippines must visit and inspect registered places of production monthly, starting at least 3 months before harvest begins and continuing through the end of the shipping season, to verify that the growers are complying with the requirements of this section and follow pest control guidelines, when necessary, to reduce quarantine pest populations. When trapping is required under paragraph (c) of this section, the NPPO of the Philippines must also verify that the growers are complying with the requirements in that paragraph and must certify that each place of production has an effective fruit fly trapping program. Any personnel conducting trapping under paragraphs (c) of this section must be trained and supervised by the NPPO of the Philippines. APHIS may monitor the places of production as necessary to ensure compliance.

(2) If the NPPO of the Philippines finds that a place of production or packinghouse is not complying with the requirements of this section, no fruit from the place of production or packinghouse will be eligible for export to the United States until APHIS and the NPPO of the Philippines conduct an investigation and appropriate remedial actions have been implemented.

(3) The NPPO of the Philippines must retain all forms and documents related to export program activities in places of production and packinghouses for at least 1 year and, as requested, provide them to APHIS for review.

(c) *Fruit fly trapping to establish places of production with low pest prevalence.* Beginning at least 3 months before harvest begins and continuing through the end of the harvest, trapping must be conducted in registered places of production with at least 1 trap per 0.2 square kilometers to demonstrate that the places of production have a low prevalence of *Bactrocera* spp. fruit flies. APHIS-approved traps baited with APHIS-approved plugs must be used and serviced at least once every 2 weeks. During the trapping, when traps are serviced, if fruit flies are trapped at a particular place of production at cumulative levels above 2 flies per trap per day, pesticide bait treatments must be applied in the affected place of production in order for the place of production to remain eligible to export bananas to the United States. The NPPO of the Philippines must keep records of fruit fly detections for each trap, update the records each time the traps are checked, and make the records available to APHIS inspectors upon request. If no *Bactrocera* spp. larvae have been found in the inspections required in paragraph (h) of this section by February 9, 2015, the activities described in this paragraph are no longer required.

(d) *Bagging requirements.* Plastic bags impregnated with pesticides must cover the bananas. During the growing period, if a pesticide bag falls off or is torn, the fruit that had been in that bag may not be exported to the United States.

(e) *Harvesting requirements.* (1) Bananas must be harvested at a hard green stage and inspected at the port of entry to determine that:

(i) Bananas shipped by air are still green upon arrival in the United States;

(ii) Bananas shipped by sea are either green upon arrival in the United States or yellow but firm.

(2) Harvested bananas must be placed in field cartons or containers that are marked to show the official registration number of the place of production. The identification of the place of production must be maintained from the time when the fruit leaves the place of production until the fruit is released for entry into the United States.

(f) *Post-harvest processing.* After harvest, all damaged or diseased fruit must be culled at the packinghouse. Fruit must be washed with a high pressure water spray, and washed with soap and water.

(g) *Packinghouse requirements.* (1) Packinghouses must prevent the entry of pests with a double-door entry system designed to exclude quarantine pests of concern.

(2) Bananas for export must be packed into new, clean boxes, crates or other packing materials. Bananas intended for export to the United States must be labeled with the name and location for the packinghouse, and segregated from bananas intended for other markets.

(3) The shipping documents accompanying the consignment of bananas from the Philippines that are exported to the United States must include the official registration number of the place of production at which the bananas were grown and must identify the packinghouse in which the fruit was processed and packed. This identification must be maintained until the fruit is released for entry into the United States.

(4) The packinghouse operations for export of bananas must be monitored by the NPPO of the Philippines.

(h) *NPPO of the Philippines inspection.* (1) Following any post-harvest processing, inspectors from the NPPO of the Philippines must certify that bananas were harvested at the hard green stage.

(2) Inspectors from the NPPO of the Philippines must inspect a biometric sample of the fruit from each place of production at a rate to be determined by APHIS. The inspectors must visually inspect for quarantine pests listed in the introductory text of this section and must cut fruit to inspect for quarantine pests that are internal feeders. If *Bactrocera* spp. fruit flies are found upon inspection, the export program will be suspended until an investigation has been conducted by APHIS and the NPPO of the Philippines and appropriate mitigations have been implemented. If other quarantine pests are detected in this inspection, the consignment will be destroyed and the registered place of production will be rejected from the export program.

(i) *Phytosanitary certificate.* Each consignment of fruit must be accompanied by a phytosanitary certificate issued by the NPPO of the Philippines that contains an additional declaration stating that the bananas in the consignment were grown, packed, and inspected in accordance with the systems approach in 7 CFR 319.56–58.

(Approved by the Office of Management and Budget under control number 0579–0394)

Done in Washington, DC, this 4th day of February 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–02775 Filed 2–6–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 72

[Docket No. APHIS–2012–0069]

Texas (Splenetic) Fever in Cattle

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the Texas (Splenetic) Fever regulations by updating the scientific names for the ticks that transmit the disease, listing additional names for the disease, and removing all products except coumaphos from the list of dips permitted for use on cattle in interstate movement. These actions are necessary to update and clarify the regulations.

DATES: *Effective Date:* February 7, 2013

FOR FURTHER INFORMATION CONTACT: Dr. Matthew T. Messenger, Staff Entomologist, Cattle Fever Tick Eradication Program Manager, VS, APHIS, 4700 River Road Unit 39, Riverdale, MD 20737–1231; (301) 851–3421.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 9 CFR part 72, ''Texas (Splenetic) Fever in Cattle'' (referred to below as the regulations), restrict the interstate movement of cattle from areas of the United States that are quarantined because of ticks that are vectors for bovine babesiosis. The disease is referred to in the regulations as splenetic or tick fever. Splenetic or tick fever is a contagious, infectious, and communicable disease of cattle that causes cattle to become weak and dehydrated and can cause death.

Section 72.1 lists the scientific names for ticks capable of transmitting microscopic parasites (Babesia) that cause bovine babesiosis. We are amending the list by clarifying that *Margaropus annulatus* is now considered a distinct species, and the genus *Boophilus* has been reclassified as a subgenus of the genus *Rhipicephalus.* In addition, we are removing *R. evertsi evertsi* from the list since this species is endemic to Africa and does not have established populations in North America.

Section 72.2 lists areas of the United States where splenetic or tick fever exists in cattle. We are amending this section to indicate that the terms southern fever, cattle fever, Texas fever, bovine piroplasmosis, redwater, and bovine babesiosis all refer to the same disease.

Section 72.13 concerns tickicidal dips for cattle and dipping procedures. Paragraph (b) lists the dips permitted for use on cattle in interstate movement. We are amending paragraph (b) by removing all dips except coumaphos, which is the only product being used currently. All other products have been removed from the market and their Environmental Protection Agency registration canceled by the manufacturers.

Currently, the title of part 72 is ''Texas (Splenetic) Tick Fever in Cattle.'' We are changing the title of the part to ''Bovine Babesiosis'' for the sake of clarity and technical accuracy.

Executive Orders 12866 and 12988 and Regulatory Flexibility Act

This rule relates to internal agency management. Therefore, this rule is exempt from the provisions of Executive Orders 12866 and 12988. Moreover, pursuant to 5 U.S.C. 553, notice of proposed rulemaking and opportunity for comment are not required for this rule, and it may be made effective less than 30 days after publication in the **Federal Register.** In addition, under 5 U.S.C. 804, this rule is not subject to Congressional review under the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121. Finally, this action is not a rule as defined by 5 U.S.C. 601 *et seq.,* the Regulatory Flexibility Act, and thus is exempt from the provisions of that Act.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Paperwork Reduction Act

This rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 9 CFR Part 72

Animal diseases, Cattle, Quarantine, Transportation.

Accordingly, 9 CFR part 72 is amended as follows:

PART 72—BOVINE BABESIOSIS

■ 1. The authority citation for part 72 continues to read as follows:

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

■ 2. The heading of part 72 is revised to read as set forth above.

■ 3. Section 72.1 is revised to read as follows:

§ 72.1 Interstate movement of infested or exposed animals prohibited.

No animals infested with ticks [*Boophilus annulatus* or *Rhipicephalus* (*Boophilus*) *annulatus, Margaropus annulatus, Boophilus microplus* or *Rhipicephalus* (*Boophilus*) *microplus,* or Babesiasis (Babesiosis) species vectors of *Margaropus, Rhipicephalus, Amblyomma, Demacentor,* or *Ixodes*] or exposed to tick infestation may be moved interstate, except as provided in this part.

■ 4. Section 72.2 is amended as follows:

■ a. By revising the section heading to read as set forth below.

■ b. In the first sentence of the section, by removing the word ''splenetic'' and adding the words ''bovine piroplasmosis, bovine babesiosis, redwater, or splenetic, southern, cattle, Texas'' in its place.

§ 72.2 Restrictions on movement of cattle.

* * * * *

§ 72.13 [Amended]

■ 5. Section 72.13 is amended as follows:

■ a. In paragraph (b) introductory text, by removing the word ''Department'' and by adding the words ''U.S. Department of Agriculture'' in its place.

■ b. By removing paragraphs (b)(1), (b)(3), and (b)(4), by redesignating paragraph (b)(2) as paragraph (b)(1), and by adding and reserving a new paragraph (b)(2).

Done in Washington, DC, this 4th day of February 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–02784 Filed 2–6–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2012–1200; Special Conditions No. 25–475–SC]

Special Conditions: Embraer S.A., Model EMB–550 Airplane; Hydrophobic Coatings in Lieu of Windshield Wipers

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Embraer S.A., Model EMB–550 airplane. This airplane will have a novel or unusual design feature(s) associated with hydrophobic coatings. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: *Effective Date:* March 11, 2013.

FOR FURTHER INFORMATION CONTACT: Paul Bernado, FAA, Airplane and Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington, 98057–3356; telephone 425–227–1209; facsimile 425–227–1320.

SUPPLEMENTARY INFORMATION:

Background

On May 14, 2009, Embraer S.A. applied for a type certificate for their new Model EMB–550 airplane. The Model EMB–550 airplane is the first of a new family of jet airplanes designed for corporate flight, fractional, charter, and private owner operations. The aircraft has a conventional configuration with low wing and T-tail empennage. The primary structure is metal with composite empennage and control surfaces. The Model EMB–550 airplane is designed for 8 passengers, with a maximum of 12 passengers. It is equipped with two Honeywell HTF7500–E medium bypass ratio turbofan engines mounted on aft fuselage pylons. Each engine produces approximately 6,540 pounds of thrust for normal takeoff. The primary flight controls consist of hydraulically powered fly-by-wire elevators, aileron and rudder, controlled by the pilot or copilot sidestick.

The Model EMB–550 airplane will use a hydrophobic coating on the windshield in lieu of windshield wipers. The existing regulation, Title 14, Code of Federal Regulations (14 CFR) 25.773(b)(1), requires a means to maintain a sufficiently clear portion of the windshield for both pilots to have sufficiently extensive view along the flight path during precipitation conditions in heavy rain at speeds up to 1.5 V_{SR1}. The heavy rain and high speed conditions in the rule do not necessarily represent the limiting condition for this new technology. For example, airflow over the windshield may be necessary to remove moisture, but may not be adequate to maintain a sufficiently clear area of the windshield in low speed flight or during surface operations. Alternatively, airflow over the windshield may be disturbed during critical times such as the approach to land, where the airplane is at higher-than-normal pitch angle.

Type Certification Basis

Under the provisions of 14 CFR 21.17, Embraer S.A. must show that the Model EMB–550 airplane meets the applicable provisions of part 25, as amended by Amendments 25–1 through 25–127 thereto.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Model EMB–550 airplane because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Embraer S.A. Model EMB–550 airplane must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36 and the FAA must issue a finding of regulatory adequacy under § 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under § 21.17(a)(2).

Novel or Unusual Design Features

The Embraer S.A. Model EMB–550 airplane will incorporate the following novel or unusual design features: The Model EMB–550 airplane has a hydrophobic coating on the windshield to provide adequate pilot compartment view in precipitation in lieu of windshield wipers.

Discussion

14 CFR 25.773(b)(1) requires a means to maintain a clear portion of the windshield for both pilots to have a sufficiently extensive view along the flight path during precipitation conditions. The regulations require this means to maintain such an area during precipitation in heavy rain at speeds up to 1.5 V_{SR1}. The requirement that the means to maintain a clear area of forward vision must function at high speeds and high precipitation rates is based on the use of windshield wipers as the means to maintain an adequate area of clear vision in precipitation conditions. The requirement in 14 CFR 121.313(b), and in 14 CFR 125.213(b), to provide ''a windshield wiper or equivalent for each pilot station'' has remained unchanged since at least 1953.

The effectiveness of windshield wipers to maintain an area of clear vision normally degrades as airspeed and precipitation rates increase. It is assumed that because high speeds and high precipitation rates represent limiting conditions for windshield wipers, they will also be effective at lower speeds and precipitation levels. Accordingly, § 25.773(b)(1)(i) does not require maintenance of a clear area of forward vision at lower speeds or lower precipitation rates.

A forced airflow blown directly over the windshield has also been used to maintain an area of clear vision in precipitation. The limiting conditions

for this technology are comparable to those for windshield wipers. Accordingly, introduction of this technology did not present a need for special conditions to maintain the level of safety embodied in the existing regulations.

Hydrophobic windshield coatings may depend to some degree on airflow directly over the windshield to maintain a clear vision area. The heavy rain and high-speed conditions specified in the current rule do not necessarily represent the limiting conditions for this new technology. For example, airflow over the windshield, which may be necessary to remove moisture from the windshield, may not be adequate to maintain a sufficiently clear area of the windshield in low speed flight or during ground operations. Alternatively, airflow over the windshield may be disturbed during such critical times as the approach to land, where the airplane is at a higher than normal pitch attitude. In these cases, areas of airflow disturbance or separation on the windshield could cause failure to maintain a clear vision area on the windshield.

In addition to potentially depending on airflow to function effectively, hydrophobic coatings may also be dependent on water droplet size for effective precipitation removal. For example, precipitation in the form of a light mist may not be sufficient for the coating's properties to result in maintaining a clear area of vision.

In summary, the current regulations identify speed and precipitation rate requirements that represent limiting conditions for windshield wipers and blowers, but not for hydrophobic coatings, so it is necessary to issue special conditions to maintain the level of safety represented by the current regulations.

These special conditions provide an appropriate safety standard for the hydrophobic coating technology as the means to maintain a clear area of vision by requiring it to be effective at low speeds and precipitation rates as well as the higher speeds and precipitation rates identified in the current regulation.

Discussion of Comments

Notice of proposed special conditions No. 25–12–07–SC for the Embraer S.A. Model EMB–550 airplanes was published in the **Federal Register** on November 9, 2012, (77 FR 67308). No comments were received, and the special conditions are adopted as proposed.

Applicability

As discussed above, these special conditions are applicable to the Embraer S.A. Model EMB–550 airplane. Should Embraer S.A. apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model of airplanes. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Embraer S.A. Model EMB–550 airplanes.

Hydrophobic Coatings in Lieu of Windshield Wipers

The airplane must have a means to maintain a clear portion of the windshield, during precipitation conditions, enough for both pilots to have a sufficiently extensive view along the ground or flight path in normal taxi and flight attitudes of the airplane. This means must be designed to function, without continuous attention on the part of the flightcrew, in conditions from light misting precipitation to heavy rain at speeds from fully stopped in still air, to 1.5 V_{SR1} with lift and drag devices retracted.

Issued in Renton, Washington, on February 4, 2013.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–02740 Filed 2–6–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2012–0952; Airspace Docket No. 12–AAL–6]

Establishment of Class E Airspace; Kasigluk, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace at Kasigluk, AK, to accommodate aircraft using Area Navigation (RNAV) Global Positioning System (GPS) standard instrument approach procedures at Kasigluk Airport. This action also makes a minor adjustment to the geographic coordinates of the airport. The FAA is taking this action to enhance the safety and management of aircraft operations at the airport.

DATES: Effective date, 0901 UTC, May 2, 2013. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Richard Roberts, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 203–4517.

SUPPLEMENTARY INFORMATION:

History

On October 4, 2012, the FAA published in the **Federal Register** a notice of proposed rulemaking to modify controlled airspace at Kasigluk, AK (77 FR 60660). 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, it was noted that the geographic coordinates were not rounded up. This action corrects that error.

Class E airspace designations are published in paragraph 6005, of FAA Order 7400.9W dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in that Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by establishing Class E airspace extending upward from 700 feet above the surface, at Kasigluk Airport, Kasigluk, AK, to accommodate aircraft using the new RNAV (GPS) standard instrument approach procedures at the airport. Also, the airport's geographic longitudinal coordinate is rounded up to the next whole number. This action is necessary for the safety and management of instrument flight rules operations at the airport.

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

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air)

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, and effective September 15, 2012 is amended as follows:

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

* * * * *

AAL AK E5 Kasigluk, AK [New]

Kasigluk Airport, AK
(Lat. 60°52′24″ N., long. 162°31′28″ W.)

That airspace extending upward from 700 feet above the surface within a 7.0-mile radius of Kasigluk Airport.

Issued in Seattle, Washington, on January 30, 2013.

Clark Desing,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2013–02590 Filed 2–6–13; 8:45 am]

BILLING CODE 4910–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1212

[Document Number NASA–2012–0005]

RIN 2700–AD86

Update of Existing Privacy Act—NASA Regulations

AGENCY: National Aeronautics and Space Administration.

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to the final regulations (NASA–2012–0005), which were published in the **Federal Register** of Thursday, October 4, 2012 (77 FR 60620). The regulations relate to requests to access individual Privacy Act records.

DATES: Effective February 7, 2013.

FOR FURTHER INFORMATION CONTACT: Nanette Jennings, 202–358–0819.

SUPPLEMENTARY INFORMATION:

Background

NASA's final regulations that published in the **Federal Register** of October 4, 2012 [77 FR 60622] inadvertently omits the responsibility of NASA's Freedom of Information Act (FOIA) Office that processes requests for individual records. An individual's access request for his/her own record maintained in a system of records are processed by NASA's Privacy Act Office and FOIA Office staff. Therefore, this correction adds responsibility of the FOIA Office. This corrections also corrects the title to § 1212.201 and terms that were missed in the initial publication.

Need for Correction

As published, the final regulations contain omissions, an incorrect section title and terms which may prove to be misleading and need to be clarified.

List of Subjects in 14 CFR Part 1212

Freedom of information, Privacy.

Accordingly, 14 CFR part 1212 is corrected by making the following correcting amendments:

PART 1212—PRIVACY ACT—NASA REGULATIONS

■ 1. The authority citation for part 1212 is revised to read as follows:

Authority: The National Aeronautics and Space Act, as amended, 51 U.S.C. 20101 et seq.; the Privacy Act of 1974, as amended, 88 Stat. 1896, 5 U.S.C. 552a.

■ 2. Revise the heading of § 1212.201 and paragraph (c)(1), redesignate paragraph (f) as paragraph (g), and add a new paragraph (f) to read as follows:

§ 1212.201 Requesting a record.

* * * * *

(c) * * *

(1) Requests must be directed to the appropriate system manager, or, if unknown, to the Center Privacy Manager or Freedom of Information Act (FOIA) Office at NASA Headquarters or Field Center. The request should be identified clearly on the envelope and on the letter as a ''Request Under the Privacy Act.''

* * * * *

(f) If the Center FOIA Office receives a first party request for records or access, the FOIA Office will process the

request under the Privacy Act pursuant to this part.

* * * * *

§ 1212.704 [Corrected]

■ 3. In paragraph (a) remove the word ''Installations'' and add in its place the word ''Centers'' and remove the words ''Component Centers'' and add in its place the words ''Component Facilities.''

Nanette Jennings,

NASA Federal Register Liaison Officer.

[FR Doc. 2013–02778 Filed 2–6–13; 8:45 am]

BILLING CODE 7510–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 771

Federal Transit Administration

49 CFR Part 622

[Docket No. FTA–2011–0056]

RIN 2132–AB03

Environmental Impact and Related Procedures

AGENCY: Federal Transit Administration (FTA), Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: This final rule makes revisions to the joint Federal Transit Administration (FTA) and Federal Highway Administration (FHWA) regulations that implement the National Environmental Policy Act (NEPA). The revisions are aimed at streamlining the FTA environmental process for transit projects, in response to the August 31, 2011, Presidential Memorandum titled ''Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review.'' The revisions also respond to Executive Order 13563's directive to periodically review existing regulations to determine if they can be made more effective and/or less burdensome. The new categorical exclusions (CEs) established by this rule, which affect actions by FTA and FTA grant applicants, are intended to improve the efficiency of the environmental review process by making available the least intensive form of review for those actions that typically do not have the potential for significant environmental effects, and, therefore, do not merit additional analysis and documentation associated with an environmental assessment or an environmental impact statement.

DATES: Effective on February 7, 2013.

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SUPPLEMENTARY INFORMATION:

Executive Summary

The Federal Transit Administration (FTA) and the Federal Highway Administration (FHWA) published a Notice of Proposed Rulemaking (NPRM) on March 15, 2012. In the NPRM, FTA proposed: (1) The creation of ten new categorical exclusions (CEs) to be located in a newly proposed section of the regulation at 23 CFR 771.118; (2) the expansion of public involvement methods to include electronic means; (3) the addition of language on early scoping into the regulations; (4) a modification to the list of project types that normally result in the preparation of an Environmental Impact Statement (EIS); and (5) the inclusion of an FTA review role in contracting for Environmental Assessment (EA) and EIS projects. The comment period closed on May 14, 2012.

Numerous organizations submitted substantive comments to FTA that generally were positive in tone. Many comments requested clarification of terms or phrases, and several comments requested modification of the CE language and/or adding additional examples to the CEs found under section 771.118(c). Other than comments on preamble terminology itself, these comments were addressed by either providing the requested clarifications or modifying the CE language or examples.

Some of the more substantial revisions made in response to comments received on the proposed rule include: (1) The removal of an ''adverse effect to historic properties'' condition from section 771.118(c)(3); (2) the addition of ''operating assistance'' to section 771.118(c)(4); (3) a distinction between bridge projects (i.e., section 771.118(d)(2) covers projects involving new construction or reconstruction of a bridge, while section 771.118(c)(8) covers bridge rehabilitation and maintenance); and (4) the deletion of the proposed requirement that FTA review the project scope prior to contract finalization for preparation of EAs and EISs). FTA also made a number of minor revisions to the proposals in the NPRM, which are described in detail in this final rule.

Additionally, since the close of the comment period for the NPRM, the President signed into law the Moving Ahead for Progress in the 21st Century Act (MAP–21). This final rule is consistent with provisions in MAP–21, and FTA and FHWA will initiate further rulemaking to implement the various environmental provisions contained in MAP–21. FTA made one edit in particular with respect to MAP–21: FTA removed the ''railroad'' limitation from the early acquisition of right-of-way CE pursuant to MAP–21's revision to 49 U.S.C. 5323. Previously, an FTA grant applicant was permitted to acquire only railroad right-of-way prior to the completion of NEPA, but with the statutory revision, FTA grant applicants are now permitted to acquire any right-of-way, at their own risk, prior to the completion of NEPA. FTA received comments on its proposed CE for early acquisition in the NPRM, and the changes made by the final rule to the early acquisition provision in the regulation and to the CEs for early acquisition mirror the MAP–21 statutory language.

Of the five major changes FTA and the FHWA included in the March 2012 NPRM noted in the beginning of the Executive Summary, four are being carried forward in this final rule: (1) The creation of ten new CEs to be located in a newly proposed section of the regulation at 23 CFR 771.118; (2) the expansion of public involvement methods to include electronic means; (3) the addition of language on early scoping into the regulations; and (4) a modification to the list of project types that normally result in the preparation of an EIS. FTA intends that the preamble language contained in this final rule be used as guidance when applying the changes made by this final rule. This rule will become effective immediately upon publication, as described in the ''Immediate Effective Date'' section below.

Background

This final rule makes a number of revisions to the procedures that govern how FTA complies with the National Environmental Policy Act (NEPA). The regulation being revised, Part 771 of Title 23, Code of Federal Regulations (CFR), is a joint FTA and FHWA regulation, but nearly all of the revisions are written specifically to apply to actions by FTA and FTA grantees. The rule does contain a minor, non-substantive revision to a footnote discussing supplementary guidance, which applies specifically to the FHWA

as well. The remaining revisions, including the ten new CEs, apply to FTA.

FTA's primary goal in developing this final rule has been to streamline the environmental review process to facilitate compliance with NEPA by providing for more efficient reviews of proposed actions while continuing to protect environmental and human health. In a Presidential Memorandum on the subject, ''Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review,'' issued August 31, 2011, President Obama challenged the heads of Federal agencies to ''take steps to expedite permitting and review, through such strategies as integrating planning and environmental reviews; coordinating multi-agency or multi-governmental reviews and approvals to run concurrently; setting clear schedules for completing steps in the environmental review and permitting process; and utilizing information technologies to inform the public about the progress of environmental reviews as well as the progress of Federal permitting and review processes.'' This final rule is consistent with that direction, and also consistent with Executive Order 13571 issued on April 27, 2011, titled ''Streamlining Service Delivery and Improving Customer Service,'' through which President Obama challenged Federal agencies to develop and implement plans for, among other actions: ''improving the customer experience by adopting proven customer service best practices and coordinating across service channels (such as online, phone, in-person, and mail service)''; ''streamlining agency procedures to reduce costs and accelerate delivery, while reducing the need for customer calls and inquiries''; and ''identifying ways to use innovative technologies to accomplish the customer service activities above, thereby lowering costs, decreasing service delivery times, and improving the customer experience.'' The general public, especially anyone affected or served by a transit project, is a primary ''customer'' served by FTA's environmental review process. Moreover, this final rule is consistent with a goal of Executive Order 13604 issued on March 22, 2012, titled ''Improving Performance of Federal Permitting and Review of Infrastructure Projects,'' which is to ''significantly reduce the aggregate time required to make decisions in the permitting and review of infrastructure projects by the Federal Government, while improving environmental and community outcomes'' and is aimed at ensuring that the ''Federal permitting and review processes * * * provide a transparent, consistent, and predictable path for both grant applicants and affected communities.''

FTA, therefore, aims to maximize the use of the Internet, in accordance with the President's Order, to provide efficient customer service to the public through expedited delivery of NEPA documents and other environmental documents prepared by or for FTA. But recognizing not every customer has access to the Internet, FTA will continue to use other means of providing public access to FTA's environmental documents, as well.

This final rule is consistent with the requirement in Section 6 of Executive Order 13563, ''Improving Regulation and Regulatory Review,'' issued by President Obama on January 18, 2011. Section 6 calls on Federal agencies to periodically review existing regulations to ''determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.'' This rule streamlines existing regulations while maintaining their effectiveness by making available the least intensive form of environmental review for those actions that typically do not have the potential for significant environmental effects, and, therefore, do not merit additional analysis and documentation.

In addition to the recent Presidential direction noted above, the regulations of the Council on Environmental Quality (CEQ) implementing NEPA direct agencies to ''review their policies, procedures, and regulations * * * and revise them as necessary to insure full compliance with the purposes and provisions of the Act'' (40 CFR 1500.6). The joint FTA/FHWA shared environmental procedures were last modified in 2009 with revisions to comply with certain provisions of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), but the procedures have not undergone a complete retrospective analysis by the two agencies since their creation in 1987. A notice of proposed rulemaking (NPRM) proposing major revisions to this regulation was published on May 25, 2000, but was never finalized. The NPRM for this final rule was published in the **Federal Register** on March 15, 2012.

FTA notes that since the publication of its NPRM, on July 6, 2012, the President signed ''Moving Ahead for Progress in the 21st Century,'' or ''MAP–21'' (112 Pub. L. 141, 126 Stat. 405), which, beginning on October 1, 2012, provides renewed authorization for Federal surface transportation programs. MAP–21 also contains a number of changes to the environmental review process for FTA and the FHWA, some of which (such as the requirement for new CEs) are similar to the provisions proposed through and finalized by this rulemaking. FTA and the FHWA have determined that this final rule comports with some provisions of MAP–21, even though this rulemaking was initiated prior to the enactment of MAP–21.

In line with MAP–21, FTA recognizes the use of CEs, whenever appropriate, as a way to improve NEPA efficiency. It has been more than ten years since FTA comprehensively considered the CEs listed in the environmental procedures as they apply to transit projects, and more than 20 years since changes to the CEs were made as a result of a comprehensive review. For this reason, FTA is now updating, through this final rule, the CEs for particular types of proposed transit projects and other proposed FTA actions. The CEs listed in paragraphs (c) and (d) of 23 CFR 771.117 are now designated for actions within the FHWA's authority through this final rule and will no longer apply to FTA-only actions. Additionally, FTA is creating a new section, 23 CFR 771.118, which contains the CEs that will apply to FTA actions and contains the new lists of CEs created through this rulemaking action that are designated for actions within FTA's authority. All references to a regulatory section or paragraph below, for which the CFR Title is not specified, refer to Title 23, Code of Federal Regulations.

The list of new CEs in section 771.118(c) is intended to cover the actions that previously applied to FTA in section 771.117(c), though the CE language was expanded for purposes of efficiency in accordance with CEQ guidance, ''Establishing, Applying, and Revising CEs under NEPA'' (75 FR 75628). FTA will also be providing guidance that directs FTA field offices to no longer use the lists of CEs in sections 771.117(c) and (d), but instead use the new lists in sections 771.118(c) and (d). The guidance will also provide direction on implementing and interpreting the new CEs.

The CEs adopted in section 771.118(c) are organized into ten defined categories of actions, each accompanied by examples representing the types of FTA activities that fall within each category. As explained in the NPRM, this approach is in compliance with the CEQ regulations (40 CFR 1508.4), which

describe CEs as ''a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations * * * and for which, therefore, neither an EA nor an EIS is required.'' CEQ's November 2010 guidance on establishing CEs reiterates CEQ's recommendation to Federal agencies to characterize the types of CE actions through broadly defined criteria, when appropriate, including clearly defined eligible categories and constraints, followed by examples. The examples FTA decided to list within each of the new CEs are intended to be representative of the types of activities that fit within the defined criteria of the CE; they are not intended to limit the CE or to broaden it beyond those activities that do not typically, either individually or cumulatively, cause significant environmental effects.

Consistent with past practice for categories of actions, which based on FTA's experience normally do not result in significant environmental effects, FTA will continue to use the categorical exclusion in section 771.118(d) for the examples listed in that paragraph as well as for other actions that are shown, through documentation, not to have significant environmental impacts. To do so, FTA requires documentation to support that CE designation as appropriate, as is stated in section 771.118(d), which mirrors the former section 771.117(d). These CEs encourage grant applicants to propose project actions located and designed so that no significant impact will occur. FTA is deleting, however, some items in the list of illustrative examples in the former section 771.117(d) from the new list in section 771.118(d) as they are duplicative of CEs found in section 771.118(c) or applicable to the FHWA. Additionally, FTA is including new examples of actions that are slightly more broad than some of the actions proposed in the NPRM for section 771.117(c) based on comments received on that section and based on the fact that the actions that can be categorically excluded are not limited to the examples listed in section 771.118(d) (see Section-by-Section Analysis of this final rule). The items listed under section 771.118(d) are examples of actions that could be processed as CEs by FTA. Through this final rule FTA is not making a substantive determination that the actions represented by the new examples are categorically excluded, but rather is simply providing examples of the types of actions that do not normally result in significant effects and typically can be categorically excluded through documentation showing no significant environmental impacts result from the action. Each of the examples in section 771.118(d) represents a less restrictive form of actions listed as CEs in section 771.118(c). FTA considered the comments received on those CEs in section 771.117(c) and its past experience with such actions in adding new examples to the list at section 771.118(d). Although MAP–21 Section 1318 requires rulemaking that would propose, to the extent appropriate, moving two of those examples from section 771.118(d) to the listed activities in section 771.118(c), specifically sections 771.118(d)(1) and (3), FTA is leaving those two examples in section 771.118(d) until such time as the rulemaking required by MAP–21 Section 1318 is conducted to allow for further notice and comment on a proposal to move them to section 771.118(c).

This rulemaking action does not change the requirements for approving projects as CEs, either for ''listed'' CEs (in section 771.117(c) for the FHWA and section 771.118(c) for FTA) or for ''documented'' CEs (in section 771.117(d) for the FHWA or section 771.118(d) for FTA). For listed CEs, there should be a documented description of the project or activity (for FTA grantees this is typically contained in, or accompanies, a grant application) sufficient to show that the action fits within the listed CE and that no unusual circumstances exist that would make the application of the CE improper. For documented CEs, there should be sufficient documentation to demonstrate that the project meets all criteria for a CE, including any conditions specified in the regulation for the (d) list CE in question.

The CEs adopted by this final rule have been substantiated with supporting documentation, which includes, but is not limited to, comparative benchmarking and expert opinion. The supporting documentation includes FTA Findings of No Significant Impact (FONSI) for projects that fall within the ten broad categories. Comparative benchmarking provides support for the new CEs by using the experience of other Federal agencies that conduct actions of similar nature, scope, and intensity. Additionally, as described in the NPRM, FTA convened an expert panel to review and evaluate each of the new CEs with respect to concept, applicability, and potential environmental effects. Information describing the basis for the CEs determinations (i.e., the substantiation package) and information concerning the members of the expert panel, and their NEPA-related experience, can be found on the FTA Web site (*http://fta.dot.gov/about/12347.html*) and in the docket for this rulemaking in Regulations.gov under docket number FTA–2011–0056. The NPRM that was the basis for this final rule and the comments received on it can also be accessed there.

FTA examined data for the FONSIs used to substantiate the CEs proposed for FTA use (23 CFR 771.118). Based on a snapshot of available 2008 and 2009 data, the average amount of time from EA initiation to FONSI signature was approximately 16.3 months. As this estimate is based on a constrained sample (ranging from facility improvements to streetcar and Bus Rapid Transit implementation), FTA intends to track current and future projects in order to provide a more accurate assessment in the future. Currently, FTA anticipates an 85 percent time savings for future projects of similar scope to those found in the substantiation package when processed as categorically excluded projects through section 771.118.

As stated above, this rulemaking action stems in part from the U.S. Department of Transportation's ''Retrospective Review and Analysis of Existing Rules'' in response to Executive Order 13563. Information on that process can be obtained either on DOT's Web site at *http://regs.dot.gov/RetrospectiveReview.htm* or at Regulations.gov under docket number DOT–OST–2011–0025.

What This Final Rule Contains

The following section of this preamble includes a summary of the comments received in response to the NPRM and FTA's response to those comments. The summaries and responses are organized by the section number of the regulatory text to which they relate.

Directly following the summary and response to comments, the preamble includes a ''Section-by-Section Analysis'' of the revisions to the regulatory text made by this action. These explanations will aid the reader in understanding the reason behind each regulatory change.

Following the Section-by-Section Analysis is the ''Regulatory Analysis and Notices'' section, which includes descriptions of the requirements that apply to the rulemaking process and information on how this rulemaking effort fits within those requirements.

The final rule concludes with the actual revisions to the regulatory text in the amendatory language format required by the Office of the Federal Register. This language modifies FTA's environmental impact and related procedures on the effective date of the regulation.

Summary of Comments and Responses

FTA and the FHWA received substantive comments from 18 transit agencies, 8 State Departments of Transportation, 7 organizations, 2 Metropolitan Planning Organizations, 2 individuals, 1 business, and 1 Federal agency. Nearly all comments have been categorized by regulatory section number and summarized below, with a response following each section. There were some instances in which a commenter sought clarification of the meaning of preamble language in the NPRM rather than commenting on the actual regulatory proposal. Rather than summarize and respond to comments that sought clarification of preamble language (which was not intended to be definitive, but rather an explanation of the regulatory text itself), FTA has considered those requests for clarification in the drafting of the preamble language for this final rule. The language of the preamble can be used as guidance in interpreting the regulatory text in this final rule, but it is neither binding nor regulatory.

The following summary and response to comments refers only to FTA, given that all of the comments related to proposed regulatory text that would affect only FTA actions.

General Comments

Comment: FTA received comments on issues other than the specific changes proposed in the NPRM. Four comments generally supported the proposed rule changes and the goal of streamlining environmental review. Several comments recommended standard review times and standard approaches to environmental documents. One comment encouraged public notice of the availability of certain documents through electronic mail. One comment questioned the need for transit-oriented development as a priority. Finally, one comment recommended that FTA consider all forms of rider amenities in transit planning.

Response: FTA appreciates the comments we received, including those generally in support of the proposed rule change and our goal of environmental streamlining. FTA encourages timely review of environmental documents, though the agency recognizes that individual projects are unique and that mandating standard review times would be impractical. In addition, FTA is committed to the use of electronic media as appropriate, and the response to comments on Section 771.111 indicates this commitment. Finally, FTA acknowledges all other comments that are not directly addressed herein, and notes that those comments were not within the scope of this rulemaking action.

Section 771.105 Policy

Comment: FTA received no comments on the proposed changes in this section.

Response: FTA is adopting the proposed change as final.

Section 771.109 Applicability and Responsibilities

Comment: FTA received no comments on the proposed changes in this section.

Response: FTA is adopting the proposed change as final.

Section 771.111 Applicability and Responsibilities

Comment: FTA received eight comments about its proposal in section 771.111(i)(1) that grant applicants for capital assistance in the FTA program may announce project milestones to the public using electronic or paper media. Five comments expressed support for use of the Internet and electronic media in the environmental process. One comment recommended FTA continue to support communities with limited Internet access, primarily in low-income areas, by continuing to make paper copies of documents available. One comment requested FTA clearly outline its desire to modernize options for public involvement through electronic media, including whether grant applicants can use electronic media exclusively. One comment recommended FTA consider requiring grant applicants to retain materials related to the environmental process online for a certain time period, as some projects may be complex or have limited Internet resources.

Response: FTA is aware that not everyone has access to the Internet and electronic media. FTA is not lessening any public involvement requirements through this rulemaking. Rather, FTA is revising the regulation to encourage its grant applicants to use various means in seeking public input, with an emphasis on electronic means as a supplement to traditional means. Electronic media can broaden access to project information and expedite the project review process. FTA encourages its grant applicants to retain certain environmental documents (e.g., decision documents, public meeting materials) for a project posted on the Internet until the initiation of transit operations.

Comment: FTA received eight comments in support of its proposal in section 771.111(i)(2) regarding early scoping. One comment recommended FTA provide clarification regarding the content of an early scoping notice and its publication in the **Federal Register.**

Response: An early scoping notice must provide enough information to allow the public and relevant agencies to participate effectively. The notice should clearly describe the process of early scoping and include information about any related planning study by the metropolitan planning organization or sponsoring transit agency. Early scoping cannot substitute for the normal scoping process unless the early scoping notice states that this outcome is being pursued and the early scoping process accomplishes all normal scoping requirements.

Section 771.113 Timing of Administration Activities

Comment: FTA received one comment requesting the removal of the words ''hardship and protective'' from the sentence beginning ''Exceptions for hardship and protective acquisitions of real property are addressed in * * *'' in section 771.113(d)(1). The comment explains that the proposed section 771.118(c)(6) exempts certain real property acquisitions outside those categorized as hardship and protective acquisitions.

Response: FTA acknowledges section 771.113(d) must be revised to reflect the change of sections where FTA's lists of CEs are located in regulation and to reflect the expansion by MAP–21 Section 20016 of early acquisition authority from railroad right-of-way to any right-of-way needed for a transit project. Accordingly, FTA added amendatory text to this final rule that updates the provisions on carrying out property acquisition prior to conclusion of the environmental review process. The provisions now include references to the FTA CEs in section 771.118 and no longer contain a reference to ''railroad,'' reflecting the broadening of that authority by MAP–21. In addition, a discussion in the Section-by-Section analysis below describes the fact that section 771.118(c)(6) could cover hardship acquisitions, protective acquisitions, and the acquisition of real property interests needed for transportation right-of-way as long as the restrictive language in section 771.118(c)(6) is met and there are no unusual circumstances that would make the CE classification improper. Some

descriptive documentation would still be required for the use of the CE in section 771.118(c)(6) to allow FTA to ensure that the acquisition of property comports with the requirements for early acquisition.

Section 771.115 Classes of Actions

Comment: FTA received one comment requesting clarification regarding what type of transit infrastructure is included under the term ''a fixed transit facility,'' as listed in section 771.115.

Response: As provided in section 771.115, examples of what might constitute a ''fixed transit facility'' include rapid rail, light rail, commuter rail, and bus rapid transit. FTA considers infrastructure supporting these services also to be fixed transit facilities.

Section 771.118 FTA Categorical Exclusions

FTA received a number of comments on CEs in general, not focused specifically on any particular CE. The summaries of and responses to those comments directly follow and precede the summary and response to comments on specific CEs.

Comment: FTA received 23 comments expressing support for FTA's proposed rulemaking. Nine of these comments suggested that FTA should periodically revisit and update the list of CEs; of these comments, several suggested FTA should establish a schedule that would direct FTA to re-evaluate the CE list at specific time intervals.

Response: FTA is committed to revisiting our CE list on a regular basis, and, per the new section 771.118(e), FTA will, at a minimum, initiate rulemaking proposing to add a type of action to the list of CEs where a pattern emerges of granting CE status under section 771.118(c) for a particular type of action.

Comment: FTA received one comment requesting, in recognition of ferry systems that function as an extension of both the highway system and the transit system, that FTA explain how the proposed CEs would apply to routine actions conducted by public ferry systems.

Response: All forms of transit were considered in the development of the new CEs. The CEs apply to public ferry systems, eligible for FTA assistance, no differently than they would to other forms of public transportation.

Comment: One comment recommended that no project should receive a CE in areas with untested soils and unidentified underground infrastructure.

Response: FTA has carefully substantiated all of the new CEs adopted by this final rule, but there is always the possibility that ''unusual circumstances,'' such as the presence of contamination not easily dealt with through routine remediation, would cause FTA to instead evaluate an action through an EA or EIS.

Comment: One comment noted that without additional clarification on FTA plans to integrate listed and documented CEs, it is difficult for transit agencies to comment on this proposal. One comment noted the proposed CEs fail to produce their intended purpose: to create for FTA a set of CE provisions that are similar to the existing CEs. The comment questioned whether FTA could use the proposed CEs.

Response: FTA is uncertain of the basis for these comments, as FTA neither intended to integrate the listed and documented CEs nor to create a set of CEs that are similar to FTA's former CEs. Rather, FTA is adopting a regulatory framework that continues to distinguish between the two types of CEs. FTA's intention was for the new list of CEs to be categorically different from the list that has not been substantially revised since 1987, reflecting both changes in FTA's programs since that time and new knowledge concerning the environmental impacts of FTA's actions learned over the years.

Comment: FTA received one comment requesting the proposed CE list in section 771.118(c) include an exemption for the emergency procedures included in existing section 771.117(c)(9).

Response: The CE in section 771.117(c)(9) is for emergency repairs eligible under Section 125 of Title 23, U.S. Code, which is a statutory program that establishes a fund for the emergency repair of highways, roads, and trails. It is not expected that FTA would have an action under that statutory provision given its limited applicability. Emergency repairs of transit facilities could be categorically excluded under section 771.118(d) if the action were demonstrated to not have, either individually or cumulatively, significant effect on the human environment. In addition, FTA will consider the extent to which emergency-related activities could be categorically excluded through other rulemaking actions, including rulemaking for section 1315 of MAP–21.

Comment: FTA received one comment requesting the addition of a new category for all bridge projects to the list of CEs at section 771.118, citing potential confusion arising from including bridge projects in both proposed lists in sections 771.118(c) and 771.118(d).

Response: FTA acknowledges the similarity between sections 771.118(c)(8) and 771.118(d)(2), and has revised the language in section 771.118(d)(2) to remove the words ''rehabilitation, reconstruction or'' such that the documented CE will cover ''bridge replacement or the construction of grade separation to replace existing at-grade railroad crossings.'' The action covered by section 771.118(c)(8) would be focused on maintenance, rehabilitation, and reconstruction, as discussed below. FTA will consider whether it is appropriate to place actions related to bridge projects in section 771.118(d)(2) or in section 771.118(c) as part of rulemaking for MAP–21 Section 1318.

Comment: FTA received five comments addressing the specificity with which FTA should construct the lists of CEs. One of these comments emphasized the need for FTA to remain flexible so that CEs are ''as widely applicable as possible'' and are not defined by a list of allowable activities. Several other comments recommended adding an explanation stating the examples are not meant to be exhaustive (e.g., add ''including, but not limited to'' as appropriate). Another comment requested more clarity and distinction between the listed and documented CEs. This comment and others, however, also recommended removal of all examples in the proposed section 771.118(d) list. Some of these comments recommended that, consistent with the existing and proposed versions of section 771.118(e), those activities noted in draft sections 771.118(d)(2) through (4) be moved to section 771.118(c). The commenters suggested that the remaining example, in section 771.118(d)(1), should be deleted as unnecessary and the revised provision should end with the sentence: ''The applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result.'' Several of these comments, in suggesting the move of examples from section 771.118(d) to section 771.118(c) that concern hardship and protective acquisition of property, recommended including a note that grant applicants must provide information to FTA that substantiates a request for hardship or protective acquisition of property.

Response: The examples included for all CEs are illustrative actions of the use of the CE and are not an exhaustive list

of the potential applications of that CE. This is made clear by the use of the language ''such as'' to introduce the list of examples, which has the same meaning as ''including, but not limited to,'' as suggested by one commenter. FTA chose the list of examples in section 771.118(d) based on FTA's experience that those activities are most likely to require a greater degree of documentation from both a grants-making perspective and an environmental perspective (i.e., to ensure the classification of a CE is appropriate and there are no unusual circumstances associated with it that reflect the potential for significant environmental impacts). FTA has decided to keep several examples listed to provide for some idea of the scope and scale of activities that FTA generally would categorically exclude pursuant to section 771.118(d). FTA does not intend to change the scope and scale of activities that can be categorically excluded pursuant to section 771.118(d) under this final rule from those covered under section 771.117(d) that had been in place for FTA for approximately 25 years, but FTA is changing the list of examples of the types of actions that can be categorically excluded under section 771.118(d) to focus on those activities and actions entirely by FTA (which primarily involves the partial funding of transit projects by FTA). FTA is identifying some types of actions that had been examples in section 771.117(d) as listed CEs in the new section 771.118(c). Many of the examples in section 771.117(d) were not carried over to section 771.118(d) due to their primary applicability to the FHWA or because they are covered by the categories listed in the new section 771.118(c). Because FTA has carefully substantiated those categories of actions, less documentation will generally be required to show the CE determination is appropriate, resulting in quicker approvals for those actions. As always, unusual circumstances must be considered for the proposed project, which may require appropriate environmental studies to be conducted to determine whether the project is eligible for a CE. Based on the result of these studies, a documented CE, an EA, or an EIS may be the appropriate class of action decision that results. Moreover, documentation may be required in some cases for compliance with laws other than the NEPA. Finally, FTA will continue to include CEs for property acquisition in both sections 771.118(c)(6) (with some limitations) and 771.118(d)(3).

Comment: FTA received one comment noting that the regulatory preamble contains an important statement allowing FTA and FHWA to rely on CEs listed in either section 771.117 or 771.118 for multimodal projects. The comment suggests adding this statement to the operative language of the proposed sections 771.117(a) and 771.118(a).

Response: The language mentioned by the commenter was intended to make clear that for a project with both an FTA and an FHWA action, FTA could use the CEs in section 771.118 for an FTA action on the project and the FHWA could use the CEs in section 771.117 for the FHWA action on the same project, provided that the combined environmental effect of the FHWA and FTA actions were not significant. In addition, section 1314 of MAP–21 contains a provision that allows, under certain circumstances, one modal administration of the Department of Transportation to use the CEs of another modal administration for a multimodal project. Guidance is currently under development on the use of that CE authority.

FTA's intent was not to allow FTA to continue to apply the actions listed in section 771.117 to FTA projects. That would be unnecessary, as FTA drafted the list of CE categories in section 771.118 such that it contains all actions FTA might wish to take pursuant to the former section 771.117. Moreover, FTA retains the ability to categorically exclude actions not otherwise covered explicitly by the categories of CEs in section 771.118 through its documented CE authority in section 771.118(d). Retaining the ability to continue to categorically exclude any action that could have been categorically excluded prior to this final rule is important for multimodal projects, and to do otherwise would have the opposite effect of streamlining the process. Thus, FTA does not believe it is necessary to add further explanatory language to the regulatory text, but instead relies upon this clarification here in the preamble.

Comment: FTA received several general comments advocating that specific activities should be covered by CEs. One comment requested the regulation clearly state that stations and facilities being rehabilitated within an existing right-of-way should be automatically classified as CEs. This comment notes that, if the basic function of the station will remain the same, and there are no land acquisitions associated with the project, experience shows that there will be no significant environmental impacts other than those due to temporary and minor construction activities. A second comment requested FTA expand the proposed list in section 771.118(d) specifically to include modernization or minor expansions of transit structures and facilities, such as bridges, stations, or rail yards. A third comment requested that FTA add to section 771.118(d)(1) ''modernization and resurfacing of parking facilities.''

Response: FTA intended that rehabilitation of stations and facilities and ''modernization and resurfacing of parking facilities'' within an existing right-of-way would be clearly covered by the new CE in section 771.118(c)(8), unless unusual circumstances are present that suggest the potential for significant environmental impacts. Although FTA notes that significant environmental impacts due to very long-term construction activities would in fact require an EIS, FTA's experience has been that the types of construction impacts of the projects mentioned by the commenters are usually of short duration and tend not to rise to the level of significant. Because these types of activities are generally covered by section 771.118(c)(8), FTA will not add the example to the list in section 771.118(d).

Comment: FTA received one comment suggesting it would be helpful if FTA would better define and reduce the scope and extent of supplementary documentation required for review of the current list of CEs in section 771.117(d).

Response: FTA has focused this rulemaking on the new CEs located in section 771.118(c), and to the extent that actions previously approved as ''documented'' CEs pursuant to former section 771.117(d) are now covered by the new CEs in section 771.118(c), those actions would no longer need additional documentation. FTA would expect a description of the project or activity contained within or accompanying the grant application sufficient to show that the action fits within the listed CE (i.e., section 771.118(c)) and that no unusual circumstances would result. That said, FTA acknowledges that in practice more documentation may often be created than is necessary for environmental review documents, which include EISs, and EAs, as well as documented CEs. FTA is not changing the documentation standards for those types of NEPA approvals; instead, FTA is attempting to bring practice in line with what is actually required through issuance of guidance, increased training, and better management of the process, all of which have previously been ongoing. Scoping should have as its objective the elimination of insignificant issues from

the scope of the study as much as the incorporation of significant ones. Thus, FTA intends that extraneous, unnecessary documentation will no longer be included for documenting compliance with NEPA, no matter what the class of action.

Comment: FTA received one comment cautioning that ''the consolidation and relocation of CEs should not inadvertently have the effect of requiring an EA or EIS for projects that do not qualify for the new undocumented CEs in section 771.118(c).'' The comment requested FTA confirm that ''when a project which was formerly covered by a documented CE in section 771.117(d) does not satisfy the qualifying criteria in a corresponding CE in new section 771.118(c), the documented CE procedure remains available,'' and that ''any action that would qualify for one of the CEs previously specified in section 771.117(d) still could seek a documented CE, notwithstanding the proposed revisions.'' Several other comments requested FTA consider a CE determination for all actions not noted under section 771.118(c) if the grant applicant produces documentation showing compliance with the broader definition of a CE noted in the proposed rule and in the CEQ regulations implementing NEPA.

Response: FTA agrees and acknowledges that the new list of CEs should not inadvertently have the effect of requiring an EA or EIS for projects that do not qualify for the new CEs in section 771.118(c). Any action that would qualify for one of the CEs previously specified in section 771.117(d), if it did not qualify for a CE under the new section 771.118(c), could still be approved as a documented CE under the new section 771.118(d), notwithstanding the changes of the final rule, as long as the documentation demonstrated that the action would not result in significant environmental impacts. FTA again notes that the examples of activities provided in our list of CEs are not exhaustive but illustrative and that a CE determination may be reached for an action not specifically included in the list of examples either under each CE category in section 771.118(c) or the list of examples under section 771.118(d).

Comment: FTA received several comments requesting clarification for when a more detailed environmental review is necessary. One comment requested unambiguous environmental review criteria that would favor the CE process over the more time-consuming EA or EIS where impacts are clearly minimal unless there is ''compelling'' evidence warranting a different course of action.

Response: FTA is not changing through this rulemaking the thresholds that determine the level of environmental review (also called ''class of action'') needed for any given FTA action. Rather, FTA has documented the types of actions that normally do not, individually or cumulatively, have a significant effect on the human environment and incorporated those into this regulation as CEs. No matter what benefits might result from processing an action with one class of action versus another, FTA will use the class of action that is appropriate given the potential impacts associated with the action. That is the case even for an action listed as an example in the new list of CEs in section 771.118(c). In other words, an action listed in the examples in section 771.118(c) would still require an EA or EIS if FTA determined unusual circumstances associated with the action could result in significant environmental impacts.

Comment: One comment expressed concern about the effect of the new rule on projects that might affect stormwater runoff, noise, or environmental justice. The comment stated the construction of a bus rapid transit project might require work that interferes with the geometry of an existing road, thus affecting onsite runoff and how such runoff is managed. The comment said managing such circumstances is already addressed in regulation for the FHWA under 23 CFR part 771. The comment suggested FTA create similar regulation or reference the FHWA regulation in the new rule. A second comment recommended the comparable CEs and documented CEs under sections 771.117(c) and (d) that would apply to the FHWA with the adoption of this new rule also be similarly revised.

Response: FTA cannot determine which section of 23 CFR part 771 the comment refers, but it may be a reference to section 771.117(a), which discusses the types of impacts that would make the use of a CE inappropriate. FTA has exactly duplicated that language in section 771.118(a). If the comment is referring to section 771.105(d), that paragraph applies as much to FTA as to the FHWA, as does any section of 23 CFR part 771 not explicitly limited to either the FHWA or FTA. The FHWA will consider revisions to 23 CFR 771.117 as part of rulemaking directed by MAP–21.

Comment: FTA received one comment expressing concern that some of the language in the revised CEs could result in new burdens and delays, rather than streamlining, in comparison to the existing CEs and associated NEPA procedures set forth in the current version of section 771.117.

Response: FTA cannot tell from this comment what is behind the concerns noted. The revisions are intended to streamline the FTA environmental review process for transit projects. FTA believes that the proposed CEs will improve the efficiency of that process by making available the least intensive form of review for certain actions that would have previously required CEs with more voluminous documentation or EAs. The new lists in sections 771.118(c) and (d) are intended to cover all actions that were previously covered by the list in section 771.117(c), as well as other actions for which FTA had substantiation.

Comment: One comment recommended supplemental guidance clarifying the outlined provisions be made available to the FTA regional offices to ensure consistency in implementing new environmental regulations.

Response: FTA plans to develop guidance on the use of these CEs and make it available to all of its offices. The guidance will likely be based on the content of the Section-by-Section analysis contained in this final rule.

Comment: Four comments provided recommendations regarding project review schedules. One comment urged FTA to include specific timelines for the review and approval of these types of projects. Another comment recommended a standard review time of 30 days be established for CE schedules. A third comment recommended that in setting deadlines for CEs, discussions involving FTA, participating agencies, and the grant applicant should take place in order to determine a realistic deadline for the project. Specifically, this comment recommends grant applicants and regulatory agencies agree on individualized CE deadlines in the beginning stages of the development process. The comment believes that any changes to the CE process should allow for project-specific flexibility in the setting of deadlines. The fourth comment expressed concern that the NPRM did not propose to require FTA to develop schedules for review or to commit to specific dates for the completion of the review of environmental documents. This comment stated that setting schedules can be a difficult and even risky task, but urged FTA to include this change in the final rule because doing so would be an important step in making the environmental review of transit projects more streamlined, less time-consuming, and more predictable.

Response: FTA encourages timely review of environmental documents, though FTA recognizes that individual projects and their impacts are unique, which makes standard review times impracticable. One of the main goals FTA has had through this rulemaking has been to reduce the time associated with approving a project through a CE. Projects approved through the new list of CEs in section 771.118(c) normally would not require further NEPA approvals. FTA does expect documentation that shows the project fits the category of action in section 771.118(c) and that no unusual circumstances are present that would make the CE determination improper. In many cases, a thorough project description in the grant application will be sufficient. In the other cases, if the project has the potential to result in impacts to resources protected under other environmental laws, additional documentation and review time would be needed for that documentation. For example, the consultation required under Section 106 of the National Historic Preservation Act already has regulatory timeframes in 36 CFR part 800 associated with consultation between FTA and the State Historic Preservation Officer. That consultation process cannot be shortened through review times mandated by an FTA regulation. FTA will continue to focus on evaluating projects quickly and efficiently, and is confident this final rule will streamline the process substantially.

Comment: FTA received one comment recommending that funding requests for projects under proposed section 771.118(c) require a project description to confirm the project fits the CE category and a statement that the project does not involve unusual circumstances as detailed in section 771.118(b) be used in order to further the streamlining effort. The comment suggests that where section 771.118(c) projects may adversely affect properties on or eligible for the National Register of Historic Places, the grant applicant could request FTA initiate, or authorize the grant applicant to initiate, consultation under Section 106 of the National Historic Preservation Act. The comment suggests that no other technical evaluations be required and recommends FTA's response be required within a specified timeframe.

Response: FTA's intent is to reduce the paperwork for the types of activities we determined normally do not, individually or cumulatively, have a significant effect on the human environment. As previously noted, FTA expects that in most cases a project description in the grant application will be sufficient for purposes of determining whether a project fits within one of the categories of CEs in section 771.118(c). FTA would also expect, as the comment suggested, that compliance with environmental requirements other than those of NEPA could be handled separately, although it would be perfectly appropriate to mention compliance with those requirements in the grant application, as FTA's approval of the CE would need to wait for compliance with the other requirements in accordance with section 771.105(a). FTA noted previously why mandated review times would not be appropriate given each project has unique impacts and issues that cannot be predicted in advance.

Comment: FTA received one comment urging FTA to consider allowing state transit agencies to self-certify CE status for the projects in section 771.118(c), with periodic audits by FTA to ensure regulatory compliance. Self-certification would not only speed the development of individual projects, but also free FTA staff time for other work.

Response: FTA acknowledges that many state transportation agencies have programmatic CE agreements with the FHWA. Historically, FTA has had a grant structure for funding individual transit projects that has not lent itself well to a programmatic CE agreement approach, but FTA will continue to evaluate the possibility of this approach in the future.

Comment: FTA received one comment requesting FTA require consulting parties, including the consulting State or Tribal Historic Preservation Officer, to respond within 30 days of receipt of documentation of historic resources and effects and to allow the Section 106 and NEPA processes to proceed if no response is received within that time frame. This requirement would be consistent with both the Section 106 regulations and the overall effort to streamline the review and approval of transit projects.

Response: Consultation under Section 106 of the National Historic Preservation Act is not within the scope of this rulemaking action. Further, FTA could not change the requirements associated with that process through rulemaking, as those requirements are contained in regulations issued by the Advisory Council for Historic Preservation. FTA has, however, sought to ensure that the Section 106 process is done quickly and efficiently, and FTA will continue to pursue streamlining approaches for that process separately.

Section 771.118(c)

The following paragraphs on section 771.118(c) are arranged in order of occurrence in the regulation, and each is introduced with the section number and proposed rule text of the new CE.

771.118(c)(1) Acquisition, installation, operation, evaluation, and improvement of discrete utilities and similar appurtenances (existing and new) within or adjacent to existing transportation right-of-way, such as: utility poles, underground wiring, cables, and information systems; and power substations and transfer stations.

Comment: FTA received 16 comments on proposed section 771.118(c)(1); one of these comments was in reference to the preamble. Several comments supported the proposed CE. Four comments requested FTA explicitly define the types of activities that qualify. Five comments requested FTA clarify activities that are included ''within'' or ''adjacent to'' existing transportation right-of-way. One comment suggested this CE be limited to activities ''within'' existing right-of-way and not ''adjacent to,'' because ''adjacent to'' is too subjective and may not adequately limit the activities intended to be included in this CE. One comment noted that failing to define ''discrete'' may lead to unintended environmental consequences. One comment suggested that FTA define the term with consideration for Executive Order 13154, ''Federal Leadership in Environmental, Energy, and Economic Performance,'' which encourages sustainability, and Executive Order 13423, ''Strengthening Federal Environmental, Energy, and Transportation,'' which encourages the integration of renewable energy.

Response: FTA intended for this CE to apply to utility relocation and accommodation activities when limited in scope and generally confined to the property considered the traditional transportation right-of-way. This CE covers utility activities occurring within the boundaries of the right-of-way, including those utility activities taking place primarily within the right-of-way that may extend onto adjacent property, as well as utility-related activities (e.g., landscaping or re-vegetation) that occur within the right-of-way or on immediately adjacent property. FTA will consider the present use of the adjoining property and the amount of such property involved in determining whether this CE is appropriate. ''Discrete'' utilities are those that are separate from a larger transit project or other larger project, such as the modernization of an entire rail transit

line that includes station expansions, station redesign for access by the disabled, and upgrading the traction power. FTA admits the use of the term ''transfer station'' may have been interpreted as a bus transfer station, rather than a utility power station and has clarified that terminology.

Comment: Four comments suggested FTA include additional activities in this CE. One comment suggested changing the language to ensure readers know the listed activities were not exhaustive. One comment suggested adding ''catenary and signal work.'' One comment suggested adding ''maintenance'' and ''rehabilitation'' activities. Several comments suggested adding ''replacement.'' Finally, one comment suggested FTA state that ownership of the utility is not a factor in determining whether this CE may be applicable.

Response: The examples included for this and all CEs are illustrations of the use of the CE and are not an exhaustive list of its application. This CE covers ''catenary and signal work'' given that these activities are substantially similar to the listed examples. Likewise, this CE covers ''maintenance'' and ''rehabilitation'' activities as well as the environmental impacts of these activities are likely the same or less than an ''improvement.'' FTA is adding ''replacement'' to the list of activities under this CE, as replacement is substantially similar to installation in terms of impacts and may be the most common utility activity occurring within transit rights-of-way. Finally, ownership of the utility is not a factor in determining the application of this CE. For example, a utility company may own an easement on the transit right-of-way, but an action on their part may not involve an FTA action, and as such may not result in application of FTA's NEPA regulation.

771.118(c)(2) Acquisition, construction, rehabilitation, and improvement or limited expansion of stand-alone recreation, pedestrian, or bicycle facilities, such as: a multiuse pathway, lane, trail, or pedestrian bridge; and transit plaza amenities.

Comment: FTA received 12 comments on proposed section 771.118(c)(2) that covers certain pedestrian and bicycle facilities and similar or related facilities. Several of these comments were in reference to the preamble. Some of the comments supported the proposed CE. Some of the comments requested FTA define the term ''limited expansion.'' One comment requested FTA define the term ''transit plaza amenities.'' One comment suggested FTA clarify the term ''stand-alone.'' This comment suggested this CE should not apply to stand-alone facilities, but to the acquisition, construction, etc., of facilities associated with an already existing station, so long as the facilities are not a part of a larger new project.

Response: FTA views the expansion of such facilities covered by this CE as being ''limited'' where the expansion is smaller in magnitude than the original facility and is confined to the original environmental setting. Transit plaza amenities are those features of a facility that add to its desirability as viewed by the traveling public (e.g., wayfinding signs, bike lockers, ticket vending machines, benches, and landscaping). FTA uses the term ''stand-alone'' to mean a facility that is capable of operating independently. FTA uses the term, as applied here, to avoid including facilities that are part of a larger proposed project with the potential for significant environmental impacts.

Comment: Several comments suggested FTA include additional activities in this CE. One comment suggested FTA include ''ferry terminal passenger overhead loading structures'' because rehabilitation, construction, and improvements to these structures do not ''materially expand the environmental footprint of existing structures.'' One comment suggested FTA add ''maintenance activities'' because they are similar to the activities already listed.

Response: As stated above, the CE does not contain an exhaustive list of examples. This CE covers ferry terminal passenger overhead loading structures in that these structures are virtually synonymous with ''pedestrian bridge.'' FTA agrees that maintenance activities are similar in impact to the activities already listed and included ''maintenance'' in this final rule.

Comment: One comment suggested this CE should not extend to new construction with new surface disturbance and significant changes in or increase in use because stand-alone facilities such as pedestrian and bike paths can impact ''sizeable swaths of habitat.''

Response: FTA usually constructs this type of facility in urbanized areas and sizeable swaths of habitat are not impacted. If sizeable swaths of habitat are impacted, then that unusual circumstance would likely require FTA and the grant applicant to conduct appropriate environmental studies under section 771.118(b)(1) to determine whether the CE classification is proper.

771.118(c)(3) Limited activities designed to mitigate environmental harm that cause no harm themselves or to maintain and enhance environmental quality and site aesthetics, and employ construction best management practices, such as: noise mitigation activities; rehabilitation of public transportation buildings, structures, or facilities, including those that are listed or eligible for listing on the National Register of Historic Places when there are no adverse effects under the National Historic Preservation Act; retrofitting for energy conservation; and landscaping or re-vegetation.

Comment: FTA received 21 comments on proposed section 771.118(c)(3); one of these comments was in reference to the preamble. Several comments supported the proposed CE. Several comments suggested FTA not limit the historic transportation activities to those not having an adverse effects under the Section 106 regulation (36 CFR Part 800), with several comments specifically suggesting removing the language ''when there are no adverse effects under the National Historic Preservation Act.'' One of these comments noted that not all adverse effects constitute a ''significant impact'' under NEPA. Similarly, one comment suggested this CE be consistent with sections 771.117(c)(6) and (7), both of which lack the ''no adverse effect'' language.

Response: FTA recognizes that not all adverse effects under Section 106 constitute a significant environmental impact for purposes of compliance with NEPA. For consistency with our other CEs, FTA deleted ''including those that are listed or eligible for listing on the National Register of Historic Places when there are no adverse effects under the National Historic Preservation Act.'' Such reference to Section 106 would suggest that Section 106 is an issue only for this CE and would lessen the attention paid to Section 106 for other CEs in which Section 106 compliance is not mentioned in the CE language; Section 106 applies to all actions covered by CEs that may affect a property on or eligible for the National Register of Historic Places.

Comment: FTA received five comments suggesting additional activities be covered under this CE. One comment suggested adding ''replacement of in-water creosote-treated timber piles, berthing, and other structures such as wingwalls, dolphins, and pilings underneath trestle and docks.'' This comment noted that removal of creosote-treated timber is an environmental priority for many Federal, State, and local agencies. One comment suggested adding ''stormwater management'' and ''roof replacement.'' Several comments suggested adding

''bridges'' and ''viaducts.'' One comment suggested adding ''other resource conservations measures (not just limited to energy).''

Response: As stated above, the CE does not contain an exhaustive list of examples. This CE covers replacement of in-water creosote-treated timber piles, berthing, and other structures, as this constitutes rehabilitation of public transportation buildings, structures, or facilities. Likewise, this CE covers stormwater management as an activity designed to mitigate environmental harm. This CE covers roof replacement to the extent it fits within the CE's limitations (i.e., designed to mitigate environmental harm and causes no harm itself, or maintains and enhances environmental quality and site aesthetics, and employs construction best management practices). This CE covers rehabilitation of bridges and viaducts if they are considered public transportation structures. FTA agrees that ''other resource'' conservation measures (not just energy) should be included in the list of examples, and amended the final rule to include this activity.

Comment: There were ten comments requesting FTA remove the word ''limited.'' Four of these comments stated the term is unclear, ambiguous, or subject to misinterpretation. Four comments suggested eliminating the word to allow for an expansion of the activities included in this CE.

Response: FTA's expectation is that these CE activities would occur within or adjacent to the transportation right-of-way to be eligible for FTA assistance. Thus, these activities would be limited by FTA's funding program requirements. Removing the term ''limited'' would not broaden the application of this CE. Therefore, FTA agrees that this term is unnecessary and it is not included in the final rule.

771.118(c)(4) Planning and administrative activities which do not involve or lead directly to construction, such as: training, technical assistance and research; promulgation of rules, regulations, directives, or program guidance; approval of project concepts; and engineering.

Comment: FTA received six comments on proposed section 771.118(c)(4). One comment suggested FTA omit environmental requirements in their entirety for internal management and planning activities that have no environmental impact.

Response: FTA's intent with this rulemaking is to reduce the paperwork for activities that normally do not, individually or cumulatively, have a significant effect on the human environment. As noted above, FTA's expectation for the documentation required for a CE under section 771.118(c) is minimal, usually collected as part of the grant application process, and should not cause an undue burden. FTA cannot, through a categorical exclusion, change the applicability of other environmental laws that might apply.

Comment: FTA received six comments suggesting this CE include additional activities. Several comments suggested FTA include ''planning and technical studies'' to maintain consistency and avoid ambiguity. One comment suggested FTA include ''operating assistance to transit authorities to continue existing or increase service to meet routine demand,'' as included in former sections 771.117(c)(1) and (16). Several comments suggested certain geotechnical activities be included. One of these comments suggested adding geotechnical investigations that are necessary to define the elements of the proposed action or alternative so that grant applicants can assess structural, seismic, and environmental conditions. This comment also noted geotechnical investigation is often included as part of the scoping process. Another comment suggested adding technical borings, monitoring wells, utility potholing, archeological surveys, and similar subsurface investigations which would not lead directly to construction or environmental impacts.

Response: As stated above, the CE does not contain an exhaustive list of examples. This CE covers planning and technical studies. FTA agrees that ''operating assistance to transit authorities to continue existing or increase service to meet routine demand'' activity should be added to the CE as it is supported by past FTA documentation and regulations (i.e., section 771.117(c)(16)). FTA agrees that ''geotechnical investigations'' are routine activities that are a necessary part of the environmental review of a construction project and typically do not have significant environmental impacts, but FTA has chosen not to add the activity to the list of examples at this time, as some geotechnical work can be substantial and might not be appropriate for approval under this CE. That said, some geotechnical work (such as the use of ground penetrating radar), could be approved under this CE as long as it did not involve construction or lead directly to construction.

771.118(c)(5) Discrete activities, including repairs, designed to promote transportation safety, security, accessibility and effective communication within or adjacent to existing right-of-way, such as: the deployment of Intelligent Transportation Systems and components; installation and improvement of safety and communications equipment, including hazard elimination and mitigation; and retrofitting existing transportation vehicles, facilities, or structures.

Comment: FTA received 19 comments on proposed section 771.118(c)(5); eight of these comments were in reference to the preamble. One comment suggested FTA include ''ferry terminal passenger overhead loading or transfer spans'' to the CE list. One comment requested FTA add additional language to clarify that the CE does not include new construction with surface disturbance and significant change or increase in use. Several comments suggested FTA remove the term ''discrete'' because it is too subjective a term. Several comments suggested FTA add ''installation of fencing, signs, pavement markings, and small passenger shelters'' to the list of activities.

Response: As stated above, the CE does not contain an exhaustive list of examples. Section 771.118(c)(2) covers ferry terminal passenger overhead loading or transfer spans. Activities occurring under this CE would rarely include new construction with surface disturbance and significant change or increase in use. If this occurred, another CE in section 771.118(c) may apply, or FTA and the grant applicant would conduct and document appropriate environmental studies to determine if the CE classification under section 771.118(d) is proper. FTA agrees the term ''discrete'' is confusing and deleted it. The term was intended to distinguish stand-alone projects, such as the installation of communications equipment along an existing line, from an element of a larger project, such as construction of a new transit line that includes installation of communication equipment, among other elements. As suggested, FTA added ''replacements, and rehabilitations'' to the final rule for clarity. This CE covers ''installation of fencing, signs, pavement markings, and small passenger shelters,'' as these activities promote transportation safety, security, accessibility, and effective communication.

771.118(c)(6) Acquisition or transfer of an interest in real property that is not within or adjacent to recognized environmentally sensitive areas (e.g., wetlands, non-urban parks, wildlife management areas) and does not result in a substantial change in the functional use of the property or in substantial displacements, such as: scenic

easements and historic sites for the purpose of preserving the site. This CE extends only to acquisitions that will not limit the evaluation of alternatives.

Comment: FTA received 19 comments on proposed section 771.118(c)(6); four of these comments were in reference to the preamble. One comment requested clarification of the phrases ''acquisition or transfer of an interest in real property'' and ''not within or adjacent to.'' FTA received four comments requesting ''or transfers'' be added to the second sentence of the CE. FTA received several comments requesting clarification that ''acquisitions or transfers'' include acquiring interests in real property where those real property interests will not limit the evaluation of alternatives.

Response: FTA uses the phrase ''Acquisition or transfer of an interest in real property'' to mean the act of purchasing or otherwise acquiring a property right in the property (e.g., absolute ownership, trackage right, easement, etc.). FTA uses the phrase ''not within or adjacent to'' to mean property that is not inside or adjoining other property considered environmentally sensitive. FTA agrees that including ''or transfers'' in the second sentence will clarify FTA's intent to apply this CE to both acquisitions and transfers of interest in real property. FTA further clarifies that the ''acquisitions or transfers'' under this CE will not limit the NEPA evaluation of alternatives for FTA-assisted projects built on the property. Note that a similar CE covering property acquisition in section 771.118(d)(3) would allow property acquisition without these limitations but would require documentation under section 771.118(d) to demonstrate that the CE applies.

Comment: FTA received one comment requesting clarification of the phrase ''substantial displacements, such as scenic easements and historic sites.'' FTA received one comment that noted the commenter interpreted this CE to include ''hardship acquisitions, provided that they do not result in a substantial change in the functional use of the property or in substantial displacements prior to completion of the [NEPA] process for any proposed change in the use of the property for the project under consideration.''

Response: FTA's reference to scenic easements or historic sites (for preserving the site) was to provide examples of special cases where this CE might apply. As noted previously, section 771.118(d)(3) covers other acquisition of property (including real property for hardship or protective purposes) where the limitations of section 771.118(c)(6) are not satisfied.

Comment: FTA received one comment suggesting the CE include the phrase ''until such time as the evaluation of alternatives is completed or suspended'' in order to clarify the timing of the change in the functional use of the property. One comment suggested the ''functional use'' criterion may be unnecessarily narrow because not all changes in functional use pose a potential for impacts. The comment suggested FTA revise the proposed criterion from ''does not result in a substantial change in the functional use of the property'' to read, ''does not result in a substantial physical change to the property.''

Response: FTA agrees with the recommendation to add, ''until such time as the evaluation of alternatives is completed or suspended'' though FTA revised the language to read, ''for future FTA-assisted projects that make use of the acquired or transferred property.'' FTA will keep ''functional use'' as a qualifying criterion for this CE because any change in the functional use of the property, if FTA-assisted, would require a separate NEPA evaluation of the project.

Comment: FTA received one comment that suggested additional activities be included in this CE. The comment requested FTA add ''Approval for Right of Way Disposal or Joint or Limited Use'' which was previously in section 771.117(d)(6).

Response: For FTA, the transit agency's disposal of property that it owns, but in which there is an FTA financial interest due to past grant(s), is not a Federal action for purposes of NEPA and the FTA environmental review process because, as several Federal courts have found, Federal agencies do not exercise sufficient control over these actions to trigger NEPA. *See, e.g., Woodham* v. *FTA, 125 F.Supp.2d 1106, 1110 (N.D. Ga. 2000); South Bronx Coalition for Clean Air* v. *Conroy,* 20 F. Supp.2d 565, 570–71 (S.D.N.Y. 1998). Thus, there is no need to categorically exclude these actions from NEPA because NEPA does not apply. Instead, disposition actions by transit agencies of their own property are governed by FTA rules that protect FTA's investment in transit, and the property owner can take any action within those rules with no discretion by FTA over which action is taken.

For joint development projects funded with FTA grants, FTA has added a new CE at section 771.118(c)(10) that would cover actions previously covered by section 771.117(d)(6).

771.118(c)(7) Acquisition, rehabilitation and maintenance of vehicles or equipment, within or accommodated by existing facilities, that does not result in a change in functional use of the facilities, such as: equipment to be located within existing facilities and with no substantial off-site impacts; and vehicles, including buses, rail cars, trolley cars, ferry boats and people movers that can be accommodated by existing facilities or by new facilities that qualify for categorical exclusion.

Comment: FTA received 14 comments on proposed section 771.118(c)(7); eight of these comments were in reference to the preamble. Of the remaining comments, several comments asked FTA to clarify phrases used in the proposed rule, including ''located within existing facilities;'' ''no substantial off-site impacts;'' and ''that can be accommodated by existing facilities or new facilities.'' One comment recommended FTA revise the language to clearly address installation of new equipment within the transit facility. Several comments suggested FTA add ''installation'' and ''replacement'' involving vehicles and equipment to this category.

Response: FTA uses the phrase ''located within existing facilities'' to mean equipment located within a property that is already dedicated to a transportation function or within an existing building. FTA uses the phrase ''no substantial off-site impacts'' to mean that minor, insignificant impacts may occur outside property lines. FTA uses the phrase ''that can be accommodated by existing facilities or by new facilities'' to mean that the existing facilities have sufficient excess capacity to accommodate the vehicles, or, if the transit vehicles require new facilities, the new facilities also meet the requirements for a categorical exclusion. If the new facilities required by the new vehicles require an EA or EIS, the vehicle acquisition would be evaluated as part of that larger project. FTA agrees with adding ''installation'' and ''replacement'' of vehicles or equipment to the CE and has done so.

771.118(c)(8) Maintenance and minimally intrusive rehabilitation and reconstruction of facilities that occupy substantially the same environmental footprint and do not result in a change in functional use, such as: Improvements to bridges, tunnels, storage yards, buildings, and terminals; and construction of platform extensions and passing track.

Comment: FTA received 40 comments on proposed section 771.118(c)(8); five of these comments were in reference to

the preamble. FTA received nine comments requesting clarification of terms and phrases, including ''minimally intrusive;'' ''facilities that occupy substantially the same environmental footprint;'' ''reconstruction;'' and ''footprint.'' Eight comments specifically suggested FTA delete ''minimally intrusive.'' A few comments suggested FTA replace ''environmental'' with ''physical,'' and one comment recommended FTA replace ''environmental footprint'' with ''general location.'' One comment requested FTA replace ''that occupy substantially the same environmental footprint'' with ''that does not result in substantial off-site impacts.'' One comment requested the category be further limited (e.g., ''actions that do not increase the environmental footprint of a facility'').

Response: FTA intended the term ''minimally intrusive'' to describe rehabilitation and reconstruction activity that would not have significant adverse environmental effects. FTA agrees that this term could be misinterpreted. Further, FTA finds this CE is substantially constrained by the other limitations in the CE and therefore removed ''minimally intrusive'' from the final rule. FTA uses the term ''reconstruction'' to mean a rebuilding of the facility. FTA intended the phrase ''facilities that occupy substantially the same environmental footprint'' to mean facilities that are geographically located on the same property and within the same developed or disturbed area; for purposes of clarity, FTA will use ''geographic footprint'' instead of ''environmental footprint.'' The term ''geographic footprint'' is intended to be slightly more general than the term ''engineering footprint,'' the use of which would confine project activities strictly to the locations where human-built structures or facilities already exist, whereas the term ''geographic footprint'' would include all areas already affected by the impacts of the facility. This also addresses the concern that this comment be further limited. In other words, confining these activities to those areas would ensure no potential for significant environmental effects.

Comment: FTA received 13 comments recommending revisions to the CE language. FTA received several comments stating the CE language is not clear and does not broaden the scope of activities included under this CE. One comment also proposed creating a new CE specifically for ''maintenance and improvement to rail-bed and track when carried out within the existing right-of-way.''

Response: FTA agrees that track and railbed improvements are projects that qualify under this CE, and are so commonly assisted by FTA grants they should be added to the list of examples. The language in the final rule reflects this change. FTA does believe that this CE broadens the transit-related CEs from the former section 771.117(c), and activities that do not qualify under this CE might still qualify under section 771.118(d), with documentation.

Comment: FTA received one comment stating the proposed replacement provision ''muddles the concept of restorative activities'' by providing examples of ''improvements,'' while at the same time disclaiming the availability of a CE for any project that will cause a change (i.e., an ''improvement'') in functional use. In other words, if a grant applicant intends a project to ''improve'' certain infrastructure through maintenance, rehabilitation, and reconstruction, the project is entitled to a CE. However, if the proposed action ''improves'' the functional use of the facility, a CE may not be available.

Response: FTA disagrees with this analysis. Maintenance, rehabilitation, and reconstruction of certain facilities would be included in this CE as long as the facilities occupy substantially the same geographic footprint, meaning the impact to the environment is essentially unchanged and the functional use of the facility is unchanged. An improvement to the facilities is not a change in functional use. For example, when a transit center is rehabilitated under this CE, it may be improved by incorporating the latest communications and passenger information technologies. If the transit center's function is changed by converting it into a bus maintenance facility, then it would not qualify under this CE, though it may qualify under section 771.118(d), with documentation. Thus, certain improvements would be allowed by this CE as long as the functional use does not change and the other conditions are met.

Comment: FTA received 12 comments requesting FTA include additional examples for section 771.118(c)(8). Proposed additional examples include ''track and railbed improvements;'' ''railbed maintenance and improvements within the existing right-of-way;'' ''stations'' or ''stations and station buildings;'' ''bridge replacement;'' ''renewal and/or component repair;'' and ''retaining walls.'' FTA received one comment requesting clarification whether track and railbed work is included in this CE. FTA received one comment requesting that ''terminals'' include ferry terminals, and one comment asking FTA to confirm rehabilitation of transit infrastructure (track, ties, supporting structures, and utilities) would be included in this CE.

Response: As stated above, the CE does not contain an exhaustive list of examples. FTA is adding ''track and railbed improvements,'' ''stations,'' and ''retaining walls'' to the list of examples because these activities are frequently assisted by FTA grants. ''Bridge replacement,'' however, is more appropriately addressed under section 771.118(d), which requires that it be appropriately documented. As written, this CE covers ''renewal and/or component repair,'' ferry terminals, and transit infrastructure rehabilitation.

Comment: FTA received one comment that asked whether all activities listed under former section 771.117(d)(3) fall under this CE.

Response: Most, but not all, of the activities falling under section 771.117(d)(3) would fall under section 771.118(c)(8). The types of actions in section 771.117(d)(3), specifically reconstruction of a bridge and construction of a new rail-highway grade separation, at this time would require documentation to demonstrate that the CE would apply and that no unusual circumstances would result. These types of projects are included in section 771.118(d)(2) of this final rule. Other than these larger projects, activities falling under section 771.117(d)(3) now fall under section 771.118(c)(8) in this final rule, as well.

771.118(c)(9) Assembly or construction of facilities that is consistent with existing land use and zoning requirements (including floodplain regulations), is minimally intrusive, and requires no special permits, permissions, and uses a minimal amount of undisturbed land, such as: buildings and associated structures; bus transfers, busways, and streetcar lines within existing transportation right-of-way; and parking facilities.

Comment: FTA received 58 comments on proposed section 771.118(c)(9); 11 of these comments were in reference to the preamble. FTA received nine comments on the term ''minimally intrusive.'' Comments suggested the term was ambiguous or subjective and recommended FTA either remove this language or provide further clarification of its meaning. FTA received 20 comments on the phrase ''requires no special permit, permissions.'' Comments suggested the phrase added confusion to the applicability of the CE as nearly all projects require some type of permit or permission, and recommended FTA

either remove this language or provide further clarification of its meaning. FTA received 11 comments on the phrase ''uses a minimal amount of undisturbed land.'' Comments suggested FTA remove this language, provide further clarification of its meaning, or change the language to ''uses previously disturbed land.'' FTA received 11 comments on the term ''bus transfers.'' Comments suggested the term was ambiguous or too limiting and recommended FTA either provide further clarification of its meaning or replace the language with the term ''bus transfer stations and intermodal centers'' in order to capture all appropriate bus facilities and broaden the applicability of this CE. FTA received 11 comments on the term ''streetcar lines.'' Comments suggested FTA replace this language with ''fixed guideways'' in order to be mode-neutral and broaden the scope of projects eligible under this CE.

Response: FTA agrees the term ''minimally intrusive'' is covered by the permit restriction and therefore removes it from the final rule. FTA agrees that the phrase ''requires no special permit, permissions'' is also not necessary, as it represents requirements under other laws that would require the same degree of compliance regardless of the NEPA class of action. FTA is removing that language as not necessary to the determination. Where special permits are required that raise questions about the environmental impacts of the proposed action, a documented CE, EA, or EIS may be appropriate if ''unusual circumstances'' are present that suggest there could be individual or cumulative significant effects to the environment. FTA intended the phrase ''uses a minimal amount of undisturbed land'' to mean a negligible amount of land in its natural state. Given the comment and the need for clarification, however, FTA is revising that language to read ''uses primarily land previously disturbed for transportation use.'' FTA believes that use of this phrase responds to the comment and clarifies the application.

FTA agrees to replace ''bus transfers'' with ''bus transfer stations or intermodal centers'' in the final rule. Rather than replace ''streetcar lines'' with ''fixed guideways'' in the final rule, FTA will use the term ''busways, streetcar lines, or other transit investments'' to allow for other types of transit investments that would be appropriate for this CE.

Comment: FTA received eight comments suggesting FTA modify the CE language by adding ''operating'' prior to ''within existing transportation right-of-way'' to limit the actions that could be covered by this CE. One comment asked FTA to clarify why FTA did not include bus stations/stops, bus passenger shelters, bus lanes, bus bays, bus queue jumper and bypass lanes, and bus malls. One comment asked FTA to consider including ''electric trolleybus'' to the list of examples. Lastly, one comment noted many of the FTA FONSIs supporting this CE in the substantiating documentation include right-of-way acquisition. FTA interprets this comment to mean the commenter would like this CE to include projects that would primarily occur within the public right-of-way, but not entirely, and result in few displacements.

Response: Rather than include the term ''operating'' prior to ''within existing transportation right-of-way'' in this final rule, FTA added language to that particular CE example that attempts to get at the same point but with more specificity. Rather than using ''existing transportation right-of-way,'' FTA will use the terminology: ''areas of the right-of-way occupied by the physical footprint of the existing facility or otherwise maintained for transportation operations.'' This will provide the limitation requested by the commenter in a more specific way for this project example in this CE. Future rulemaking will address a CE designation for projects within the ''operational right-of-way,'' as required under section 1316 of MAP–21. FTA chose to limit the number of examples under this and all CEs because FTA meant for the list to be merely illustrative of its applicability. For example, FTA will not include ''electric trolleybus'' to the list of examples, even though they would be covered by the CE if the proposed action otherwise met the CE requirements. But as noted above, FTA has decided, to make this clearer, to broaden the example to ''busways, streetcar lines, or other similar transit investments.'' FTA decided not to allow some unspecified amount of land acquisition beyond public rights-of-way to be associated with this CE for streetcar and busway projects because the environmental impacts of the use of that land would be unknown. But projects functionally similar to those listed and requiring minor right-of-way acquisition may still be covered by the CE as long as ''unusual circumstances'' would not result in environmental impacts where the CE classification would be improper.

Comment: FTA received one comment suggesting that proposed section 771.118(c)(9) overlaps with the proposed sections 771.118(d)(1) and (d)(2), and that this could cause confusion when determining which CE to apply. This comment requested more clarity and distinction between undocumented and documented CEs. This comment also recommended removal of all examples in the section 771.118(d).

Response: For purposes of streamlining, FTA focused this rulemaking on the new section 771.118(c). FTA does not agree that examples falling under section 771.118(d) should be removed. FTA continues to believe that, at this time, grant applicants should submit documentation demonstrating the specific conditions or criteria for the examples listed are satisfied and that unusual circumstances will not result in significant environmental effects.

771.118(c)(10) Development activities for transit and non-transit purposes, located on, above, or adjacent to existing transit facilities, that are not part of a larger transportation project and do not substantially enlarge such facilities, such as: police facilities, daycare facilities, public service facilities, and amenities.

Comment: FTA received 17 comments on proposed section 771.118(c)(10); several of these comments were in reference to the preamble. FTA received four comments that requested clarification of the range of activities falling within the definition of ''development activities.'' One comment suggested the proposed CE is limited to public service facilities and amenities, and does not include commercial or residential development. Four comments recommended FTA replace the term ''development'' with ''construction,'' ''facilities,'' ''structures,'' or ''buildings.'' One comment requested FTA clarify that the proposed uses must not adversely impact transit operations, safety, and future facility plans. One comment requested FTA clarify the phrase ''located on, above, or adjacent to existing transit facilities.'' Several comments requested FTA clarify the phrase ''do not substantially enlarge such facilities'' and one comment requested the CE be further limited because ''substantially'' is ''open to interpretation.'' Finally, one comment proposed that standard public notification and public comment opportunities associated with local land use decisions meant that a separate EA for development activities was unwarranted.

Response: FTA agrees the term ''development activities'' is excessively inclusive and therefore replaces it with the term ''development of facilities.'' FTA does not want to limit this CE to public service facilities and amenities,

and adds, ''commercial, retail, and residential development'' to the list of activities covered by this CE accordingly. FTA agrees the development must not adversely impact transit operations and safety. The environmental review process is not FTA's mechanism for enforcing operating and safety constraints in this situation; rather, MAP–21 has provided FTA with new authority in these areas. FTA uses the terms ''located on, above, or adjacent to'' in keeping with common usage and interpretation, but FTA is very unlikely to be involved in a project that does not have some transit connection. FTA uses the term ''substantially'' to limit the potential environmental impacts of the facilities covered by section 771.118(c)(10), but section 771.118(d) may apply when section 771.118(c)(10) does not. FTA agrees that typically an EA for the development activities described in this CE would not be triggered by local ordinances that require public notification procedures; an EA would be triggered based on uncertainty of environmental impacts. Comments on section 771.118(d) have all been covered in the responses above to general comments and to the comments on section 771.118(c).

Section 771.118(d)

Comment: FTA received one comment requesting clarification regarding whether the activities under section 771.118(d)(1) include adding bus lanes, bus shoulder lanes, busways, bus malls, bus bays, bus queue jumper and bypass lanes, HOV lanes, and/or HOT lanes, and whether the list also includes the conversion of a mixed-use traffic lane into a bus lane, HOV lane, HOT lane, or bus mall in addition to turn lanes and passing lanes.

Response: FTA recommends a grant applicant work closely with the FTA regional office to determine whether a particular project is eligible for FTA assistance and meets the requirements for any particular CE. In this instance, the comment provides some examples that appear to be new transit lanes to a highway. Some of the project examples in the comment may or may not, depending on additional unknown project details, include a transit component. The language of the example in section 771.118(d)(1) is written to cover the conversion of existing auxiliary lanes or shoulders to a transit purpose, not general purpose travel lanes, but it is only an example, and other similar projects could potentially be categorically excluded if a reasonable amount of documentation can show there is no potential for significant environmental impacts. Also, the new CE in section 771.118(c)(9) can be used for busways if the limitations in the CE language are met.

Comment: FTA received seven comments on the proposed documented categorical exclusion located within section 771.118(d)(2). One comment requested that FTA clarify the range of actions allowed under ''reconstruction'' and ''grade-separation to replace existing at-grade railroad crossings.'' Several comments suggested that FTA consider appending additional actions to this example, including ''grade separation to replace at-grade busway crossings'' and ''direct access ramps.'' Additionally, the comment recommended that FTA use either the term ''railroad-highway grade crossing'' or ''railway-highway grade crossing'' instead of ''at-grade railroad crossings.''

Response: Section 771.118(d) mimics section 771.117(d), except that it lists fewer examples in light of the separate FHWA and FTA lists and the more expansive list proposed for section 771.118(c). Given that the list of actions in the new section 771.118(d) are only examples of the types of actions that could be categorically excluded through the use of documentation, FTA does not see the need to modify the language in the example at this time. The projects represented by the edits to this CE language by commenters could certainly be categorically excluded if demonstrated as having no potential for significant environmental effects in the same way as a project represented by the language in the CE example.

FTA acknowledges, however, that the language in section 771.118(d)(4) must be modified to reflect the expansion by MAP–21 Section 20016 of early acquisition authority from railroad right-of-way to any right-of-way needed for a transit project (i.e., ''railroad'' was deleted). Despite the expansion to any right-of-way needed for a transit project, the conditions found in sections 771.118(a) and (b) must be met to qualify for a CE.

Section 771.119 Environmental assessments

The proposed changes to sections 771.119 and 771.123 were very similar in content, and, as a result, the comments on section 771.119 were essentially the same as the comments on section 771.123. Responses below address both Sections.

Section 771.123 Draft environmental impact statements

Comment: FTA received several comments in support of the proposed change to section 771.119(k) relating to outside contractors preparing EAs, and section 771.123(d) relating to outside contractors preparing draft EISs. FTA received 13 comments that opposed the proposed change and recommended that FTA eliminate this proposal from inclusion in the final rule. Twenty-seven comments suggested the proposal may have unintended impacts on project timeline, add uncertainty to the process, and delay preparation and completion of environmental documentation, all running counter to FTA's goal of making the environmental review process more efficient. Several comments suggested the proposal may be inconsistent with transit agency or local government environmental requirements or contracting requirements and may be inconsistent with State law. Thirteen comments recommended FTA should instead provide guidance to grant applicants before they contract the environmental work, and that this guidance provide standard outlines and suggested content for the contracts' statements of work (SOWs) for EAs and EISs. These commenters argued this guidance would provide significant support toward achieving FTA's streamlining goal. Seven comments recommended FTA define the term ''informal scoping'' and agency expectations for this step in the process. One comment suggested that rather than require FTA approval of a NEPA contractor's SOW, which can often be very long and detailed, a more streamlined approach would be to require FTA approval of a simple outline or table of contents for the EA or EIS describing the alternatives and elements of the environment to be studied in the document. The grant applicant can then work directly with the contractor to reflect the agreed upon scope of the document. Finally, one comment requested FTA consider allowing grant applicants to hire a NEPA contractor using a two-part SOW. The first part would be limited to work necessary for scoping; the second would be to prepare the environmental document, subject to the conditions set forth in sections 771.119 and 771.123.

Response: Due to the number of comments received and their overwhelming opposition to, or problem identification for, the proposed language in the NPRM, FTA will not include contracting language in 23 CFR Part 771 at this time. FTA will provide guidance to highlight best practices on contracting, including recommendations on the procurement timing and EA/EIS development (e.g., two-part statements of work, task orders), and what grant applicants should consider when

reviewing statements of work and selecting contractors.

Section-by-Section Analysis

Section 771.101 Purpose

The NPRM contained no proposed changes for section 771.101, but MAP–21 eliminated environmental provisions previously contained in 49 U.S.C. 5324, so FTA is removing reference to that section and changing the reference to 49 U.S.C. 5323 to be consistent with the new statutory structure.

Section 771.105 Policy

The minor, non-substantive revision to the footnote to section 771.105(a) proposed in the NPRM has been included. This revision recognizes the fact that both FTA and the FHWA frequently update guidance relevant to the preparation of environmental documents. The added phrase ''but is not limited to'' clarifies this point, such that the introduction to supplementary guidance now reads: ''FHWA and FTA have supplementary guidance on environmental documents and procedures for their programs. This guidance includes, but is not limited to * * *'' In addition, the spelling of the word ''Web sites'' has been changed to the more commonly used ''websites.''

Section 771.107 Definitions

Although not mentioned in the NPRM, FTA and the FHWA have made revisions to the definition of ''Administration'' in paragraph (d) of this section to clarify that any reference in Part 771 to ''the Administration'' means the FHWA, FTA, or a State when the State is functioning as the FHWA or FTA in carrying out responsibilities delegated or assigned to the State under 23 U.S.C 325, 326, or 327, or other applicable law. The clarification was made due to changes to sections 771.117 and 771.118 where it is now specifically noted that section 771.117 applies to FHWA actions and section 771.118 applies to FTA actions. If the final rule did not make this change, then technically, the CE lists would not apply in any instance in which a State has been delegated or assigned the authority of the FHWA or FTA. This is a technical/administrative change only. In addition, clarifying text was added to the end of the definition to clarify that this definition is not intended to affect the scope of any delegation or assignment.

Section 771.109 Applicability and responsibilities

The minor, non-substantive revision proposed for this section to correct the spelling of the word ''construction'' has been completed.

Section 771.111 Early coordination, public involvement, and project development

FTA is adopting the proposed procedures in section 771.111(i) that provide grant applicants with flexibility and efficiency in the public involvement aspects of the environmental process. Section 771.111(i)(1) encourages grant applicants to announce project milestones using either electronic or paper media. Currently, the use of electronic means is already practiced by some grant applicants, but FTA is making clear that the use of the option is available for all grant applicants. FTA is taking advantage of its experience that seeking public input in the environmental process by various means, such as increasing the use of project websites, adds value and flexibility that broadens public access and input and, thereby, ultimately expedites project review. Additionally, FTA deleted ''pursuant to 49 U.S.C. 5323(b)'' from the end of section 771.111(i) to reflect changes to FTA law made by MAP–21. There is no longer a statutory requirement for public involvement in transit law at Chapter 53 of Title 49, U.S. Code, but public involvement is required by NEPA and remains fixed in FTA's environmental regulation (i.e., 23 CFR part 771) and thereby part of the environmental review process for transit projects. Section 771.111(i)(2) formally presents the option of doing ''early scoping,'' which can be used to link the metropolitan and statewide transportation planning processes, mandated by 49 U.S.C. 5303–5304, with the environmental review process to provide a seamless transition from transportation planning to project-specific environmental evaluation. Early scoping provides a logical connection between planning-level corridor studies and environmental review required by NEPA to produce a proposed action to be studied during the NEPA process. Steps for following the early scoping process are included in section 771.111(i)(2), which FTA is adopting. To increase the transparency of FTA environmental documents and process, section 771.111(i)(3) encourages posting and distributing environmental process-related materials through publicly-accessible electronic means, including project websites. FTA is adopting section 771.111(i)(4) to encourage the posting of all EISs (draft and final) and environmental records of decision (RODs) on a grant applicant's project website and maintaining it there until the project is constructed and operating. Additionally, the Environmental Protection Agency (EPA) has developed an electronic filing system for EIS documents (e-NEPA), which allows for posting of EISs on the EPA website (*http://www.epa.gov/oecaerth/nepa/submiteis/index.html*). FTA provides a link on its website to direct the public to EPA's comprehensive EIS database at *http://www.fta.dot.gov/12347_documents.html.* This final rule does not change the procedure for distribution of hard copies of FTA environmental documents upon request or the placement of such documents in public libraries and local government buildings within the project area.

Section 771.113 Timing of Administration activities

Prior to this final rule, section 771.113 contained references to the CEs in section 771.117 that applied to both FTA and the FHWA. With this final rule, FTA's use of section 771.118 for its CEs and the designation of section 771.117 for FHWA CEs required updates to the CE references in section 771.113. Therefore, section 771.113(d)(1) has been revised to refer to section 771.117(d)(12) for FHWA, and to add a reference to the new sections 771.118(c)(6) and (d)(3) for FTA. Section 771.113(d)(2) has been revised to reference section 771.118(d)(4), as this CE applies only to transit actions. Additionally, section 771.113(d)(2) was revised to delete ''pre-existing railroad'' from the acquisition exception and to update the statutory authority to ''49 U.S.C. 5323(q)'' as a result of changes mandated by MAP–21. By deleting ''pre-existing railroad,'' right-of-way not associated with railroad corridors may be purchased under section 771.118(d)(4) when the conditions in sections 771.118(a) and (b) are met, though no work can take place on the right-of-way until the completion of NEPA for the project.

Section 771.115 Classes of actions

Section 771.115(a)(3) has been revised to clarify that construction or extension of a fixed-guideway transit facility not located within an existing transportation right-of-way normally requires the preparation of an EIS. In addition, bus rapid transit (BRT), as defined in the *National Transit Database—Glossary* was added to the list of examples of such transit facilities. The former regulation was sometimes interpreted to expect an EIS for a proposed transit project located within an existing transportation right-of-way if the project would add a new transit

mode to that right-of-way. This final rule reflects FTA's experience that transit projects constructed within existing transportation rights-of-way often do not have significant impacts on the environment and do not require an EIS. In fact, it is FTA's experience that certain transit facilities qualify for a CE when constructed predominantly within a transportation right-of-way. In any instance where unusual circumstances would cause such a project, which would normally be an excluded action, to have the potential for significant environmental effects that would require further analysis,, FTA would review it with an EA or an EIS.

Section 771.115(b) has been revised to state that the CE lists in section 771.117 apply to FHWA actions, and the CE lists in section 771.118 apply to FTA actions.

Section 771.117 FHWA categorical exclusions

The header for section 771.117 has been changed to ''FHWA categorical exclusions,'' because the CEs listed in section 771.117 now apply to FHWA actions. Conforming amendments to clarify the list applies to the FHWA were performed by changing ''the Administration'' to ''the FHWA'' in sections 771.117(b), (c), and (d). In addition, although not proposed in the NPRM, this final rule deletes section 771.117(d)(13) as unnecessary because the CE does not apply to the FHWA and the list in section 771.117(d) is for FHWA actions. The CE will continue to apply to FTA actions through section 771.118(d)(4). This is a technical/administrative correction only.

Section 771.118 FTA categorical exclusions

FTA is adopting the new section 771.118 that contains CEs applicable to FTA actions. The section contains: section 771.118(a) that describes and defines CE actions; section 771.118(b) that defines unusual circumstances; and section 771.118(e) that addresses the consideration for adding new CEs in the future. These three paragraphs mimic sections 771.117(a), (b), and (e) that formerly applied to both the FHWA and FTA, but now apply only to FHWA actions.

New sections 771.118(c) and (d) have been added to describe the FTA CEs. The list in section 771.118(c) is more expansive than the former list in section 771.117(c). It focuses on the actions most applicable to FTA and generalizes the descriptions of those actions to be as inclusive as appropriate for a CE. As described above in the Comments and Responses section, this final rule makes minor revisions to the NPRM wording of these CEs in response to comments on the NPRM and for clarity. FTA will determine whether the action described by the grant applicant falls within the CE category. FTA expects that a description of the project in the grant application will normally be sufficient for FTA to determine that the CE applies and that no unusual circumstances would result for projects falling under section 771.118(c), but projects could require documentation for other environmental requirements, such as Section 106 of the National Historic Preservation Act, the Endangered Species Act, the Clean Water Act, or the Clean Air Act. The section also includes section 771.118(d), which lists CEs that require documentation to verify that the application of a CE is appropriate. Section 771.118(d) lists fewer examples of CEs than the former section 771.117(d) because the FHWA and FTA lists have been separated and the CEs listed in section 771.118(c) were generalized to include many of the transit actions formerly covered by section 771.117(d). Multimodal projects containing both FHWA and FTA actions (such as the reconstruction of a highway lane within existing right-of-way for express bus service funded by FTA but requiring an FHWA approval) may be processed as CEs under section 771.117 for FHWA *and* under section 771.118 for FTA provided there are no cumulative significant effects of the FHWA and FTA actions.

Per CEQ guidance, the CEs in section 771.118 are presented as general categories that include appropriate limitations and provide an informative (but not exhaustive) list of examples. The CEs adopted in this final rule are listed in the amendatory language of the regulation itself. Substantiation of the CEs, in accordance with CEQ guidance, was provided as part of the NPRM and remains available in the NPRM docket on Regulations.gov. Three of the revisions to the NPRM wording of the CEs included in this final rule are substantive and are described below.

Section 771.118(c)(3) was expanded to allow the maintenance and rehabilitation of historic transportation facilities that may be adversely affected by the project. None of the CEs except this one originally involved compliance with both NEPA and Section 106. Such reference to Section 106 would suggest that Section 106 is an issue only for this CE and would lessen the attention paid to Section 106 for other CEs in which Section 106 compliance is not mentioned in the CE language. Section 106 applies to all CEs that may affect a property on or eligible for the National Register of Historic Places. Furthermore, FTA and its grant applicants have in the past had Section 106 programmatic agreements covering the adverse effects of the maintenance and rehabilitation of historic rapid rail stations eligible for FTA state-of-good-repair grants. Such programmatic agreements should be encouraged by FTA, not discouraged by eliminating the applicability of this CE when a programmatic agreement is signed.

Section 771.118(c)(4) was revised to include transit operating assistance. Operating assistance is typically used by the grant applicant to pay bus drivers their wages and for other similar operating costs that do not involve any construction. Operating assistance has been one of FTA's long-standing CEs without challenge or question, and was inadvertently omitted from the NPRM.

Section 771.118(d)(2) was reworded to distinguish between bridge projects requiring in-water activities and those that do not. Whereas the NPRM worded section 771.118(d)(2) to cover all bridge-related projects, in this final rule that section now requires environmental documentation only for bridge projects involving new construction or reconstruction of a bridge. Bridge rehabilitation and maintenance, which would have no significant environmental impacts, are covered by section 771.118(c)(8) and do not require additional NEPA documentation.

FTA's rationale for having the acquisition of certain real property interests covered in sections 771.118(c)(6), (d)(3), and (d)(4) requires explanation. Sections 771.118(d)(3), and (d)(4) cover the traditional early acquisitions available in the former version of this regulation, namely hardship and protective acquisitions in section 771.118(d)(3) and the acquisition of existing railroad right-of-way (ROW) in section 771.118(d)(4). FTA indicates in section 771.118(c)(6) that under certain conditions, an early property acquisition is appropriate and categorically excluded even when the acquisition is not a protective, hardship, or railroad ROW acquisition. The early acquisitions covered by section 771.118(c)(6) do have some constraints, however, regarding the environmental context of the property. FTA chose to add the environmentally constrained acquisitions to the CE list in section 771.118(c), while retaining the protective and hardship acquisitions in section 771.118(d). In addition, FTA is retaining but modifying the CE proposed for section 771.118(d) that would cover railroad ROW acquisition. FTA is modifying that CE by deleting the word ''railroad'' to reflect the change made to the statute by MAP–21 Section

20016. FTA recognizes the categories of property acquisition in sections 771.118(c) and (d) overlap in their coverage, but neither absorbs the other category of CE in its entirety. Therefore, FTA is adopting all of the CE categories regarding property acquisition to maximize coverage.

Further, for reasons described more fully in the background information, FTA is further expanding section 771.118(d) through the adoption of the following examples of actions that can be categorically excluded through the use of documentation:

(5) Construction of bicycle facilities within existing transportation right-of-way.

(6) Facility modernization through construction or replacement of existing components.

These examples may be eligible as categorical exclusions as long as they meet the requirements set forth in sections 771.118(a) and (b).

Section 771.119 Environmental assessments

FTA is adopting no change to section 771.119.

Section 771.123 Draft environmental impact statements

FTA is adopting no change to section 771.123(d). Section 771.123(j) is deleted as unnecessary, as proposed in the NPRM.

Section 771.133 Compliance with other requirements

No changes are made to this paragraph. FTA had proposed to add a sentence to this paragraph that stated that its approval of an environmental document constitutes its finding of compliance with Sections 5323(b) and 5324(b) of Title 49, U.S. Code. Since issuance of that NPRM, however, MAP–21 deleted the substantive requires in those sections. So FTA will not make changes to the regulatory text at this time.

Regulatory Analysis and Notices

All comments received on or before the close of business on the comment closing date indicated above were considered and are available for examination in the docket (FTA–2011–0056) at Regulations.gov. Comments received after the comment closing date were filed in the docket and were considered to the extent practicable.

Immediate Effective Date

FTA has determined that this rule be made effective immediately upon publication. The Administrative Procedure Act (5 U.S.C. 553(d)) requires that a rule be published 30 days prior to its effective date unless one of three exceptions applies. One of these exceptions is when the agency finds good cause for a shorter period. Here, FTA has determined that ''good cause'' exists for immediate effectiveness of this rule because this rule is expected to apply in many cases that address the immediate need to repair the transit system facilities and equipment damaged by Hurricane Sandy. Hurricane Sandy affected mid-Atlantic and northeastern states in October 2012, and particularly devastated transit operations in New Jersey and New York. These operations serve about 40% of all transit riders in the country. Through immediate promulgation of the categorical exclusions in section 771.118, many of the much needed Hurricane Sandy recovery efforts can occur in a more expeditious manner, while still ensuring that the environment is protected. Thus, it is in the public interest for this final rule to have an immediate effective date. FTA acknowledges the revisions contained within this final rule are applicable to a broader suite of FTA-funded and approved projects, but the good cause for making the rule effective immediately is specifically the support of Hurricane Sandy recovery efforts.

Executive Orders 13563 and 12866 and DOT Regulatory Policies and Procedures

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, of promoting flexibility, and of reviewing existing rules to determine if they can be made more effective or less burdensome in achieving their objectives. FTA and the FHWA determined this action is a significant regulatory action under Section 3(f) of Executive Order 12866 and the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11032). Therefore, this final rule was submitted to the Office of Management and Budget (OMB) for interagency review.

This final rule clarifies the existing regulatory requirements for categorical exclusions, and the provisions of this rule would not adversely affect, in any material way, any sector of the economy. In addition, these changes will not interfere with any action taken or planned by another agency and will not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. FTA anticipates that the changes included in this final rule will enable certain projects to move more expeditiously through the Federal NEPA review process and will reduce the preparation of extraneous environmental documentation and analysis not needed for compliance with NEPA or for ensuring that projects are built in an environmentally responsible manner. Under the previous regulations, approximately 90 percent of FTA's actions were CEs (specifically, under former sections 771.117(c) and (d)). FTA anticipates the percentage will increase under this final rule, especially where new categorically excluded actions are included.

FTA has estimated generally that, in the past, the duration of FTA's environmental review process for various NEPA actions has been within the following ranges: EISs from 1.5 years to 4 years; EAs from 6 months to 22 months; and documented CEs from 1 to 6 months. Where a particular action falls within that range depends on a number of factors, including the complexity of the action, the extent of environmental impacts, the local financial resources available for the project, and the source of Federal funds (along with any project development or evaluation processes involved in securing a Federal funding commitment). Actions processed as CEs under the old section 771.117(c) (now under this final rule at section 771.118(c)) have tended to take from a few days up to a month, depending primarily on whether there are other environmental requirements that must be met and whether the project description in the grant application is sufficiently thorough.

The greatest percentage of actions that will be processed under the new section 771.118(c) that were not previously processed under the old section 771.117(c) were likely processed before as documented CEs under section 771.117(d). The time saved from processing those actions under the new list would be due primarily to the need for less documentation, and thus would depend greatly on whether there are other environmental requirements (such as Section 106 consultation under the National Historic Preservation Act or compliance with Executive Order 12898 on Environmental Justice) that still must be met regardless of the CE type used. Some projects that will qualify as CEs

under the new section 771.118(c) might otherwise have been processed as EAs in the past. For those projects, greater time savings are anticipated given that there no longer will be a need to prepare an EA and a Finding of No Significant Impact for publication, in addition to reduced need to produce environmental documentation demonstrating a lack of impacts. As for projects previously evaluated with EISs, it is unlikely that any such actions would qualify as CEs under the new section 771.118(c) because most actions evaluated as EISs result in significant environmental impacts.

FTA is not able to quantify the economic effects of these changes because the types of projects that will be proposed for FTA funding and their potential impacts are unknown at this time. FTA received no comment on the likely effects of the changes proposed by the NPRM, but FTA anticipates this final rule will result in substantial benefits associated with the quicker delivery of transit projects with no associated increase in costs or decrease in environmental protection.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*), FTA and the FHWA must consider whether this final rule would have a significant economic impact on a substantial number of small entities. ''Small entities'' include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. FTA does not believe that this final rule will have a significant economic impact on entities of any size, and FTA received no comment in response to our request for any such information in the NPRM. Thus, FTA and the FHWA determine that this final rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132: Federalism

Executive Order 13132 requires agencies to assure meaningful and timely input by state and local officials in the development of regulatory policies that may 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. This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. FTA and the FHWA have determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have Federalism implications. We received no comments from State and local governments in response to our request in the NPRM for information on the effect that specific proposals would have on State or local governments.

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 requires agencies to assure meaningful and timely input from Indian tribal government representatives in the development of rules that ''significantly or uniquely affect'' Indian communities and that impose ''substantial and direct compliance costs'' on such communities. FTA analyzed this final rule under Executive Order 13175 and believes that the proposed action will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian tribal governments; and will not preempt tribal laws. Therefore, a tribal impact statement is not required. FTA received no comment in response to our request in the NPRM for comments from Indian tribal governments on the effect that adoption of specific proposals might have on Indian communities.

National Environmental Policy Act

This action would not have any effect on the quality of the environment under the National Environmental Policy Act of 1969 (NEPA). The CEQ regulations do not direct agencies to prepare a NEPA analysis or document before establishing Agency procedures (such as this regulation) that supplement the CEQ regulations for implementing NEPA. Agencies are required to adopt NEPA procedures that establish specific criteria for, and identification of, three classes of actions: those that normally require preparation of an EIS; those that normally require preparation of an EA; and those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). CEs are one part of those agency procedures, and therefore establishing CEs does not require preparation of a NEPA analysis or document. Agency NEPA procedures assist agencies in the fulfillment of agency responsibilities under NEPA, but are not the agency's final determination of what level of NEPA analysis is required for a particular proposed action. The requirements for establishing agency NEPA procedures are set forth at 40 CFR 1505.1 and 1507.3. The determination that establishing CEs does not require NEPA analysis and documentation was upheld in *Heartwood, Inc.* v. *U.S. Forest Service,* 73 F. Supp. 2d 962, 972–73 (S.D. Ill. 1999), *aff'd,* 230 F.3d 947, 954–55 (7th Cir. 2000).

Statutory/Legal Authority for This Rulemaking

The FHWA and FTA derive explicit authority for this rulemaking action from 49 U.S.C. 322, which provides authority to ''[a]n officer of the Department of Transportation [to] prescribe regulations to carry out the duties and powers of the officer.'' That authority is delegated to the FHWA and FTA through 49 CFR 1.81(a)(3), which provides that the authority to prescribe regulations contained in 49 U.S.C. 322 is delegated to each Administrator ''with respect to statutory provisions for which authority is delegated by other sections in [49 CFR Part 1].'' Included in 49 CFR part 1, specifically 49 CFR 1.81(a)(5), is the delegation of authority with respect to NEPA, the statute implemented by this final rule. Moreover, the CEQ regulations that implement NEPA provide at 40 CFR 1500.6 that ''[a]gencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of [NEPA].''

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, no Federal agency shall conduct or sponsor a collection of information unless in advance the agency has obtained approval by and a control number from OMB, and no person is required to respond to a collection of information unless it displays a valid OMB control number. This rule does not include any new or revise any existing information collection.

Regulation Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document may be used to cross-reference this action with the Unified Agenda.

Privacy Act

Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comments (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477).

Unfunded Mandates Reform Act of 1995

This final rule will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48). This final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $128.1 million or more in any one year (2 U.S.C. 1532).

Executive Order 12630 (Taking of Private Property)

FTA analyzed this final rule under Executive Order 12630, Government Actions and Interface with Constitutionally Protected Property Rights. This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630.

Executive Order 12988 (Civil Justice Reform)

This action 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.

Executive Order 13211 (Energy Effects)

FTA analyzed this action under Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' dated May 18, 2001. FTA determined that this is not a significant energy action under that order because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

Executive Order 13045 (Protection of Children)

FTA analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. FTA certifies that this final rule is not an economically significant rule and will not cause an environmental risk to health or safety that may disproportionately affect children.

List of Subjects

23 CFR Part 771

Environmental protection, Grant programs—transportation, Highways and roads, Historic preservation, Public lands, Recreation areas, Reporting and recordkeeping requirements.

49 CFR Part 622

Environmental impact statements, Grant programs—transportation, Public transit, Recreation areas, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, amend Chapter I of Title 23 and Chapter VI of Title 49, of the Code of Federal Regulations as set forth below:

Federal Highway Administration

Title 23—Highways

PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

■ 1. The authority citation for part 771 continues to read as follows:

Authority: 42 U.S.C. 4321 et seq.; 23 U.S.C. 106, 109, 128, 138, 139, 315, 325, 326, and 327; 49 U.S.C. 303; Pub. L. 109–59, 119 Stat. 1144, Sections 6002 and 6010; 40 CFR parts 1500–1508; 23 U.S.C. 322; 49 CFR 1.81; Pub. L. 112–141, 126 Stat. 405.

■ 2. Amend § 771.101 by revising the last sentence to read as follows:

§ 771.101 Purpose.

* * * This regulation also sets forth procedures to comply with 23 U.S.C. 109(h), 128, 138, 139, 325, 326, 327, and 49 U.S.C. 303, 5301, and 5323.

■ 3. Amend § 771.105 by revising footnote 1 of paragraph (a) to read as follows:

§ 771.105 Policy.

* * * * *

(a) * * * [1]

[1] FHWA and FTA have supplementary guidance on environmental documents and procedures for their programs. This guidance includes, but is not limited to: FHWA Technical Advisory T6640.8A, October 30, 1987; ''SAFETEA–LU Environmental Review Process: Final Guidance,'' November 15, 2006; Appendix A of 23 CFR part 450, titled ''Linking the Transportation Planning and NEPA Processes''; and ''Transit Noise and Vibration Impact Assessment,'' May 2006. The FHWA and FTA supplementary guidance, and any updated versions of the guidance, are available from the respective FHWA and FTA headquarters and field offices as prescribed in 49 CFR part 7 and on their respective Web sites at *http://www.fhwa.dot.gov* and *http://www.fta.dot.gov,* or in hard copy by request.

■ 4. Amend § 771.107 by revising paragraph (d) to read as follows:

§ 771.107 Definitions.

* * * * *

(d) *Administration.* The FHWA or FTA, whichever is the designated Federal lead agency for the proposed action. A reference herein to the Administration means the FHWA, or FTA, or a State when the State is functioning as the FHWA or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, or 327, or other applicable law. A reference herein to the FHWA or FTA means the State when the State is functioning as the FHWA or FTA respectively in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, or 327, or other applicable law. Nothing in this definition alters the scope of any delegation or assignment made by FHWA or FTA.

* * * * *

§ 771.109 [Amended]

■ 5. Amend § 771.109 in paragraph (b) by removing the misspelled word ''contruction'' and adding in its place the word ''construction''.

■ 6. Amend § 771.111 by revising paragraph (i) to read as follows:

§ 771.111 Early coordination, public involvement, and project development.

* * * * *

(i) Applicants for capital assistance in the FTA program:

(1) Achieve public participation on proposed projects through activities that engage the public, including public hearings, town meetings, and charettes, and seeking input from the public through the scoping process for environmental review documents. Project milestones may be announced to the public using electronic or paper media (e.g., newsletters, note cards, or emails) pursuant to 40 CFR 1506.6. For projects requiring EISs, an early opportunity for public involvement in defining the purpose and need for action and the range of alternatives must be provided, and a public hearing will be held during the circulation period of the draft EIS. For other projects that substantially affect the community or its public transportation service, an adequate opportunity for public review and comment must be provided.

(2) May participate in early scoping as long as enough project information is known so the public and other agencies can participate effectively. Early scoping constitutes initiation of NEPA scoping while local planning efforts to aid in establishing the purpose and need and

in evaluating alternatives and impacts are underway. Notice of early scoping must be made to the public and other agencies. If early scoping is the start of the NEPA process, the early scoping notice must include language to that effect. After development of the proposed action at the conclusion of early scoping, FTA will publish the Notice of Intent if it is determined at that time that the proposed action requires an EIS. The Notice of Intent will establish a 30-day period for comments on the purpose and need and the alternatives.

(3) Are encouraged to post and distribute materials related to the environmental review process, including but not limited to, NEPA documents, public meeting announcements, and minutes, through publicly-accessible electronic means, including project Web sites. Applicants are encouraged to keep these materials available to the public electronically until the project is constructed and open for operations.

(4) Are encouraged to post all environmental impact statements and records of decision on a project Web site until the project is constructed and open for operation.

* * * * *

■ 7. Amend § 771.113 by revising paragraphs (d)(1) and (2) to read as follows:

§ 771.113 Timing of Administration activities.

* * * * *

(d) * * *

(1) Exceptions for hardship and protective acquisitions of real property are addressed in paragraph (d)(12) of § 771.117 for FHWA. Exceptions for the acquisitions of real property are addressed in paragraphs (c)(6) and (d)(3) of § 771.118 for FTA.

(2) Paragraph (d)(4) of § 771.118 contains an exception for the acquisition of right-of-way for future transit use in accordance with 49 U.S.C. 5323(q).

* * * * *

■ 8. Amend § 771.115 by revising paragraph (a)(3) and paragraph (b) to read as follows:

§ 771.115 Classes of actions.

* * * * *

(a) * * *

(3) Construction or extension of a fixed transit facility (e.g., rapid rail, light rail, commuter rail, bus rapid transit) that will not be located within an existing transportation right-of-way.

* * * * *

(b) Class II (CEs). Actions that do not individually or cumulatively have a significant environmental effect are excluded from the requirement to prepare an EA or EIS. A specific list of CEs normally not requiring NEPA documentation is set forth in § 771.117(c) for FHWA actions or pursuant to § 771.118(c) for FTA actions. When appropriately documented, additional projects may also qualify as CEs pursuant to § 771.117(d) for FHWA actions or pursuant to § 771.118(d) for FTA actions.

* * * * *

■ 9. Amend § 771.117 by:

■ a. Revising the heading of the section.

■ b. Removing paragraph (d)(13).

■ c., Revising the first sentence of paragraph (b) introductory text.

■ d. Revising paragraph (c) introductory text.

■ e. Revising the first sentence of paragraph (d) introductory text.

■ f. Revising paragraph (e).

The revisions read as follows:

§ 771.117 FHWA categorical exclusions.

* * * * *

(b) Any action which normally would be classified as a CE but could involve unusual circumstances will require the FHWA, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. * * *

* * * * *

(c) The following actions meet the criteria for CEs in the CEQ regulations (40 CFR 1508.4) and § 771.117(a) and normally do not require any further NEPA approvals by the FHWA:

* * * * *

(d) Additional actions which meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after the FHWA approval. * * *

* * * * *

(e) Where a pattern emerges of granting CE status for a particular type of action, the FHWA will initiate rulemaking proposing to add this type of action to the list of categorical exclusions in paragraph (c) or (d) of this section, as appropriate.

■ 10. Add § 771.118 to read as follows:

§ 771.118 FTA categorical exclusions

(a) Categorical exclusions (CEs) are actions which meet the definition contained in 40 CFR 1508.4, and, based on past experience with similar actions, do not involve significant environmental impacts. They are actions which: do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.

(b) Any action which normally would be classified as a CE but could involve unusual circumstances will require FTA, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. Such unusual circumstances include:

(1) Significant environmental impacts;

(2) Substantial controversy on environmental grounds;

(3) Significant impact on properties protected by Section 4(f) of the DOT Act or Section 106 of the National Historic Preservation Act; or

(4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

(c) Actions that FTA determines fall within the following categories of FTA CEs and that meet the criteria for CEs in the CEQ regulation (40 CFR 1508.4) and paragraph (a) of this section normally do not require any further NEPA approvals by FTA.

(1) Acquisition, installation, operation, evaluation, replacement, and improvement of discrete utilities and similar appurtenances (existing and new) within or adjacent to existing transportation right-of-way, such as: utility poles, underground wiring, cables, and information systems; and power substations and utility transfer stations.

(2) Acquisition, construction, maintenance, rehabilitation, and improvement or limited expansion of stand-alone recreation, pedestrian, or bicycle facilities, such as: a multiuse pathway, lane, trail, or pedestrian bridge; and transit plaza amenities.

(3) Activities designed to mitigate environmental harm that cause no harm themselves or to maintain and enhance environmental quality and site aesthetics, and employ construction best management practices, such as: noise mitigation activities; rehabilitation of public transportation buildings, structures, or facilities; retrofitting for energy or other resource conservation; and landscaping or re-vegetation.

(4) Planning and administrative activities which do not involve or lead directly to construction, such as: training, technical assistance and research; promulgation of rules, regulations, directives, or program

guidance; approval of project concepts; engineering; and operating assistance to transit authorities to continue existing service or increase service to meet routine demand.

(5) Activities, including repairs, replacements, and rehabilitations, designed to promote transportation safety, security, accessibility and effective communication within or adjacent to existing right-of-way, such as: the deployment of Intelligent Transportation Systems and components; installation and improvement of safety and communications equipment, including hazard elimination and mitigation; installation of passenger amenities and traffic signals; and retrofitting existing transportation vehicles, facilities or structures, or upgrading to current standards.

(6) Acquisition or transfer of an interest in real property that is not within or adjacent to recognized environmentally sensitive areas (e.g., wetlands, non-urban parks, wildlife management areas) and does not result in a substantial change in the functional use of the property or in substantial displacements, such as: acquisition for scenic easements or historic sites for the purpose of preserving the site. This CE extends only to acquisitions and transfers that will not limit the evaluation of alternatives for future FTA-assisted projects that make use of the acquired or transferred property.

(7) Acquisition, installation, rehabilitation, replacement, and maintenance of vehicles or equipment, within or accommodated by existing facilities, that does not result in a change in functional use of the facilities, such as: equipment to be located within existing facilities and with no substantial off-site impacts; and vehicles, including buses, rail cars, trolley cars, ferry boats and people movers that can be accommodated by existing facilities or by new facilities that qualify for a categorical exclusion.

(8) Maintenance, rehabilitation, and reconstruction of facilities that occupy substantially the same geographic footprint and do not result in a change in functional use, such as: improvements to bridges, tunnels, storage yards, buildings, stations, and terminals; construction of platform extensions, passing track, and retaining walls; and improvements to tracks and railbeds.

(9) Assembly or construction of facilities that is consistent with existing land use and zoning requirements (including floodplain regulations) and uses primarily land disturbed for transportation use, such as: buildings and associated structures; bus transfer stations or intermodal centers; busways and streetcar lines or other transit investments within areas of the right-of-way occupied by the physical footprint of the existing facility or otherwise maintained or used for transportation operations; and parking facilities.

(10) Development of facilities for transit and non-transit purposes, located on, above, or adjacent to existing transit facilities, that are not part of a larger transportation project and do not substantially enlarge such facilities, such as: police facilities, daycare facilities, public service facilities, amenities, and commercial, retail, and residential development.

(d) Additional actions which meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after FTA approval. The applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result. Examples of such actions include but are not limited to:

(1) Modernization of a highway by resurfacing, restoring, rehabilitating, or reconstructing shoulders or auxiliary lanes (e.g., lanes for parking, weaving, turning, climbing).

(2) Bridge replacement or the construction of grade separation to replace existing at-grade railroad crossings.

(3) Acquisition of land for hardship or protective purposes. Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition qualify for a CE only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.

(i) Hardship acquisition is early acquisition of property by the applicant at the property owner's request to alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document on the basis of health, safety or financial reasons that remaining in the property poses an undue hardship compared to others.

(ii) Protective acquisition is done to prevent imminent development of a parcel which may be needed for a proposed transportation corridor or site. Documentation must clearly demonstrate that development of the land would preclude future transportation use and that such development is imminent. Advance acquisition is not permitted for the sole purpose of reducing the cost of property for a proposed project.

(4) Acquisition of right-of-way. No project development on the acquired right-of-way may proceed until the NEPA process for such project development, including the consideration of alternatives, has been completed.

(5) Construction of bicycle facilities within existing transportation right-of-way.

(6) Facility modernization through construction or replacement of existing components.

(e) Where a pattern emerges of granting CE status for a particular type of action, FTA will initiate rulemaking proposing to add this type of action to the appropriate list of categorical exclusions in this section.

§ 771.123 [Amended]

■ 11. Amend § 771.123 by removing paragraph (j).

Federal Transit Administration

Title 49—Transportation

PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

Subpart A—Environmental Procedures

■ 12. The authority citation for subpart A to 622 is revised to read as follows:

Authority: 42 U.S.C. 4321 et seq.; 49 U.S.C. 303 and 5323(q); 23 U.S.C. 139 and 326; Pub. L. 109–59, 119 Stat. 1144, sections 6002 and 6010; 40 CFR parts 1500–1508; and 49 CFR 1.81.

Peter Rogoff,

Administrator, Federal Transit Administration.

Victor M. Mendez,

Administrator, Federal Highway Administration.

[FR Doc. 2013–02345 Filed 2–6–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1926

[Docket No. OSHA–2012–0025]

RIN 1218–AC75

Cranes and Derricks in Construction: Revising the Exemption for Digger Derricks

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Withdrawal of direct final rule.

SUMMARY: OSHA published a direct final rule and a companion notice of proposed rulemaking on November 9, 2012, to broaden the exemption for digger derricks in its construction standard for cranes and derricks. OSHA received a significant adverse comment on the direct final rule and is, therefore, withdrawing the direct final rule. OSHA will issue a final rule at a later date based on the notice of proposed rulemaking.

DATES: OSHA published the direct final rule for revising the exemption for digger derricks on November 9, 2012 (77 FR 67270), and is withdrawing that direct final rule as of February 7, 2013.

FOR FURTHER INFORMATION CONTACT:

General information and press inquiries: Mr. Frank Meilinger, Director, OSHA Office of Communications, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–1999.

Technical information: Mr. Garvin Branch, Directorate of Construction, Room N–3468, OSHA, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–2020; fax: (202) 693–1689.

SUPPLEMENTARY INFORMATION: On November 9, 2012, OSHA published a direct final rule (77 FR 67270) and a companion notice of proposed rulemaking (77 FR 67313) to broaden the exemption for digger derricks in its construction standard for cranes and derricks. In those documents, OSHA stated that if it received a significant adverse comment, the Agency would ''publish a timely withdrawal of this direct final rule'' and determine whether to proceed with the rulemaking on the basis of the proposed rule. OSHA received one significant adverse comment on the direct final rule (Docket ID OSHA–2012–0025–0008) and is, therefore, withdrawing the direct final rule. The Agency will treat the comment on the direct final rule as a comment on the proposed rule and publish a final rule at a later date.

Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, authorized the withdrawal of the direct final rule. OSHA is withdrawing the direct final rule pursuant to 29 U.S.C. 653, 655, and 657, 40 U.S.C. 3701 *et seq.,* 5 U.S.C. 553, Secretary of Labor's Order 1–2012 (77 FR 3912), and 29 CFR part 1911.

Signed at Washington, DC on February 1, 2013.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2013–02777 Filed 2–6–13; 8:45 am]

BILLING CODE 4510–26–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4022

Benefits Payable in Terminated Single-Employer Plans; Interest Assumptions for Paying Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule; correction.

SUMMARY: The Pension Benefit Guaranty Corporation published in the **Federal Register** of January 15, 2013, a final rule amending PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans to prescribe interest assumptions under the regulation for valuation dates in February 2013. This document corrects an inadvertent error in that final rule.

DATES: Effective February 7, 2013 and applicable beginning February 1, 2013.

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion (*Klion.Catherine@pbgc.gov*), Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: PBGC published in the **Federal Register** of January 15, 2013 (78 FR 2881), a final rule amending PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans to prescribe interest assumptions under the regulation for valuation dates in February 2013. The effective date for that rule was February 1, 2013. This document corrects the Code of Federal Regulations accordingly.

List of Subjects in 29 CFR Part 4022

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

Therefore, the PBGC amends 29 CFR part 4022 as follows:

PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

■ 1. The authority citation for part 4022 continues to read as follows:

Authority: 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

Appendix C to Part 4022 [Amended]

■ 2. In the table for Appendix C to Part 4022, in the entry for Rate Set 232, under ''On or after'', remove the date ''2–1–12'', and add, in its place, the date ''2–1–13''.

Issued in Washington, DC, on this 1st day of February 2013.

Laricke Blanchard,

Deputy Director for Policy, Pension Benefit Guaranty Corporation.

[FR Doc. 2013–02689 Filed 2–6–13; 8:45 am]

BILLING CODE 7709–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 111207737–2141–02]

RIN 0648–XC482

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 620 in the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for pollock in Statistical Area 620 in the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the A season allowance of the 2013 total allowable catch of pollock for Statistical Area 620 in the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), February 4, 2013, through 1200 hrs, A.l.t., March 10, 2013.

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

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

The A season allowance of the 2013 total allowable catch (TAC) of pollock in Statistical Area 620 of the GOA is 16,433 metric tons (mt) as established by the final 2012 and 2013 harvest specifications for groundfish of the GOA (77 FR 15194, March 14, 2012) and inseason adjustment (78 FR 267, January 3, 2013).

In accordance with § 679.20(d)(1)(i), the Regional Administrator has determined that the A season allowance of the 2013 TAC of pollock in Statistical Area 620 of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 16,134 mt and is setting aside the remaining 300 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for pollock in Statistical Area 620 of the GOA.

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

Classification

This action responds to the best available information recently obtained from the fishery. The Acting Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) and § 679.25(c)(1)(ii) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of directed fishing for pollock in Statistical Area 620 of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of February 3, 2013.

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

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

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

Dated: February 4, 2013.

Kara Meckley,

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

[FR Doc. 2013–02774 Filed 2–4–13; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 78, No. 26
Thursday, February 7, 2013

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 HOMELAND SECURITY

6 CFR Part 115

[ICEB–2012–0003]

RIN 1653–AA65

Standards To Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities; Extension of Comment Period

AGENCY: Department of Homeland Security.

ACTION: Notice of proposed rulemaking (NPRM); Extension of comment period.

SUMMARY: This action extends the comment period for an NPRM that DHS published on December 19, 2012. In that document, DHS proposed to issue regulations setting standards to prevent, detect, and respond to sexual abuse and assault in DHS confinement facilities. DHS is extending the comment period for one week due to projected outages at the Federal eRulemaking Portal, *http://www.regulations.gov,* and the Federal Document Management System. This extension is to ensure that all interested parties have an opportunity to present their views on the proposed rulemaking.

DATES: Comments must be received on or before 11:59 p.m. on February 26, 2013, or reach the Mail or Hand Delivery/Courier address listed below in **ADDRESSES** on or before that date and time.

ADDRESSES: You may submit comments, identified by DHS Docket No. ICEB–2012–0003, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Office of Policy; U.S. Immigration and Customs Enforcement, Department of Homeland Security; Potomac Center North, 500 12th Street SW., Washington, DC 20536; Contact Telephone Number (202) 732–4292. To ensure proper handling, please reference DHS Docket No. ICEB–2012–0003 on your correspondence.
- *Hand Delivery/Courier:* Office of Policy; U.S. Immigration and Customs Enforcement, Department of Homeland Security; Potomac Center North, 500 12th Street SW., Washington, DC 20536; Telephone: (202) 732–4292 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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

FOR FURTHER INFORMATION CONTACT: Alexander Y. Hartman, Office of Policy; U.S. Immigration and Customs Enforcement, Department of Homeland Security; Potomac Center North, 500 12th Street SW., Washington, DC 20536; Telephone: (202) 732–4292 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Submitting Comments

See the **SUPPLEMENTARY INFORMATION** section in the NPRM (77 FR 75300) for further information on how to comment on the proposals in the NPRM and how DHS will handle comments received. The ''Additional Information'' section also contains related information about the docket, privacy, and the handling of proprietary or confidential business information. In addition, there is information on obtaining copies of related rulemaking documents.

II. Background

On December 19, 2012, DHS issued an NPRM entitled, ''Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities.'' 77 FR 75300. The NPRM required commenters to submit their comments for receipt by February 19, 2013. DHS recently learned of upcoming maintenance to the Federal eRulemaking Portal, *http://www.regulations.gov,* and the Federal Document Management System (FDMS), currently scheduled for February 16–18, 2013. These systems will not be available during that time. To avoid confusion during the end of the comment period and to ensure that all interested parties have an opportunity to comment on the NPRM, DHS is extending the comment period by one week.

Absent unforeseen circumstances, DHS does not anticipate any further extension of the comment period for this rulemaking.

Extension of Comment Period

DHS has determined that a one-week extension of the comment period is sufficient to provide the public adequate time to submit comments, notwithstanding the projected outages to the Federal eRulemaking Portal and FDMS. Accordingly, the public comment period for the NPRM is extended through February 26, 2013.

Christina E. McDonald,

Associate General Counsel for Regulatory Affairs, Department of Homeland Security.

[FR Doc. 2013–02757 Filed 2–6–13; 8:45 am]

BILLING CODE 9110–9B–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 318

[Docket No. APHIS–2012–0008]

RIN 0579–AD70

Interstate Movement of Sharwil Avocados From Hawaii

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the Hawaii quarantine regulations to allow the interstate movement of untreated Sharwil avocados from Hawaii into the continental United States. As a condition of movement, Sharwil avocados from Hawaii would have to be produced in accordance with a systems approach that would include requirements for registration and monitoring of places of production and packinghouses, an orchard trapping program, grove sanitation, limits on harvest periods and distribution areas, and harvesting and packing requirements to ensure that only intact fruit that have been protected against infestation are shipped. This action would allow for the interstate movement of Sharwil avocados from Hawaii into other States while continuing to provide protection against the introduction of quarantine pests.

DATES: We will consider all comments that we receive on or before April 8, 2013.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2012-0008-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS-2012-0008, 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-2012-0008* 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) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Mr. David Lamb, Regulatory Policy Specialist, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 851–2103.

SUPPLEMENTARY INFORMATION:

Background

Under the regulations in 7 CFR part 318, ''State of Hawaii and Territories Quarantine Notices'' (referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA or the Department) prohibits or restricts the interstate movement of fruits, vegetables, and other products from Hawaii, Puerto Rico, the U.S. Virgin Islands, and Guam to the continental United States to prevent the spread of plant pests that occur in Hawaii and the territories.

Among other things, the regulations allow interstate movement of Sharwil avocados from Hawaii to the continental United States only if the avocados undergo fumigation, or combined fumigation and cold treatment for fruit flies. The regulations also allow untreated Sharwil avocados to move to Alaska, which has a climate where fruit flies cannot become established. APHIS has received a request from the Hawaii Department of Agriculture to allow interstate movement of untreated mature green Sharwil avocado fruit into the lower 48 continental United States. The treatments currently required for the movement of Sharwil avocados can have unacceptable adverse effects on the quality of the fruit.

We have evaluated the plant pest risks associated with this request and have prepared a pest risk assessment[1] (PRA) and a risk management document[2] (RMD). The PRA identified relevant pests of Sharwil avocado in Hawaii and examined the risks associated with the movement of Sharwil avocados into the continental United States. The RMD concludes that a systems approach could effectively mitigate the pest risk associated with such movement.

System approaches have been used successfully to authorize the importation of a variety of fruits and vegetables under the regulations in 7 CFR part 319, such as tomatoes from Spain, France, Morocco, Chile, and Central America (§ 319.56–28), citrus from Chile (§ 319.56–38), and peppers and pitaya from Central America (§§ 319.56–40 and 319.56–55). We have also successfully applied such an approach to import Hass avocados from Mexico under a systems approach for *Stenoma catenifer,* seed and stem weevils, and fruit flies for over 8 years with no interceptions of quarantine pests. This proposed rule describes the systems approach APHIS has developed for movement of fresh Sharwil avocados from Hawaii into the continental United States.

APHIS previously allowed Hawaiian Sharwil avocados to move interstate to the lower 48 continental United States. This decision was based on research in the 1980s that showed that mature green Hawaiian Sharwil avocados are an extremely poor host for the Oriental fruit fly (*Bactrocera dorsalis*) and are not naturally infested with Mediterranean fruit (*Ceratitis capitata* (Wiedemann)) or melon fly (*Bactrocera cucurbitae*). However, in February 1992, Oriental fruit fly larvae were found in fruit that was qualified for interstate shipment from Hawaii under the previous systems approach, and APHIS ended the program based on these larval finds in an interim rule published and effective on July 15, 1992 (57 FR 31306–31307, Docket No. 92–081–1).

More recent research on Sharwil avocado host status to fruit flies has identified the weaknesses of the earlier program and suggests how a new systems approach can be made effective. Liquido *et al.* (1995)[3] surveyed for field infestation of fruit flies in mature green Sharwil avocados on Kona in 1992 and 1993. Surveys were done in March–August 1992 and in September 1992–May 1993, with 5,004 samples, 4,888 of which were mature green fruits with pedicel firmly attached on the tree at the time of sampling. Out of 1,047 fruit samples collected in March 1992, 4 mature green fruits with pedicel firmly attached to the tree during sampling were infested with Oriental fruit flies; only 1 of these infested fruit had no morphological aberration. During this field survey, the area was experiencing a severe drought, and the only infested samples were found in what were considered late-season fruits. All fruit samples during the September 1992–May 1993 census had no fruit fly infestation. No other species of fruit flies were found. Liquido *et al.* (1995) concluded that drought was the primary cause of the breakdown of resistance mechanisms in Sharwil avocados. Follett (2009)[4] investigated puncture resistance of 'Sharwil' avocados, and Follett and Vargas (2010)[5] proposed a modified version of the original systems approach which included measures adapted to this proposed rule. Klungness *et al.* (2009)[6] found that fruit fly populations were consistently low in Sharwil avocado orchards in Hawaii, and found only 4 larvae in 2 fruit from 489 fruit collected from the ground, both fruit from the same farm.

This research suggests conditions that foster infestation by fruit flies may be very localized and specific to certain areas and certain times. The natural resistance of Sharwil avocados to fruit fly infestation appears to break down with increase in fruit maturity or degree of ripeness and after harvest. Based on the research by Liquido *et al.* (1995), Sharwil avocados are not hosts of Oriental fruit flies under normal conditions but may become poor hosts of Oriental fruit fly under certain field

[1] ''Qualitative Pathway-Initiated Risk Assessment for the Movement of Mature Green Sharwil Avocado, Persea Americana Mill., from Hawaii into Continental United States.'' Available at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0008.*

[2] ''Interstate Movement of Mature Green 'Sharwil' Avocado, Persea americana Mill. from Hawaii into the Continental United States.'' September, 2011. Available at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0008.*

[3] Liquido, N.J., H.T. Chan Jr., and G.T. McQuate. 1995. Hawaiian tephritid fruit flies (Diptera): Integrity of the infestation-free quarantine procedure for 'Sharwil' avocado. J. Econ. Entomol. 88(1): 85–96.

[4] Follett, P.A. 2009. Puncture resistance in 'Sharwil' avocados to oriental fruit fly and Mediterranean fruit fly (Diptera: Tephritidae) oviposition. Journal of Economic Entomology. 102: 921–926.

[5] Follett, P.A., Vargas, R.I., Jang, E.B. 2010. A Systems Approach to Mitigate Oriental Fruit Fly Risk in 'Sharwil' Avocados Exported From Hawaii. Acta Horticulturae. Acta Horticulturae. 880: 439–445.

[6] Klungness, L.M., Vargas, R.I., Jang, E.B., Mau, R.F., Kinney, K. 2009. Susceptibility of ripe Avocado to Invasive Alien Fruit Flies (Tephritidae) on the Island of Hawaii. Hawaiian Entomological Society Proceedings. 41:1–13 2009.

conditions that may include water stress and nutritional deficiencies. Specifically, the failure in the Sharwil avocado program in 1991 involved unusual conditions that included soft fruit and uncontrolled fruit fly populations, conditions the new proposed systems approach is designed to avoid.

The PRA identified one quarantine pest with a high unmitigated risk potential, the Oriental fruit fly (*B. dorsalis* (Hendel)). It also identified eight quarantine pests with medium unmitigated risk potential. These include the scale insects, mealybugs, and moths *Ceroplastes rubens* Maskell, *Dysmicoccus neobrevipes* Beardsley, *Maconellicoccus hirsutus* (Green), *Nipaecoccus viridis* (Newstead), *Paracoccus marginatus* Williams and Granara de Willink, *Pseudococcus cryptus* Hempel, *Epiphyas postvittana* (Walker), and *Cryptoblabes gnidiella* Millière. The PRA also identified the scale insect *Coccus viridis* (Green) and *Planococcus minor* (Maskell) as quarantine pests of concern, but we recently established that these pests no longer meets our definition of a quarantine pest and added them to our list [7] of pests that we no longer regulate.

The pests with medium unmitigated risk potential can be readily discerned during inspection of avocados, where inspectors can see either the pests themselves or evidence of their presence. We believe that spread of these pests can be prevented by inspection of a biometric sample of fruit for quarantine pests of concern at the packinghouse facility. However, APHIS has determined that measures beyond standard predeparture inspection are required to mitigate the risks posed by *B. dorsalis.*

Based on the recommendations of the RMD, the systems approach we are proposing would require:

- Registration, monitoring, and oversight of places of production to ensure that the fruit is produced in compliance with requirements of the systems approach;
- An orchard sanitation program under which fallen fruit and culls must be removed from the harvest area;
- Trapping and orchard control for *B. dorsalis* at the place of production;
- A limited harvest period and harvesting requirements to ensure that the fruit are harvested only at the mature green stage with stems attached;
- Post-harvest inspection of a biometric sample of the fruit;
- Packing only at a registered, screened packinghouse that maintains fruit identity and safeguards against infestation;
- Box marking to maintain fruit identity;
- Limited distribution areas for the fruit in the continental United States; and
- A compliance agreement executed in accordance with § 318.13–3(d) in which the grower agrees to comply with all the requirements of the systems approach.

Growers of Sharwil avocados who wish to ship to the continental United States would have to register their orchards and packinghouses with APHIS so that we can ensure that they meet the requirements of the systems approach with regard to their orchards, packinghouses, and operations, as described below. Registration also gives APHIS the opportunity to visit and inspect the premises as necessary to monitor compliance and to ensure that only Sharwil avocado trees are harvested for shipment under this program. During registration, growers also should usually be able to sign the compliance agreement discussed below.

We would require a place of production sanitation program mainly to ensure that fallen and damaged fruit and debris do not facilitate high pest populations, and to ensure that fallen fruit are not inadvertently collected during harvest and packed with intact mature fruit picked from the trees. This is needed because, while *B. dorsalis* infestations in mature green Sharwil with intact stems is very unlikely under natural field conditions, the nature of resistance Sharwil possesses does not ensure that infestation could not occur in overripe, soft, or damaged fruit. For the same reason, we would require that the fruit be harvested only at the mature hard green stage with stems attached.

Beginning at least 1 month before harvest begins and continuing through the completion of harvest, fruit fly traps would have to be maintained in the place of production where the avocados were grown. Specific trapping requirements would be included in the compliance agreement and would be adjusted as necessary to ensure that trapping is effective. APHIS-approved traps baited with APHIS-approved lures would have to be used. The producer would have to keep records of the trap locations and fruit fly finds for each trap and make the records available to APHIS upon request. The records would have to be maintained for at least 1 year. This condition would ensure the earliest possible detection of increasing populations of fruit flies in and around fields where avocados are grown.

Additional specific trapping requirements and actions required if *B. dorsalis* is found in traps would be included in the compliance agreement and would be adjusted as necessary to ensure that trapping is effective. If *B. dorsalis* is detected by the trapping at an actionable rate as specified in the compliance agreement, control actions required by the compliance agreement or ordered by an inspector must be taken. Consistent with the recommendations of the RMD, the compliance agreement would initially require bait sprays approved by APHIS to be used to control fruit flies in the orchard if *B. dorsalis* is detected by the trapping at a rate above 0.4 flies per trap per day.

The harvest period would be limited to November 1 through March 31. Limiting the harvest season will prevent overripe fruit that are more susceptible to pests from entering the pathway. Late in the harvest season, overripe fruit are more likely to be found in the orchard and might be picked by accident.

Packing could be performed only at a registered, screened packinghouse that maintains fruit identity and safeguards against infestation. The fruit would be packed in boxes marked ''Distribution limited to the following States: CO, CT, DE, DC, ID, IL, IN, IA, KS, KY, ME, MD, MA, MI, MN, MO, MT, NE., NH, NJ, NY, ND, OH, PA, RI, SD, UT, VT, VA, WA, WV, WI, and WY.'' The consignment also would be identified in accordance with the requirements of § 318.13–3(g).

Distribution of Sharwil avocados in the continental United States would be limited to 32 northern-tier States and the District of Columbia. The limited distribution would ensure that if any fruit with fruit flies are shipped, the hosts and climate conditions at their destination will not allow them to reproduce.

The allowed destinations would be Colorado, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

We would also require that persons who move avocados in accordance with the regulations would have to sign a compliance agreement agreeing to comply with such conditions as may be required by an inspector in each specific case to prevent infestation of the

[7] This list can be viewed at *http://www.aphis.usda.gov/plant_health/plant_pest_info/frsmp/non-reg-pests.shtml.*

avocados and spread of *B. dorsalis.* This compliance agreement is needed both to aid enforcement and to adapt implementation of the regulations to each distinct situation. Individual compliance agreements would help to ensure that growers are not burdened by requirements if they are not necessary due to the situation or operations at their particular premises. Compliance agreements can also provide detailed guidance on how to comply with regulatory requirements in a grower's particular situation. The nature and operations of compliance agreements are described in the current regulations in § 318.13–3(d). Each compliance agreement will specify safeguards necessary for the particular situation.

Following harvest, a biometric sample of the fruit would be inspected by APHIS following any post-harvest processing. A biometric sample of a size determined by APHIS would be visually inspected for quarantine pests, and a portion of the fruit will be cut open to detect internal pests, including *B. dorsalis.* If any *B. dorsalis* are found, the entire consignment of avocados would be prohibited from movement to the destination States allowed by this rule, and the place of production producing that fruit will be suspended from the interstate shipment program until APHIS conducts an investigation and appropriate remedial actions have been implemented. If any other quarantine pests, but not *B. dorsalis,* are found, the entire consignment of avocados will be prohibited from interstate movement unless it is treated with an approved quarantine treatment monitored by APHIS.

Sharwil avocados produced under this systems approach will be inspected by APHIS as part of predeparture clearance inspections in Hawaii. Infested consignments will be rejected, and APHIS will conduct traceback to identify and correct problems. When necessary, corrective action will include removal of the packinghouse and orchard from the interstate movement program.

Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities.

This proposed rule would allow the interstate movement of untreated Sharwil avocados from Hawaii into the continental United States if the avocados are produced in accordance with a systems approach to prevent the spread of *B. dorsalis* and other pests.

The 2007 Census of Agriculture reported that there were a total of 8,245 avocado farms in the United States, with about 76 percent in California, 13 percent in Hawaii, and 11 percent in Florida. Average gross receipts for California avocado producers for the 2007–08 season was about $52,700, compared to average receipts of about $12,700 for Florida's growers and about $750 for Hawaii's growers. The Small Business Administration's small-entity standard for avocado farms is annual receipts of not more than $750,000. While nearly all U.S. avocado operations are small entities, it is evident that there is significant variation among the three States in average farm size.

We anticipate that Sharwil avocado consignments from Hawaii to the mainland would total about 180 metric tons per year, equivalent to about one-half of 1 percent of the U.S. supply of non-Hass avocados and to less than one-twentieth of 1 percent of the U.S. supply of all avocado varieties. They would be shipped between November and March, supplementing winter supplies.

Hawaii avocado production is estimated at 1.0 million pounds for the 2008–09 season, and 660,000 pounds for the 2009–10 season. The decline appears to be associated with adverse weather conditions.

Avocado production in the United States largely takes place in California, where nearly all of the fruit grown is of the small, dark-colored, rough-skinned Hass variety. In Florida and Hawaii, varieties like the Sharwil, which is much larger and bright green in color, are predominant. Most avocado imports and exports by the United States are Hass. Given our limited understanding of the strength of consumers' preferences for the various avocado varieties (that is, their degree of substitutability), we consider potential effects of the proposed rule for producers of non-Hass varieties as well as for all U.S. avocado farmers.[8]

While the proposed rule would benefit Hawaiian avocado producers by allowing them to use a systems approach to mitigate pest risk, making the sale of Sharwil avocados to the continental United States more economically feasible, the quantity that is expected to be shipped would not significantly affect the mainland avocado market overall or the more limited market for non-Hass varieties. With imports providing one-third of the U.S. supply of non-Hass avocados and two-thirds of the U.S. supply of all avocados, any effects of the proposed rule for U.S. mainland producers would be further muted. Moreover, the Sharwil avocados from Hawaii would be shipped between November and March, when there is increased reliance on foreign suppliers. Any market effects of the proposed rule could be expected to be borne proportionately by avocados supplied from abroad during the winter months.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. APHIS–2012–0008. Please send a copy of your comments to: (1) Docket No. APHIS–2012–0008, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer,

[8] One indicator of distinct markets is sizable price differences. For the four production years 2006–07 through 2009–10, California avocados had an average wholesale price of 96 cents per pound, compared to 70 cents per pound for Hawaii avocados and 30 cents per pound for Florida avocados. (2011 Agricultural Statistics Annual, Table 5–16. *http://www.nass.usda.gov/Publications/Ag_Statistics/2011/Chapter05.pdf*).

OCIO, USDA, room 404–W, 14th Street and Independence Avenue SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

Allowing the interstate movement of Sharwil avocados from Hawaii into the continental United States would require production and packinghouse site registrations, box markings, and compliance agreements. We are soliciting comments from the public (as well as affected agencies) concerning our proposed information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the proposed information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond (such as through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses).

Estimate of burden: Public reporting burden for this collection of information is estimated to average 0.037540 hours per response.

Respondents: Producers and importers of avocados.

Estimated annual number of respondents: 30.

Estimated annual number of responses per respondent: 51.5.

Estimated annual number of responses: 1,545.

Estimated total annual burden on respondents: 58 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this proposed rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

Lists of Subjects in 7 CFR Part 318

Cotton, Cottonseeds, Fruits, Guam, Hawaii, Plant diseases and pests, Puerto Rico, Quarantine, Transportation, Vegetables, Virgin Islands.

Accordingly, we propose to amend 7 CFR part 318 as follows:

PART 318—STATE OF HAWAII AND TERRITORIES QUARANTINE NOTICES

■ 1. The authority citation for part 318 continues to read as follows:

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 7 CFR 2.22, 2.80, and 371.3.

■ 2. A new § 318.13–20 is added to read as follows:

§ 318.13–20 Sharwil avocados from Hawaii to continental United States.

Commercial shipments of Sharwil avocados may be moved interstate from Hawaii to the continental United States without treatment under the following conditions:

(a) *Registration.* Persons wishing to move Sharwil avocados in accordance with this section must register the avocados' place of production and the packinghouse that packs the avocados. A registration form may be obtained from local APHIS offices in Hawaii. Persons registering places of production or packinghouses must agree to allow inspectors access to the places of production and packinghouses as necessary to monitor compliance with this section.

(b) *Grove sanitation.* Avocado fruit that has fallen from the trees must be removed from each place of production at least once every 7 days and in compliance with any schedule specified in the compliance agreement required in paragraph (h) of this section. Fallen avocado fruit may not be included in field containers of fruit brought to the packinghouse to be packed for interstate movement.

(c) *Trapping and orchard control.* (1) Beginning at least 1 month before harvest, the place of production of the avocados must have a trapping system in place for *B. dorsalis* that complies with all conditions specified in the compliance agreement required in paragraph (h) of this section. APHIS-approved traps and APHIS-approved lures must be used, and the place of production or the packinghouse must retain for at least 1 year data regarding the number and location of the traps, as well as any fruit flies that have been caught, and make this information available to APHIS upon request.

(2) If *B. dorsalis* is detected by the trapping at an actionable rate as specified in the compliance agreement, control actions required by the compliance agreement or ordered by an inspector must be taken.

(d) *Harvesting requirements.* Avocados may only be harvested between November 1 and March 31. Avocados must be hard ripe fruit at the mature green stage with stems attached. Fruit must not indent with moderate finger pressure and no part of the fruit shall be soft. The fruit must be moved to a registered packinghouse within 12 hours of harvest or must be protected from fruit fly infestation until moved. The fruit must be safeguarded by an insect-proof screen or plastic tarpaulin while in transit to the packinghouse and while awaiting packing.

(e) *Packinghouse requirements.* During the time registered packinghouses are in use for packing avocados for movement to the continental United States, the packinghouses may only accept avocados that are from registered places of production and that are produced in accordance with the requirements of this section and of the compliance agreement required in paragraph (h) of this section.

(1) Avocados must be packed within 24 hours of harvest in an insect-exclusionary packinghouse. All openings to the outside of the packinghouse must be covered by screening with openings of not more than 1.6 mm or by some other barrier that prevents pests from entering.

(2) Fruit must be packed in insect-proof packaging, or covered with insect-proof mesh or a plastic tarpaulin, for transport to the continental United States. These safeguards must remain intact until arrival in the continental United States.

(3) Fruit boxes must be clearly marked ''Distribution limited to the following States: CO, CT, DE, DC, ID, IL, IN, IA, KS, KY, ME, MD, MA, MI, MN, MO, MT, NE., NH, NJ, NY, ND, OH, PA, RI, SD, UT, VT, VA, WA, WV, WI, and WY'' and each consignment must be identified in accordance with the requirements of § 318.13–3(g).

(f) *Inspection.* A biometric sample of a size determined by APHIS will be visually inspected for quarantine pests by an inspector, and a portion of the fruit will be cut open to detect internal pests, including *B. dorsalis.* If any quarantine pests are found, the entire consignment of avocados will be

prohibited from interstate movement unless it is treated with an approved quarantine treatment monitored by APHIS. If any *B. dorsalis* are found, the entire consignment of avocados will be prohibited from interstate movement, and the place of production producing that fruit will be suspended from the interstate shipment program until APHIS conducts an investigation and appropriate remedial actions have been implemented.

(g) *Limited distribution.* No Sharwil avocados moved under this program may be shipped to locations in the continental United States other than Colorado, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

(h) *Compliance agreement.* Persons wishing to move avocados in accordance with this section must sign a compliance agreement in accordance with § 318.13–3(d) of this part in which he or she agrees to comply with such conditions as may be required by the inspector in each specific case to prevent infestation.

Done in Washington, DC, this 4th day of February 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–02781 Filed 2–6–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No. EERE–2011–BT–TP–0054]

RIN 1904–AC63

Energy Conservation Program: Test Procedures for Residential Clothes Dryers

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The U.S. Department of Energy (DOE) proposes to amend its test procedures for residential clothes dryers established under the Energy Policy and Conservation Act. The proposed amendments would clarify the installation conditions for console lights, the method for measuring the drum capacity, the maximum allowable scale range, and the allowable use of a relative humidity meter.

DATES: DOE will accept comments, data, and information regarding this supplemental notice of proposed rulemaking (SNOPR) no later than March 18, 2013. See section IV, ''Public Participation,'' for details.

ADDRESSES: Any comments submitted must identify the SNOPR on Test Procedures for Residential Clothes Dryers, and provide docket number EERE–2011–BT–TP–0054 and/or regulatory information number (RIN) 1904–AC63. Comments may be submitted using any of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.

2. *Email: RCDAT–2011–TP–0054@ee.doe.gov.* Include docket number EERE–2011–BT–TP–0054 and/or RIN 1904–AC63 in the subject line of the message.

3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 6th Floor, 950 L'Enfant Plaza SW., Washington, DC 20024. Telephone: (202) 586–2945. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

For detailed instructions on submitting comments and additional information on the rulemaking process, see section IV of this document (Public Participation).

Docket: The docket is available for review at *www.regulations.gov,* including **Federal Register** notices, framework documents, public meeting attendee lists and transcripts, comments, and other supporting documents/materials. All documents in the docket are listed in the *www.regulations.gov index.* However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

A link to the docket web page can be found at: *http://www.regulations.gov/#!docketDetail;dct=FR%252BPR%252BN%252BO%252BSR;rpp=10;po=0;D=EERE-2011-BT-TP-0054.* This web page will contain a link to the docket for this notice on the *www.regulations.gov site.* The *www.regulations.gov* web page contains instructions on how to access all documents, including public comments, in the docket. See section IV for information on how to submit comments through *www.regulations.gov.*

For further information on how to submit a comment or review other public comments and the docket, contact Ms. Brenda Edwards at (202) 586-2945 or email: *Brenda.Edwards@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT:

Mr. Stephen Witkowski, U.S. Department of Energy, Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Tel.: (202) 586–7463. Email: *Stephen.Witkowski@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, 1000 Independence Avenue SW., Washington, DC, 20585–0121. Tel.: (202) 586–7796, Email: *Elizabeth.Kohl@hq.doe.gov.*

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I. Authority and Background

Title III of the Energy Policy and Conservation Act (42 U.S.C. 6291, *et seq.;* ''EPCA'' or ''the Act'') sets forth a variety of provisions designed to improve energy efficiency. (All references to EPCA refer to the statute

as amended through the Energy Independence and Security Act of 2007 (EISA 2007), Public Law 110–140 (Dec. 19, 2007)). Part B of title III, which for editorial reasons was re-designated as Part A upon codification in the U.S. Code (42 U.S.C. 6291–6309), establishes the ''Energy Conservation Program for Consumer Products Other Than Automobiles.'' Covered consumer products include clothes dryers, the subject of today's notice. (42 U.S.C. 6292(a)(8))

Under EPCA, this program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. The testing requirements consist of test procedures that manufacturers of covered products must use (1) as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA, and (2) for making representations about the efficiency of those products. Similarly, DOE must use these test requirements to determine whether the products comply with any relevant standards promulgated under EPCA.

A. General Test Procedure Rulemaking Process

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered products. EPCA provides in relevant part that any test procedures prescribed or amended under this section must be reasonably designed to produce test results that measure energy efficiency, energy use or estimated annual operating cost of a covered product during a representative average use cycle or period of use and not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

In addition, if DOE determines that a test procedure amendment is warranted, it must publish proposed test procedures and offer the public an opportunity to present oral and written comments on them. (42 U.S.C. 6293(b)(2)) In any rulemaking to amend a test procedure, DOE must also determine to what extent, if any, the proposed test procedure would alter the measured energy efficiency of any covered product as determined under the existing test procedure. (42 U.S.C. 6293(e))

B. DOE Clothes Dryer Test Procedure

DOE's test procedures for clothes dryers are codified in appendix D and appendix D1 to subpart B of Title 10 of the Code of Federal Regulations (CFR). For background on the establishment of the first DOE test procedure for clothes dryers and subsequent amendments to those procedures, and the rulemaking history for today's supplemental notice of proposed rulemaking (SNOPR), please see the NOPR published on January 2, 2013. (78 FR 152) (January 2013 NOPR). In today's SNOPR, DOE considers inquiries from test laboratories regarding specific provisions in the current clothes dryer test procedures. DOE will provide further response to comments received on the January 2013 NOPR, as appropriate, in any final rule to establish amended test procedures.

II. Discussion

A. Proposals

Console Lights

Section 2.1 in 10 CFR part 430, subpart B, appendices D and D1 specifies for the installation conditions that all console lights or other lighting systems that do not consume more than 10 watts shall be disconnected during the clothes dryer active mode test cycle. DOE received an inquiry requesting clarification of this provision. DOE notes that this provision was originally adopted in a final rule that was published in the **Federal Register** on September 14, 1977 (September 1977 Final Rule). 42 FR 46145, 46146, 46150. DOE intended this provision to apply to an older generation of clothes dryers existing at the time of the September 1977 Final Rule that used task lights to illuminate the area of the dryer for consumers doing the laundry that did not provide any function related to the drying process during the drying cycle. Newer generation clothes dryers equipped with electronic controls may have control setting indicators such as indicator lights showing the cycle progression, temperature or dryness settings, or other cycle functions. In contrast to the task lighting of older generation dryers, these indicator lights associated with cycle settings or the drying operation are fully integrated into the clothes dryer control printed circuit boards (PCBs). In addition, disconnecting such lights would require extracting the control PCB from the dryer and either physically cutting off the indicator lights or destroying their electrical signal traces etched on the PCB.

As a result of these differences, DOE proposes to clarify in section 2.1 in both appendices D and D1 that ''console lights or other lighting systems'' refers to task lights that do not provide any function during the drying cycle related to the drying process, rather than the control setting indicators in newer generation clothes dryers with electronic controls. DOE also proposes to clarify that control setting indicators such as indicator lights showing the cycle progression, temperature or dryness settings, or other cycle functions should not be disconnected during the active mode test cycle.

Drum Capacity Measurements

Section 3.1 in 10 CFR part 430, subpart B, appendices D and D1 specifies that when measuring drum capacity, the drum shall be filled with water to a level determined by the intersection of the door plane and the loading port. In addition, section 3.1 specifies that volume should be added or subtracted as appropriate depending on whether the plastic bag used for the measurement protrudes into the drum interior. DOE received an inquiry requesting clarification of this requirement. In today's SNOPR, DOE is proposing to amend section 3.1 to clarify that, for the measurement of the drum capacity, the intersection of the door plane and the loading port refers to the uppermost edge of the drum that is in contact with the door seal and that volume should be added or subtracted from the measured water fill volume to account for any space in the drum interior not measured by water fill (e.g., space occupied by the door protruding into the drum interior).

Maximum Allowable Scale Range

Section 2.4.1 in Appendix D and Appendix D1 specifies that the weighing scale for the test cloth shall have a range of 0 to a maximum of 30 pounds with a resolution of at least 0.2 ounces and a maximum error no greater than 0.3 percent of any measured value within the range of 3 to 15 pounds. Similarly, section 2.4.1.2 in Appendix D and Appendix D1 specifies that the weighing scale for drum capacity measurements should have a range of 0 to a maximum of 500 pounds with resolution of 0.50 pounds and a maximum error no greater than 0.5 percent of the measured value. DOE received an inquiry requesting clarification of this requirement. DOE recognizes that scales for weighing the test cloth may have maximum capacity higher than 30 pounds, but still meet the requirements for resolution and maximum error within the range of 3 to 15 pounds, as specified in the test procedure. DOE also recognizes that a clothes dryer, when filled with water for the drum capacity measurement, could exceed 500 pounds. As a result, DOE proposes in this SNOPR to allow a higher maximum scale range, 60 pounds for weighing the test cloth and 600 pounds for drum capacity

measurements. The resolution and maximum error requirements would remain unchanged.

Relative Humidity Meter

Section 2.4.4 in Appendix D and Appendix D1 specifies that the dry and wet bulb psychrometer used for measuring the ambient humidity shall have an error no greater than ± 1 degrees Fahrenheit (°F). DOE received an inquiry requesting clarification of this provision. DOE recognizes that relative humidity meters may be an acceptable means to measure the ambient humidity. DOE also recognizes that some humidity meters may express error tolerances in terms of the dry and wet bulb temperatures, while others express error tolerances in terms of percent relative humidity. As a result, DOE evaluated how the ± 1°F tolerance for the dry and wet bulb temperatures translates to relative humidity. DOE determined, based on the allowable range in ambient temperature (72 to 78°F) and ambient humidity (40 to 60 percent relative humidity) specified in the DOE test procedure, that a ± 1°F tolerance for the dry and wet bulb temperatures would translate to a tolerance between ± 2 percent and ± 4 percent relative humidity. As a result, DOE proposes that a relative humidity meter with a maximum error tolerance expressed in °F equivalent to the requirements the dry and wet bulb psychrometer or with a maximum error tolerance of ± 2 percent relative humidity would be acceptable for testing.

B. Compliance With Other EPCA Requirements

EPCA requires that test procedures shall be reasonably designed to produce test results which measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use. Test procedures must also not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) DOE is only proposing to amend 10 CFR part 430 subpart B, appendices D and D1 in today's SNOPR to clarify the installation conditions for console lights, the method for measuring the drum capacity, the maximum allowable scale range, and the allowable use of a relative humidity meter. Because the proposed amendments would not change the actual testing method and provide additional options for instrumentations while requiring the same resolution and accuracy, DOE does not believe the proposed amendments in today's SNOPR would result in any added test burden on manufacturers as compared to the current DOE clothes dryer test procedures in 10 CFR part 430, subpart B, appendices D and D1.

EPCA requires that DOE determine whether a proposed test procedure amendment would alter the measured efficiency of a product, thereby requiring adjustment of existing standards. (42 U.S.C. 6293(e)) As discussed above, DOE is only proposing to amendments in today's SNOPR to clarify the installation conditions for console lights, the method for measuring the drum capacity, the maximum allowable scale range, and the allowable use of a relative humidity meter. Because the proposed amendments would not change the actual testing method, DOE has determined that the proposed amendments would not alter the measured efficiency. DOE is, therefore, not considering amendments to the clothes dryer energy conservation standards at 10 CFR 430.32(h)(2)–(3).

III. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

The Office of Management and Budget has determined that test procedure rulemakings do not constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

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 (RFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE's procedures and policies may be viewed on the Office of the General Counsel's Web site (*http://energy.gov/gc/office-general-counsel*). DOE reviewed today's SNOPR under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003.

In conducting this review, DOE first determined the potential number of affected small entities. The Small Business Administration (SBA) considers an entity to be a small business if, together with its affiliates, it employs fewer than the threshold number of workers specified in 13 CFR part 121 according to the North American Industry Classification System (NAICS) codes. The SBA's Table of Size Standards is available at: *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf*. The threshold number for NAICS classification 335224, *Household Laundry Equipment Manufacturing,* which includes clothes dryer manufacturers, is 1,000 employees.

As discussed in the January 2013 NOPR, DOE initially identified at least 14 manufacturers of residential clothes dryers that sold products in the United States. DOE determined that 13 of these companies exceeded the SBA's maximum number of employees or were foreign-owned and operated. Thus, DOE identified only one potential small business manufacturer of residential clothes dryers. DOE could not locate this manufacturer on the dynamic small business search on the SBA Web site, but DOE nonetheless considered the economic impacts of the proposed test procedure amendments on this potential small business manufacturer. 78 FR 152, 178 (January 2, 2013).

As discussed in section II.A, DOE is only proposing to amend 10 CFR part 430 subpart B, appendices D and D1 today's SNOPR to clarify the installation conditions for console lights, the method for measuring the drum capacity, the maximum allowable scale range, and the allowable use of a relative humidity meter. Because the proposed amendments would not change the actual testing method and provide additional options for instrumentations while requiring the same resolution and accuracy, DOE does not believe the proposed amendments in today's SNOPR would result in any added test burden on manufacturers as compared to the current DOE clothes dryer test procedures in 10 CFR part 430, subpart B, appendices D and D1. For these reasons, DOE certifies that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE seeks comment on the certification set forth above, and will

transmit the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the SBA for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of clothes dryers must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for clothes dryers, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including clothes dryers. (76 FR 12422 (March 7, 2011). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

In this SNOPR, DOE is proposing to adopt test procedure amendments that it expects will be used to develop and implement future energy conservation standards for clothes dryers. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this proposed rule would amend the existing test procedures without affecting the amount, quality or distribution of energy usage, and, therefore, would not result in any environmental impacts. Thus, this rulemaking is covered by Categorical Exclusion A5 under 10 CFR part 1021, subpart D, which applies to any rulemaking that interprets or amends an existing rule without changing the environmental effect of that rule. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

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. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has determined that it 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. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's SNOPR. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *http://energy.gov/gc/office-general-counsel* DOE examined today's SNOPR according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This 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.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859 (March 18, 1988), that this regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's SNOPR under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any 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 alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's regulatory action to amend the test procedure for measuring the energy efficiency of clothes dryers is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the DOE Organization Act (Pub. L. 95–91), DOE must comply with section 32 of the Federal Energy Administration Act of 1974 (Pub. L. 93–275), as amended by the Federal Energy Administration Authorization Act of 1977 (FEAA; Pub. L. 95–70) (15 U.S.C. 788). Section 32 essentially provides that, where a rule authorizes or requires use of commercial standards, the rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition. The amendments proposed in today's SNOPR do not authorize or require the use of any commercial standards.

IV. Public Participation

A. Submission of Comments

DOE will accept comments, data, and information regarding this SNOPR no later than the date provided in the DATES section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this notice.

Submitting comments via regulations.gov. The regulations.gov Web page will require you to provide your name and contact information. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment.

Do not submit to regulations.gov information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through regulations.gov cannot be claimed as CBI. Comments received through the Web site will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section below.

DOE processes submissions made through regulations.gov before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that regulations.gov provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery, or mail. Comments and documents submitted via email, hand delivery, or mail also will be posted to regulations.gov. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and are free of any defects or viruses. Documents

should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: one copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

B. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties on the following issues:

1. Console Lights

DOE seeks comment on the proposal to clarify in the installation conditions that console lights or other lighting systems refer to task lights that do not provide any function during the drying cycle related to the drying process and that control setting indicator lights associated with the drying operation or cycle settings that are fully integrated into the clothes dryer controls would not be disconnected during the active mode test cycle. (*See* section II.A)

2. Drum Capacity Measurement

DOE seeks comment on the proposal to clarify for the drum capacity measurement that the intersection of the door plane and the loading port refers to the uppermost edge of the drum that is in contact with the door seal and that volume should be added or subtracted from the measured water fill volume to account for the space in the drum interior not measured by the water fill, such as the space occupied by the door. DOE also seeks comment on how the volume to be added or subtracted should be measured. (*See* section II.A)

3. Maximum Scale Range

DOE seeks comment on its proposal to increase the maximum allowable scale range, while retaining the resolution and maximum error requirements.

4. Relative Humidity Meter

DOE seeks comment on its proposal that a relative humidity meter with a maximum error tolerance expressed in °F equivalent to the existing requirements the dry and wet bulb psychrometer or with a maximum error tolerance of ± 2 percent relative humidity would be acceptable for testing.

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this supplemental notice of proposed rulemaking.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on January 31, 2013.

Kathleen B. Hogan,

Deputy Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons stated in the preamble, DOE is proposing to amend part 430 of title 10 of the Code of Federal Regulations, as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Appendix D to Subpart B of Part 430 is amended:

■ a. In section 2. *Testing Conditions,* by revising section 2.1, 2.4.1, 2.4.1.2, and 2.4.4; and

■ b. In section 3. *Test Procedures and Measurements,* by revising section 3.1.

The revisions read as follows:

Appendix D to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Clothes Dryers

* * * * *

2. Testing Conditions

2.1 *Installation.* Install the clothes dryer in accordance with manufacturer's instructions. The dryer exhaust shall be restricted by adding the AHAM exhaust simulator described in 3.3.5 of HLD–1. All external joints should be taped to avoid air leakage. Disconnect all lights, such as task lights, that do not provide any information related to the drying process on the clothes dryer which do not consume more than 10 watts during the clothes dryer test cycle. Control setting indicator lights showing the cycle progression, temperature or dryness settings, or other cycle functions that cannot be turned off during the test cycle shall not be disconnected during the active mode test cycle.

* * * * *

2.4.1 *Weighing scale for test cloth.* The scale shall have a range of 0 to a maximum of 60 pounds with a resolution of at least 0.2 ounces and a maximum error no greater than 0.3 percent of any measured value within the range of 3 to 15 pounds.

2.4.1.2 *Weighing scale for drum capacity measurements.* The scale should have a range of 0 to a maximum of 600 pounds with resolution of 0.50 pounds and a maximum error no greater than 0.5 percent of the measured value.

* * * * *

2.4.4 *Dry and wet bulb psychrometer.* The dry and wet bulb psychrometer shall have an error no greater than ±1 °F. A relative humidity meter with a maximum error tolerance expressed in °F equivalent the requirements the dry and wet bulb psychrometer or with a maximum error tolerance of ± 2 percent relative humidity would be acceptable for measuring the ambient humidity.

* * * * *

3. Test Procedures and Measurements

3.1 *Drum Capacity.* Measure the drum capacity by sealing all openings in the drum except the loading port with a plastic bag, and ensure that all corners and depressions are filled and that there are no extrusions of the plastic bag through the opening in the

drum. Support the dryer's rear drum surface on a platform scale to prevent deflection of the dryer, and record the weight of the empty dryer. Fill the drum with water to a level determined by the intersection of the door plane and the loading port (*i.e.,* the uppermost edge of the drum that is in contact with the door seal). Record the temperature of the water and then the weight of the dryer with the added water and then determine the mass of the water in pounds. Add or subtract the appropriate volume based on the space in the drum interior to account for any space in the drum interior not measured by water fill (e.g., space occupied by the door or the space above the uppermost edge of the drum within a curved door). The drum capacity is calculated as follows:

$C = w/d +/- \text{ volume adjustment}$

C = capacity in cubic feet.

w = mass of water in pounds.

d = density of water at the measured temperature in pounds per cubic feet.

* * * * *

■ 3. Appendix D1 to Subpart B of Part 430 is amended:

■ a. In section 2. *Testing Conditions,* by revising sections 2.1, 2.4.1, 2.4.1.2, and 2.4.4; and

■ b. In section 3. *Test Procedures and Measurements,* by revising sections 3.1 and 3.6.

The additions and revisions read as follows:

Appendix D1 to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Clothes Dryers

* * * * *

2. Testing Conditions

2.1 *Installation.* Install the clothes dryer in accordance with manufacturer's instructions. For conventional clothes dryers, as defined in 1.7, the dryer exhaust shall be restricted by adding the AHAM exhaust simulator described in 3.3.5.1 of AHAM HLD–1 (incorporated by reference; see § 430.3). For ventless clothes dryers, as defined in 1.19, the dryer shall be tested without the AHAM exhaust simulator. Where the manufacturer gives the option to use the dryer both with and without a duct, the dryer shall be tested without the exhaust simulator. All external joints should be taped to avoid air leakage. If the manufacturer gives the option to use a ventless clothes dryer, as defined in 1.19, with or without a condensation box, the dryer shall be tested with the condensation box installed. For ventless clothes dryers, the condenser unit of the dryer must remain in place and not be taken out of the dryer for any reason between tests. For drying testing, disconnect all lights, such as task lights, that do not provide any information related to the drying process on the clothes dryer which do not consume more than 10 watts during the clothes dryer test cycle. Control setting indicator lights showing the cycle progression, temperature or dryness settings, or other cycle functions that cannot be turned off during the test cycle shall not be disconnected during the active mode test cycle. For standby and off mode testing, the clothes dryer shall also be installed in accordance with section 5, paragraph 5.2 of IEC 62301 (incorporated by reference; see § 430.3). For standby and off mode testing, do not disconnect console lights or other lighting systems.

* * * * *

2.4.1 *Weighing scale for test cloth.* The scale shall have a range of 0 to a maximum of 60 pounds with a resolution of at least 0.2 ounces and a maximum error no greater than 0.3 percent of any measured value within the range of 3 to 15 pounds.

2.4.1.2 *Weighing scale for drum capacity measurements.* The scale should have a range of 0 to a maximum of 600 pounds with resolution of 0.50 pounds and a maximum error no greater than 0.5 percent of the measured value.

* * * * *

2.4.4 *Dry and wet bulb psychrometer.* The dry and wet bulb psychrometer shall have an error no greater than ±1 °F. A relative humidity meter with a maximum error tolerance expressed in °F equivalent the requirements the dry and wet bulb psychrometer or with a maximum error tolerance of ± 2 percent relative humidity would be acceptable for measuring the ambient humidity.

* * * * *

3. Test Procedures and Measurements

3.1 *Drum Capacity.* Measure the drum capacity by sealing all openings in the drum except the loading port with a plastic bag, and ensuring that all corners and depressions are filled and that there are no extrusions of the plastic bag through the opening in the drum. Support the dryer's rear drum surface on a platform scale to prevent deflection of the drum surface, and record the weight of the empty dryer. Fill the drum with water to a level determined by the intersection of the door plane and the loading port (*i.e.,* the uppermost edge of the drum that is in contact with the door seal). Record the temperature of the water and then the weight of the dryer with the added water and then determine the mass of the water in pounds. Add or subtract the appropriate volume based on the space in the drum interior to account for any space in the drum interior not measured by water fill (e.g., space occupied by the door or the space above the uppermost edge of the drum within a curved door). The drum capacity is calculated as follows:

$C = w/d +/- \text{ volume adjustment}$

C = capacity in cubic feet.

w = mass of water in pounds.

d = density of water at the measured temperature in pounds per cubic feet.

* * * * *

3.6 *Standby mode and off mode power.* Establish the testing conditions set forth in Section 2 ''Testing Conditions'' of this appendix, except that all lighting systems shall remain connected. If the clothes dryer waits in a higher power state at the start of standby mode or off mode before dropping to a lower power state, as discussed in section 5, paragraph 5.1, note 1 of IEC 62301 (incorporated by reference; see § 430.3),wait until the clothes dryer passes into the lower power state before starting the measurement. Follow the test procedure specified in section 5, paragraph 5.3 of IEC 62301 for testing in each possible mode as described in 3.6.1 and 3.6.2, except allow the product to stabilize for 30 to 40 minutes and use an energy use measurement period of 10 minutes. For units in which power varies over a cycle, as described in section 5, paragraph 5.3.2 of IEC 62301, use the average power approach described in paragraph 5.3.2(a) of IEC 62301, except allow the product to stabilize for 30 to 40 minutes and use an energy use measurement period not less than 10 minutes.

* * * * *

[FR Doc. 2013–02749 Filed 2–6–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

10 CFR Part 431

[Docket No. EERE–2012–BT–DET–0033]

RIN 1904–AC83

Energy Conservation Program for Consumer Products and Certain Commercial and Industrial Equipment: Proposed Determination of Commercial and Industrial Compressors as Covered Equipment

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of reopening of public comment period.

SUMMARY: This notice announces that the period for submitting comments to the notice of proposed determination, published December 31, 2012, about commercial and industrial compressors is reopening to February 28, 2013.

DATES: The Department of Energy will accept comments, data, and information about the notice of proposed determination, but no later than February 28, 2013.

ADDRESSES: Interested persons may submit comments, identified by docket number EERE–2012–BT–DET–0033 or RIN 1904–AC83, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: CompressorsDetermination.2012DET0033@ee.doe.gov.* Include EERE–2012–BT–DET–0033 and/or RIN 1904–AC83 in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. Please submit one signed original paper copy.

• *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

Instructions: All submissions received must include the agency name and docket number or RIN for this rulemaking.

Docket: The docket is available for review at *www.regulations.gov,* including **Federal Register** notices, comments, and other supporting documents/materials. All documents in the docket are listed in the *http://www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

A link to the docket Web page can be found at: *http://www.regulations.gov* docket no. EERE–2012–BT–DET–0033. This Web page contains a link to the docket for this notice on the *http://www.regulations.gov* site that contains instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Mr. James Raba, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121, Telephone: (202) 586–8654. Email: *Jim.Raba@ee.doe.gov.*

In the Office of General Counsel, contact Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue SW., Washington, DC 20585. Telephone: (202) 586–7796. Email: *Elizabeth.Kohl@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: On December 31, 2012, the Department of Energy (DOE) published in the **Federal Register** (77 FR 76972) a notice of proposed determination that commercial and industrial compressors meet the criteria for covered equipment under Part A–1 of Title III of the Energy Policy and Conservation Act, as amended. The proposed determination provided for the submission of comments no later than January 30, 2013. On January 24, 2013, Edison Electric Institute (EEI) requested an extension of the deadline to provide its comments. EEI raised concerns about the proposed definition of the term ''compressor'' and the scope of proposed coverage for commercial and industrial compressors. To allow sufficient time for review of such public notice and thereby enable EEI to provide meaningful comments in response to the proposed coverage determination for commercial and industrial compressors, it requested an extension of the comment period.

In view of the EEI request on January 24 and public notice of the availability of the *Energy Conservation Standards Rulemaking Framework Document for Commercial and Industrial Pumps* on January 25, 2013, at *www.regulations.gov,* docket identifier EERE–2011–BT–STD–0031–0013; and thereafter on January 28, 2013, the public notice of the availability of the *Energy Conservation Standards Rulemaking Framework for Commercial and Industrial Fans and Blowers,* at *www.regulations.gov,* docket identifier EERE–2013–BT–STD–0006–0001, DOE has determined that a reopening of the public comment period is appropriate based on the foregoing reasons and is hereby reopening the comment period for its proposed determination for commercial and industrial compressors as covered equipment. DOE will consider any comments received by February 28, 2013 and deems any comments received between January 30, 2013 and February 28, 2013 to be timely submitted.

Further Information on Submitting Comments

Under 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: One copy of the document including all the information believed to be confidential, and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include (1) A description of the items, (2) whether and why such items are customarily treated as confidential within the industry, (3) whether the information is generally known by or available from other sources, (4) whether the information has previously been made available to others without obligation concerning its confidentiality, (5) an explanation of the competitive injury to the submitting person which would result from public disclosure, (6) when such information might lose its confidential character due to the passage of time, and (7) why disclosure of the information would be contrary to the public interest.

Issued in Washington, DC, on January 31, 2013.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

[FR Doc. 2013–02755 Filed 2–6–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0089; Directorate Identifier 2012–NM–166–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company 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 The Boeing Company Model 747–400 series airplanes. This proposed AD was prompted by reports of auxiliary power unit (APU) faults due to power feeder cable chafing. This proposed AD would require detailed inspections for damage of the APU power feeder cables; replacing the clamps and installing grommets; and related investigative and corrective actions if necessary. We are proposing this AD to detect and correct chafing of the APU power feeder cables within a flammable fluid leakage zone, which, with arcing, could result in fire and structural damage.

DATES: We must receive comments on this proposed AD by March 25, 2013.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

• *Fax:* 202–493–2251.

• *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

• *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207;

telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Georgios Roussos, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, Seattle Aircraft Certification Office, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6482; fax: 425–917–6590; email: *georgios.roussos@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2013–0089; Directorate Identifier 2012–NM–166–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We received reports of APU faults. Investigations showed that the power feeder cables on APU generator number 2 had damage from chafing at station 2638. The cables showed evidence of a hot short to the adjacent structure, which had damage from arcs. An investigation showed that the location and configuration of the existing clamps must be changed, and protective grommets must be installed on the structure to prevent possible chafing. Chafing and subsequent arcing occurred in a flammable leakage zone. This condition, if not corrected, could result in chafing of the APU power feeder cables within a flammable fluid leakage zone, which, with arcing, could result in fire and structural damage.

Relevant Service Information

We reviewed Boeing Alert Service Bulletin 747–24A2360, Revision 1, dated May 2, 2012. For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for Docket No. FAA–2013–0089.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of these same type designs.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously.

The phrase ''related investigative actions'' might be used in this proposed AD. ''Related investigative actions'' are follow-on actions that: (1) Are related to the primary actions, and (2) are actions that further investigate the nature of any condition found. Related investigative actions in an AD could include, for example, inspections.

In addition, the phrase ''corrective actions'' might be used in this proposed AD. ''Corrective actions'' are actions that correct or address any condition found. Corrective actions in an AD could include, for example, repairs.

Costs of Compliance

We estimate that this proposed AD affects 55 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection, and clamp and grommet replacement.	6 work-hours × $85 per hour = $510 per inspection cycle.	$70	$580 per inspection cycle	$31,900 per inspection cycle.

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions 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 this proposed regulation:

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

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

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities

under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2013–0089; Directorate Identifier 2012–NM–166–AD.

(a) Comments Due Date

We must receive comments by March 25, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 747–400 series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin 747–24A2360, Revision 1, dated May 2, 2012.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 24, Electrical Power.

(e) Unsafe Condition

This AD was prompted by reports of auxiliary power unit (APU) faults due to power feeder cable chafing. We are issuing this AD to detect and correct chafing of the APU power feeder cables within a flammable fluid leakage zone, which, with arcing, could result in fire and structural damage.

(f) Compliance

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

(g) Inspection, Related Investigative and Corrective Actions

Except as required by paragraph (h)(2) of this AD, within the compliance time specified in paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–24A2360, Revision 1, dated May 2, 2012: Do a detailed inspection for damage (e.g., surface finish integrity, excessive wear or possible heat damage) of the APU power feeder cables within each wire bundle on the left and right of the bulkhead, and do all applicable related investigative and corrective actions, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–24A2360, Revision 1, dated May 2, 2012; except as required by paragraph (h)(1) of this AD. If no damage is found during this inspection, before further flight, replace the clamp(s) and install grommets, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–24A2360, Revision 1, dated May 2, 2012. Do all applicable related investigative and correction actions before further flight.

(h) Exceptions to the Service Information

(1) If any damage is found during any inspection required by this AD, and Boeing Alert Service Bulletin 747–24A2360, Revision 1, dated May 2, 2012, specifies to contact Boeing for appropriate action: Before further flight, repair the damage using a method approved in accordance with paragraph (k) of this AD.

(2) Where Boeing Alert Service Bulletin 747–24A2360, Revision 1, dated May 2, 2012, specifies a compliance time after the date on the service bulletin, this AD requires compliance within the specified compliance time after the effective date of this AD.

(i) Parts Installation Limitation

As of the effective date of this AD, no person may install, on any airplane, any wiring support clamp, except for part number TA025097L16, in any area of the airplane, as specified in Boeing Alert Service Bulletin 747–24A2360, Revision 1, dated May 2, 2012.

(j) 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 Boeing Alert Service Bulletin 747–24A2360, dated January 18, 2012, which is not incorporated by reference in this AD.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

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

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

(l) Related Information

(1) For more information about this AD, contact Georgios Roussos, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, Seattle Aircraft Certification Office, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6482; fax: 425–917–6590; email: *georgios.roussos@faa.gov.*

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

Issued in Renton, Washington, on January 19, 2013.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–02717 Filed 2–6–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0056; Directorate Identifier 2012–NE–48–AD]

RIN 2120–AA64

Airworthiness Directives; Hamilton Sundstrand Corporation Propellers

ACTION: Notice of proposed rulemaking (NPRM), DOT.

SUMMARY: We propose to adopt a new airworthiness directive (AD) for Hamilton Sundstrand Corporation 14SF–7, 14SF–15, and 14SF–23 series propellers using certain Hamilton Sundstrand Corporation auxiliary pumps and motors (auxiliary feathering pumps). This proposed AD was prompted by a report of a propeller not moving into the feathering position after an engine in-flight shutdown. This proposed AD would require removing certain serial numbers (S/Ns) of auxiliary feathering pumps from service. We are proposing this AD to prevent propellers from failing to move into the feathering position after an engine in-flight shutdown. Propellers failing to feather can cause high drag on the propeller, asymmetric thrust, and difficulty of, or impossibility in, controlling the airplane.

DATES: We must receive comments on this proposed AD by March 25, 2013.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

For service information identified in this proposed AD, contact Hamilton Sundstrand Propeller Technical Team, One Hamilton Road, Mail Stop 1–3–AB43, Windsor Locks, CT 06096–1010; fax: 860–654–5107. You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Michael Schwetz, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7761; fax: 781–238–7170; email: *michael.schwetz@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2013–0056; Directorate Identifier 2012–NE–48–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We received a report of an engine in-flight shutdown on a Bombardier DHC–8–400 airplane, where the propeller did not move into the feathering position. Bombardier was in contact with Hamilton Sundstrand Corporation inquiring about the auxiliary feathering pump used on the Hamilton Sundstrand Corporation propellers. Hamilton Sundstrand Corporation found the auxiliary feathering pump used on their 14SF series propeller is a similar design as that used on the DHC–8–400 airplane. The Hamilton Sundstrand investigation revealed some of their auxiliary feathering pump motors had internal corrosion that may cause the stator magnets in the pump motor to fail and rotate into the path of the armature, preventing the pump from feathering the propeller. This condition, if not corrected, could result in propellers failing to feather, causing high drag on the propeller, asymmetric thrust, and difficulty of, or impossibility in, controlling the airplane.

Relevant Service Information

We reviewed Hamilton Sundstrand Corporation Alert Service Bulletin (ASB) No. 14SF–61–A165, dated September 25, 2012. The ASB lists by S/N the affected Hamilton Sundstrand Corporation auxiliary feathering pumps, part number (P/N) 782655–3 (Aerocontrolex P/N 4122–006009) and provides instructions for getting the pumps modified.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require removing the affected auxiliary feathering pumps from service.

Costs of Compliance

We estimate that this proposed AD affects 284 Hamilton Sundstrand Corporation 14SF–7, 14SF–15, and 14SF–23 series propellers using affected auxiliary feathering pumps installed on airplanes of U.S. registry. We also estimate that it would take about 1.5 hours per propeller to comply with this proposed AD. The average labor rate is $85 per hour. Required parts cost is $6,000 per propeller. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $1,740,210.

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 to the extent that it justifies making a regulatory distinction.

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Hamilton Sundstrand Corporation: Docket No. FAA–2013–0056; Directorate Identifier 2012–NE–48–AD.

(a) Comments Due Date

We must receive comments by March 25, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Hamilton Sundstrand Corporation 14SF–7, 14SF–15, and 14SF–23 series propellers, using Hamilton Sundstrand Corporation auxiliary pumps and motors (auxiliary feathering pumps), part number (P/N) 782655–3 (Aerocontrolex P/N 4122–006009), with the following serial numbers (S/Ns):

(1) S/Ns 1 through 365, excluding 95, 108, 122, 177, 193, 278, 285, 293, 297, 310, and 362.

(2) S/Ns 366 through 710, excluding 387, 405, 423, 481, 506, 574, 584, 596, 632, and 669.

(3) S/Ns 711 through 1035, excluding 733, 824, 852, and 994.

(4) S/Ns 1036 through 1475, excluding 1038, 1054, 1081, 1086, 1098, and 1177.

(5) S/Ns 1476 through 1615, excluding 1523.

(6) S/Ns 4516 through 4521.

(d) Unsafe Condition

This AD was prompted by a report of a propeller not moving into the feathering position after an engine in-flight shutdown. We are issuing this AD to prevent propellers from failing to move into the feathering position after an engine in-flight shutdown. Propellers failing to feather can cause high drag on the propeller, asymmetric thrust, and difficulty of or impossibility in controlling the airplane.

(e) Compliance

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

(f) Auxiliary Feathering Pump Removal

Remove the affected auxiliary feathering pumps from service at the following:

(1) Not later than April 30, 2013, for the affected S/Ns listed in paragraph (c)(1) of this AD.

(2) Not later than October 31, 2013, for the affected S/Ns listed in paragraph (c)(2) of this AD.

(3) Not later than April 30, 2014, for the affected S/Ns listed in paragraph (c)(3) of this AD.

(4) Not later than October 31, 2014, for the affected S/Ns listed in paragraph (c)(4) of this AD.

(5) Not later than April 30, 2015, for the affected S/Ns listed in paragraph (c)(5) of this AD.

(6) Not later than April 30, 2014, for the affected S/Ns listed in paragraph (c)(6) of this AD.

(g) Installation Prohibition

After the effective date of this AD, do not install any auxiliary feathering pump listed as affected in paragraph (c) this AD, unless the auxiliary feathering pump has been properly modified. Properly modified auxiliary feathering pumps will have the letter ''M'' following the pump S/N, as described in Hamilton Sundstrand Corporation Alert Service Bulletin No. 14SF–61–A165, dated September 25, 2012.

(h) Alternative Methods of Compliance (AMOCs)

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

(i) Related Information

(1) For more information about this AD, contact Michael Schwetz, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7761; fax: 781–238–7170; email: *michael.schwetz@faa.gov.*

(2) For service information identified in this AD, contact Hamilton Sundstrand Propeller Technical Team, One Hamilton Road, Mail Stop 1–3–AB43, Windsor Locks, CT 06096–1010; fax: 860–654–5107. You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Issued in Burlington, Massachusetts, on January 29, 2013.

Colleen M. D'Alessandro,

Assistant Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2013–02719 Filed 2–6–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1329; Directorate Identifier 2012–NE–46–AD]

RIN 2120–AA64

Airworthiness Directives; Engine Alliance Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Engine Alliance GP7270 and GP7277 turbofan engines. This proposed AD was prompted by damage to the high-pressure compressor (HPC) stage 7–9 spool caused by failure of the baffle plate feature on affected HPC stage 6 disks. This proposed AD would require initial and repetitive borescope inspections of the baffle plate feature and removal from service of the HPC stage 6 disk before further flight, if the plate is missing material. This proposed AD would also require mandatory removal from service of these HPC stage 6 disks at the next HPC module exposure. We are proposing this AD to prevent uncontained failure of the HPC stage 7–9 spool, uncontained engine failure, and damage to the airplane.

DATES: We must receive comments on this proposed AD by April 8, 2013.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

For service information identified in this proposed AD, contact Engine Alliance, 411 Silver Lane, East Hartford, CT 06118, phone: 800–565–0140; Web site: *https://www.engine allianceportal.com.* You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Martin Adler, Aerospace Engineer, Engine & Propeller Directorate, FAA, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7157; fax: 781–238–7199; email: *martin.adler@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–1329; Directorate Identifier 2012–NE–46–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We received reports of the baffle plate feature failing on HPC stage 6 disks, part number (P/N) 382–100–505–0 from high cycle fatigue. The failures resulted in material from the baffle plate feature causing damage to the HPC stage 7–9 spool, causing the spool to crack. Engine Alliance has introduced a redesigned HPC stage 6 disk with a different P/N, to eliminate the failures. This condition, if not corrected, could result in uncontained failure of the HPC stage 7–9 spool, uncontained engine failure, and damage to the airplane.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require initial and repetitive borescope inspections of the HPC stage 6 disk baffle plate feature and removal from service of any HPC stage 6 disk, P/N 382–100–505–0, before further flight if the feature is missing any material. This proposed AD would also require mandatory removal from service of these HPC stage 6 disks at the next HPC module exposure, but no later than accumulating 6,800 cycles-since-new on the disk.

Costs of Compliance

We estimate that this proposed AD would affect no engines installed on airplanes of U.S. registry, and the cost to U.S. operators to be $0.

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 to the extent that it justifies making a regulatory distinction, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Engine Alliance: Docket No. FAA–2012–1329; Directorate Identifier 2012–NE–46–AD.

(a) Comments Due Date

We must receive comments by April 8, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Engine Alliance GP7270 and GP7277 turbofan engines with a high-pressure compressor (HPC) stage 6 disk, part number (P/N) 382–100–505–0, installed.

(d) Unsafe Condition

This AD was prompted by damage to the HPC stage 7–9 spool caused by failure of the baffle plate feature on affected HPC stage 6 disks. We are issuing this AD to prevent uncontained failure of the HPC stage 7–9 spool, uncontained engine failure, and damage to the airplane.

(e) Compliance

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

(f) Borescope Inspections

(1) For HPC stage 6 disks with fewer than 1,000 cycles-since-new (CSN) on the effective date of this AD, initially borescope inspect the baffle plate feature on the disk (360 degrees) before accumulating 1,500 CSN.

(2) For HPC stage 6 disks with 1,000 CSN or more on the effective date of this AD, initially borescope inspect the baffle plate feature on the disk (360 degrees) within the next 500 cycles-in-service (CIS).

(3) Thereafter, repetitively borescope inspect the baffle plate feature on the disk (360 degrees) within every 500 CIS.

(4) Remove the HPC stage 6 disk before further flight if found cracked or with missing material.

(g) Mandatory Removal From Service of Affected HPC Stage 6 Disks

At next HPC module exposure, but not to exceed 6,800 CSN on the HPC stage 6 disk, remove the HPC stage 6 disk, P/N 382–100–505–0, from service.

(h) Installation Prohibition

After the effective date of this AD, do not install any HPC stage 6 disk, P/N 382–100–505–0, into any HPC module.

(i) Definition

For the purpose of this AD, HPC module exposure is defined as separation of the flanges between the compressor case and the combustion diffuser case.

(j) Alternative Methods of Compliance (AMOCs)

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

(k) Related Information

(1) For more information about this AD, contact Martin Adler, Aerospace Engineer, Engine & Propeller Directorate, FAA, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7157; fax: 781–238–7199; email: *martin.adler@faa.gov.*

(2) Engine Alliance Service Bulletin No. EAGP7–72–236, pertains to the subject of this AD.

(3) For service information identified in this AD, contact Engine Alliance, 411 Silver Lane, East Hartford, CT 06118, phone: 800–565–0140; Web site: https://www.enginealliance portal.com. You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Issued in Burlington, Massachusetts, on January 28, 2013.

Robert J. Ganley,

Acting Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2013–02721 Filed 2–6–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0776; Directorate Identifier 2009–NE–32–AD]

RIN 2120–AA64

Airworthiness Directives; Dowty Propellers Propellers

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to revise an existing airworthiness directive (AD) that applies to all Dowty Propellers R408/6–123–F/17 model propellers. The existing AD currently requires initial applications of sealant between the bus bar assembly and the backplate assembly of certain line-replaceable units (LRUs), and repetitive applications of sealant on all R408/6–123–F/17 model propellers. Since we issued that AD, Dowty Propellers has introduced an optional terminating action to the applications of sealant. This proposed AD would add the optional terminating action. We are proposing this AD to prevent an in-flight double generator failure, which could result in reduced controllability of the airplane.

DATES: We must receive comments on this proposed AD by April 8, 2013.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

For service information identified in this AD, contact Dowty Propellers, Anson Business Park, Cheltenham Road East, Gloucester GL 29QN, UK; phone: 44 (0) 1452 716000; fax: 44 (0) 1452 716001. You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Michael Schwetz, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7761; fax 781–238–7170; e- mail: *michael.schwetz@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2009–0776; Directorate Identifier 2009–NE–32–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On August 5, 2010, we issued AD 2010–17–11, Amendment 39–16403 (75 FR 51656, August 23, 2010), for all Dowty Propellers R408/6–123–F/17 model propellers. That AD requires initial applications of sealant between the bus bar assembly and the backplate assembly of LRUs serial numbers below DAP0347, and repetitive applications of sealant on all R408/6–123–F/17 model propellers. That AD resulted from mandatory continuing airworthiness information issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. We issued that AD to prevent an in-flight double generator

failure, which could result in reduced controllability of the airplane.

Actions Since Existing AD Was Issued

Since we issued AD 2010–17–11 (75 FR 51656, August 23, 2010), Dowty Propellers introduced an optional terminating action to the repetitive applications of sealant. That action consists of replacing the bus bar assembly with a slip ring de-icer harness.

Relevant Service Information

We reviewed Dowty Propellers Service Bulletin (SB) No. D8400–61–94, Revision 3, dated October 23, 2012. The SB describes procedures for replacing the bus bar assembly with a slip ring de-icer harness.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would retain all the requirements of AD 2010–17–11 (75 FR 51656, August 23, 2010). This proposed AD would add an optional terminating action to the applications of sealant by replacing the bus bar assembly with a slip ring de-icer harness.

Costs of Compliance

We estimate that this proposed AD would affect about 104 propellers installed on airplanes of U.S. registry. We also estimate that it would take about 2 hours per propeller to apply sealant and required sealant would cost about $20 per propeller. We also estimate that it would take about 3 hours to replace the bus bar with a de-icer slip ring harness and required parts would cost about $1,200 per propeller. The average labor rate is $85 per hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $171,080. Our cost estimate is exclusive of possible warranty coverage.

Authority for This Rulemaking

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

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

Regulatory Findings

We have 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 the 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 to the extent that it justifies making a regulatory distinction, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2010–17–11, Amendment 39–16403 (75 FR 51656, August 23, 2010), and adding the following new AD:

Dowty Propellers (formerly Dowty Aerospace; Dowty Rotol Limited; and Dowty Rotol): Docket No. FAA–2009–0776; Directorate Identifier 2009–NE–32–AD.

(a) Comments Due Date

We must receive comments on this AD action by April 8, 2013.

(b) Affected ADs

This AD revises AD 2010–17–11, Amendment 39–16403 (75 FR 51656, August 23, 2010).

(c) Applicability

(1) This AD applies to Dowty Propellers R408/6–123–F/17 model propellers. These propellers are installed on, but not limited to, Bombardier, Inc. (formerly de Havilland Canada) models DHC–8–400, DHC–8–401, and DHC–8–402 series airplanes.

(d) Unsafe Condition

This AD was prompted by the need to add an optional terminating action to the applications of sealant. We are issuing this AD to prevent an in-flight double generator failure, which could result in reduced controllability of the airplane.

(e) Compliance

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

(1) For R408/6–123–F/17 model propellers with a hub, actuator, and backplate assembly line-replaceable unit serial numbers below DAP0347, do the following initial sealant application within 5,000 flight hours (FH) after September 27, 2010, or within 100 FH from the effective date of this AD, whichever occurs later:

(i) Apply sealant between the bus bar assemblies and the backplate assembly.

(ii) Use paragraph 3 of the Accomplishment Instructions of Dowty Propellers Alert Service Bulletin No. D8400–61–A66, Revision 5, dated June 16, 2010, to apply the the sealant.

(2) Thereafter, re-apply sealant as specified in paragraphs (e)(1)(i) through (e)(1)(ii) of this AD within every additional 10,000 FH.

(f) Installation Prohibition

After the effective date of this AD, do not install any Dowty Propellers R408/6–123–F/17 propeller unless sealant has been applied between the bus bar assembly and the backplate assembly as specified by this AD, or unless the optional terminating action as specified in paragraph (i) of this AD, has been performed.

(g) Differences Between This AD and the Service Information

None.

(h) Credit for Actions Accomplished in Accordance With Previous Service Information

(1) Sealant applications performed before the effective date of this AD using Dowty Propellers Service Bulletin No. D8400–61–66, dated February 9, 2007, Revision 1, dated May 4, 2007, Alert Service Bulletin No. D8400–61–A66, Revision 2, dated August 19, 2009, Revision 3, dated November 10, 2009, Revision 4, dated January 19, 2010, or Revision 5, dated June 16, 2010, satisfy the

initial sealant application requirement of this AD.

(2) Re-application of sealant within 10,000 FH since last application satisifies the reapplication requirement. However, unless you have incorporated the optional terminating action provided in this AD Revision, you must reapply the sealant per paragraph (e)(1)(i) of this AD.

(3) Replacement of the bus bar assembly with a slip ring de-icer harness before the effective date of this AD using paragraph 3.A. of the Accomplishment Instructions of Dowty Propellers Service Bulletin No. D8400–61–94, Revision 2, dated August 29, 2012, satisfies the optional terminating requirement of this AD.

(i) Optional Terminating Action

As optional terminating action to the sealant applications of this AD, replace the bus bar assembly with a slip ring de-icer harness. Use paragraph 3.A. of the Accomplishment Instructions of Dowty Propellers Service Bulletin No. D8400–61–94, Revision 3, dated October 23, 2012, to do the replacement.

(j) Alternative Methods of Compliance (AMOCs)

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

(k) Related Information

(1) Refer to European Aviation Safety Agency AD 2009–0114R1 (correction: Dated December 13, 2012) for related information.

(2) For more information about this AD, contact Michael Schwetz, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7761; fax 781–238–7170; email: *michael.schwetz@faa.gov*.

(3) For service information identified in this AD, contact Dowty Propellers, Anson Business Park, Cheltenham Road East, Gloucester GL 29QN, UK; phone: 44 (0) 1452 716000; fax: 44 (0) 1452 716001. You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Issued in Burlington, Massachusetts, on January 29, 2013.

Colleen M. D'Alessandro,

Assistant Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2013–02730 Filed 2–6–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0024; Directorate Identifier 2000–NE–12–AD]

RIN 2120–AA64

Airworthiness Directives; Turbomeca S.A. Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD) that applies to all Turbomeca S.A. Arrius Models 2B, 2B1, and 2F turboshaft engines. The existing AD currently requires replacement of injector manifolds and borescope-inspection of the flame tube and the high-pressure (HP) turbine area for possible damage. Since we issued that AD, we received a report that the corrective actions of the existing AD were insufficient to eliminate the unsafe condition. This proposed AD would require, depending on the engine model, repetitive replacements of fuel injection manifolds and the privilege injector, or, repetitive replacements of the privilege injector. We are proposing this AD to prevent an uncommanded in-flight shutdown of Arrius 2B1 and 2F turboshaft engines and damage to the helicopter.

DATES: We must receive comments on this proposed AD by April 8, 2013.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

For service information identified in this AD, contact Turbomeca, 40220 Tarnos, France; phone: 33 (0)5 59 74 40 00; telex: 570 042; fax: 33 (0)5 59 74 45 15. You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: James Lawrence, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7176; fax: 781–238–7199; email: *james.lawrence@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2013–0024; Directorate Identifier 2000–NE–12–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On January 9, 2006, we issued AD 2001–08–14R1, Amendment 39–14423 (71 FR 2993, January 19, 2006), for all Arrius Models 2B, 2B1, and 2F turboshaft engines. That AD requires replacement of injector manifolds and borescope inspection of the flame tube and the HP turbine area. That AD resulted from reports from the Direction Generale de L'Aviation Civile (DGAC), which was the airworthiness authority for France, of partially or totally blocked fuel injection manifolds found during inspections at a repair workshop. We issued that AD to prevent engine flameout during rapid deceleration, or the inability to maintain the 2.5 minutes

OEI rating, and to prevent injector air path cracks, due to blockage of the fuel injection manifolds.

Actions Since Existing AD Was Issued

Since we issued AD 2001–08–14R1, Amendment 39–14423 (71 FR 2993, January 19, 2006), Turbomeca reported that the corrective actions in that AD were insufficient to eliminate the unsafe condition. During inspections carried out at the repair workshop, some main injectors were found totally or partially blocked. In response, the European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, issued EASA AD 2012–0249, dated November 21, 2012, to mandate replacements of the fuel injection manifolds and privilege injector on Arrius 2B1 turboshaft engines, and, EASA AD 2012–0150, dated August 8, 2012, to mandate replacements of the privilege injector on Arrius 2F turboshaft engines. Also, since we issued AD 2001–08–14R1, the Arrius 2B engine model is no longer in service and has been removed from the engine Type Certificate Data Sheet No. E34NE, as requested by the manufacturer.

Relevant Service Information

We reviewed Turbomeca S.A. Alert Mandatory Service Bulletin (MSB) No. A319 73 2012, Version I, dated November 12, 2012. That Alert MSB describes Arrius 2B1 engine procedures for replacing, checking, or cleaning the injector manifolds and the privilege injector. We also reviewed Turbomeca S.A. Alert MSB No. A319 73 4001, Version K, dated February 10, 2012. That Alert MSB describes procedures for cleaning or replacing the Arrius 2F privilege injector.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require, for Arrius 2B1 turboshaft engines, initial and repetitive replacement of the fuel injection manifold and the privilege injector within 200 hours time-since-new (TSN) or since the last accomplishment of Turbomeca S.A. Alert MSB No. A319 73 2012, Version I, dated November 12, 2012, whichever occurs first. This proposed AD would also require, for Arrius 2F turboshaft engines, initial and repetitive replacement of the privilege injector before exceeding 400 hours TSN or since the last accomplishment of Turbomeca S.A. Alert MSB No. A319 73 4001, Version K, dated February 10, 2012, whichever occurs first.

Costs of Compliance

We estimate that this proposed AD would affect about 38 Arrius 2B1 engines and about 93 Arrius 2F engines installed on helicopters of U.S. registry. We also estimate that it would take about two hours per engine to replace the injector manifolds and about one hour per engine to replace the privilege injector. The average labor rate is $85 per hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $663,615.

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 have 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 the 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 to the extent that it justifies making a regulatory distinction, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2001–08–14R1, Amendment 39–14423 (71 FR 2993, January 19, 2006), and adding the following new AD:

Turbomeca S.A.: Docket No. FAA–2013–0024; Directorate Identifier 2000–NE–12–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by April 8, 2013.

(b) Affected ADs

This AD supersedes AD 2001–08–14R1, Amendment 39–14423 (71 FR 2993, January 19, 2006).

(c) Applicability

This AD applies to all Turbomeca S.A. Arrius models 2B1 and 2F turboshaft engines.

(d) Unsafe Condition

This AD was prompted by a report that the corrective actions of AD 2001–08–14R1, Amendment 39 14423 (71 FR 2993, January 19, 2006) were insufficient to eliminate the unsafe condition. We are issuing this AD to prevent an uncommanded in-flight shutdown of Arrius 2B1 and 2F turboshaft engines and damage to the helicopter.

(e) Compliance

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

(f) Arrius 2B1 Turboshaft Engines

(1) Replace the fuel injector manifolds and privilege injector with parts eligible for installation before exceeding 200 operating hours time-since-new (TSN) or since last inspection of the fuel injection manifolds or privilege injector, whichever comes first.

(2) Borescope-inspect the flame tube and the high-pressure turbine area for turbine distress.

(3) Thereafter, within every 200 operating hours time-in-service (TIS) since last fuel injector manifolds and privilege injector

replacement, replace the fuel injector manifolds and the privilege injector with parts eligible for installation.

(g) Arrius 2F Turboshaft Engines

(1) Replace the privilege injector with a privilege injector eligible for installation before exceeding 400 operating hours TSN or since last inspection on the privilege injector, whichever occurs first.

(2) Borescope-inspect the flame tube and the high-pressure turbine area for turbine distress.

(3) Thereafter, within every 400 operating hours TIS since last privilege injector replacement, replace the privilege injector with parts eligible for installation.

(h) Definition

For the purposes of this AD, time-in-service (TIS) is defined as the number of engine operating hours on the manifolds since the manifolds were new or since the manifolds were last cleaned, whichever is more.

(i) Installation Prohibitions

(1) For Arrius 2B1 turboshaft engines, after the effective date of this AD, do not install fuel injector manifolds or a privilege injector on an engine, or an engine on a helicopter, unless the fuel injection manifold and privilege injector have accumulated fewer than 200 operating hours since new, or since last inspection.

(2) For Arrius 2F turboshaft engines, after the effective date of this AD, do not install a privilege injector on an engine, or an engine on a helicopter, unless the privilege injector has accumulated fewer than 400 operating hours since new, or since last inspection.

(j) Alternative Methods of Compliance (AMOCs)

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

(k) Related Information

(1) For more information about this AD, contact James Lawrence, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7176; fax: 781–238–7199; email: *james.lawrence@faa.gov.*

(2) See European Aviation Safety Agency AD 2012–0150, dated August 8, 2012, and AD 2012–0249, dated November 21, 2012, Turbomeca S.A. Alert Mandatory Service Bulletin (MSB) No. A319 73 2012, Version I, dated November 12, 2012, and Turbomeca S.A. Alert MSB No. A319 73 4001, Version K, dated February 10, 2012, for related information.

(3) For service information identified in this AD, contact Turbomeca, 40220 Tarnos, France; phone: 33 (0)5 59 74 40 00; telex: 570 042; fax: 33 (0)5 59 74 45 15. You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Issued in Burlington, Massachusetts, on January 30, 2013.

Colleen M. D'Alessandro,

Assistant Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2013–02731 Filed 2–6–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2012–1004; Airspace Docket No. 12–ANM–21]

RIN 2120–AA66

Proposed Amendment of VOR Federal Airway V–595; OR

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (SNPRM); reopening of comment period.

SUMMARY: This SNPRM amends the notice of proposed rulemaking (NPRM) published on October 22, 2012 which proposed to amend VHF omnidirectional range (VOR) Federal airway V–595 in Oregon. This SNPRM proposes to remove an additional segment of the airway due to high terrain and navigation aid coverage issues.

DATES: Comments must be received on or before March 25, 2013.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; telephone: (202) 366–9826. You must identify FAA Docket No. FAA–2012–1004 and Airspace Docket No. 12–ANM–21 at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*.

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

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Communications should identify both docket numbers (FAA Docket No. FAA–2012–1004 and Airspace Docket No. 12–ANM–21) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2012–1004 and Airspace Docket No. 12–ANM–21.'' The postcard will be date/time stamped and returned to the commenter.

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

Availability of NPRM's

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Western Service Center, Operations Support Group, Federal Aviation Administration, 1601 Lind Ave. SW., Renton, WA 98057.

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

Background

On October 22, 2012, the FAA published in the **Federal Register** a NPRM to remove a segment of VOR Federal airway V–595 due to the planned decommissioning of the Portland, OR, VOR/DME (77 FR 64444). No comments were received.

The NPRM would have terminated V–595 at the HARZL navigation fix, which is approximately 29 NM southeast of the Portland VOR/DME. Subsequent to the publication, further study showed that mountainous terrain in the area would limit the service volume of the Deschutes, OR, VORTAC to a degree that the Deschutes VORTAC could not be used to identify the entire length of the proposed segment between Deschutes and the HARZL fix. In addition, the decommissioning of the Portland VOR/DME would require raising the IFR minimum enroute altitude (MEA) along that segment to an unusable height.

The Proposal

The FAA is proposing an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to further modify the description of VOR Federal airway V–595. Instead of removing that segment of V–595 between the Portland, OR, VOR/DME and the HARZL fix, as originally proposed, the FAA is now proposing to remove the entire V–595 segment between the Deschutes VORTAC and the Portland VOR/DME. Consequently, the amended V–595 would extend only between the Rogue Valley, OR, VORTAC and the Deschutes VORTAC. This action is necessary because the Portland, OR, VOR/DME, which currently serves as the northern end point of the route, is scheduled to be decommissioned. Further, due to high terrain issues, the Deschutes VORTAC service volume is not adequate to support the originally proposed segment between Deschutes and the HARZL fix. By separate rulemaking action, the FAA is proposing to establish new area navigation routes (T-routes) in the area.

Since this change expands the scope of the originally proposed rule, the FAA has determined that it is necessary to reopen the comment period to provide additional opportunity for public comment.

VOR Federal airways are published in paragraph 6010, of FAA Order 7400.9W dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The VOR Federal airway listed in this document would be subsequently published in the Order.

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

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

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies an Oregon route structure as required to preserve the safe and efficient flow of air traffic.

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9W, Airspace Designations and Reporting Points, Dated August 8, 2012 and effective September 15, 2012, is amended as follows:

* * * * *

Paragraph 6010 Domestic VOR Federal airways.

V–595 [Amended]

From Rogue Valley, OR, to Deschutes, OR.

Issued in Washington, DC, on January 31, 2013.

Alan Wilkes,

Acting Manager, Airspace Policy and ATC Procedures Group.

[FR Doc. 2013–02736 Filed 2–6–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 872

[Docket No. FDA–2012–N–1239]

Dental Devices; Reclassification of Temporary Mandibular Condyle Prosthesis

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed order.

SUMMARY: The Food and Drug Administration (FDA) is issuing a proposed order to reclassify temporary mandibular condyle prosthesis, a preamendments class III device, into class II (special controls), and rename the device ''temporary mandibular condyle reconstruction plate.'' FDA is also issuing the draft special controls guideline, ''Class II Special Controls Guideline: Temporary Mandibular Condyle Reconstruction Plate,'' which sets forth the special controls that the Agency believes are necessary to provide a reasonable assurance of the safety and effectiveness of the device.

DATES: Submit either electronic or written comments on this proposed order or on the draft guideline by May 8, 2013. See section XIII of this document for the proposed effective date of any final order that may publish based on this proposed order.

ADDRESSES: You may submit comments, identified by Docket No. FDA–2012–N–1239, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

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

Written Submissions

Submit written submissions in the following ways:

• *Mail/Hand delivery/Courier (for paper or CD–ROM submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and Docket No. FDA–2012–N–1239. All comments received may be posted without change to *http://www.regulations.gov*, including any personal information provided. For additional information on submitting comments, see the ''Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and insert the docket number(s), found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Michael Ryan, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1615, Silver Spring, MD 20993, 301–796–6283.

SUPPLEMENTARY INFORMATION:

I. Background—Regulatory Authorities

The Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the Medical Device Amendments of 1976 (the 1976 amendments) (Pub. L. 94–295), the Safe Medical Devices Act of 1990 (Pub. L. 101–629), the Food and Drug Administration Modernization Act of 1997 (FDAMA) (Pub. L. 105–115), the Medical Device User Fee and Modernization Act of 2002 (Pub. L. 107–250), the Medical Devices Technical Corrections Act (Pub. L. 108–214), the Food and Drug Administration Amendments Act of 2007 (Pub. L. 110–85), and the Food and Drug Administration Safety and Innovation Act (FDASIA) (Pub. L. 112–144), among other amendments, established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the FD&C Act (21 U.S.C. 360c) established three categories (classes) of devices, reflecting the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513(d) of the FD&C Act, devices that were in commercial distribution before the enactment of the 1976 amendments, May 28, 1976 (generally referred to as preamendments devices), are classified after FDA has: (1) Received a recommendation from a device classification panel (an FDA advisory committee); (2) published the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) published a final regulation classifying the device. FDA has classified most preamendments devices under these procedures.

Devices that were not in commercial distribution prior to May 28, 1976 (generally referred to as postamendments devices) are automatically classified by section 513(f) of the FD&C Act into class III without any FDA rulemaking process. Those devices remain in class III and require premarket approval unless, and until, the device is reclassified into class I or II or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. The Agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and part 807 (21 CFR part 807).

On July 9, 2012, FDASIA was enacted. Section 608(a) of FDASIA (126 Stat. 1056) amended section 513(e) of the FD&C Act, changing the process for reclassifying a device from rulemaking to an administrative order.

Section 513(e) of the FD&C Act governs reclassification of classified preamendments devices. This section provides that FDA may, by administrative order, reclassify a device based upon ''new information.'' FDA can initiate a reclassification under section 513(e) or an interested person may petition FDA to reclassify a preamendments device. The term ''new information,'' as used in section 513(e) of the FD&C Act, includes information developed as a result of a reevaluation of the data before the Agency when the device was originally classified, as well as information not presented, not available, or not developed at that time. (See, e.g., *Holland-Rantos Co.* v. *United States Department of Health, Education, and Welfare,* 587 F.2d 1173, 1174 n.1 (DC Cir. 1978); *Upjohn* v. *Finch,* 422 F.2d 944 (6th Cir. 1970); *Bell* v. *Goddard,* 366 F.2d 177 (7th Cir. 1966).)

Reevaluation of the data previously before the Agency is an appropriate basis for subsequent action where the reevaluation is made in light of newly available authority (see *Bell,* 366 F.2d at 181; *Ethicon, Inc.* v. *FDA,* 762 F.Supp. 382, 388–391 (D.D.C. 1991)), or in light of changes in ''medical science'' (*Upjohn,* 422 F.2d at 951). Whether data before the Agency are old or new data, the ''new information'' to support reclassification under section 513(e) must be ''valid scientific evidence,'' as defined in section 513(a)(3) of the FD&C Act and 21 CFR 860.7(c)(2). (See, e.g., *General Medical Co.* v. *FDA,* 770 F.2d 214 (DC Cir. 1985); *Contact Lens Association* v. *FDA,* 766 F.2d 592 (DC Cir. 1985), cert. denied, 474 U.S. 1062 (1986).)

FDA relies upon ''valid scientific evidence'' in the classification process to determine the level of regulation for devices. To be considered in the reclassification process, the ''valid scientific evidence'' upon which the Agency relies must be publicly available. Publicly available information excludes trade secret and/or confidential commercial information, e.g., the contents of a pending premarket approval application (PMA). (See section 520(c) of the FD&C Act (21 U.S.C. 360j(c)).) Section 520(h)(4) of the FD&C Act, added by FDAMA, provides that FDA may use, for reclassification of a device, certain information in a PMA 6 years after the application has been approved. This includes information from clinical and preclinical tests or studies that demonstrate the safety or effectiveness of the device but does not include descriptions of methods of manufacture or product composition and other trade secrets.

Section 513(e)(1) of the FD&C Act sets forth the process for issuing a final order. Specifically, prior to the issuance of a final order reclassifying a device, the following must occur: (1) Publication of a proposed order in the **Federal Register**; (2) a meeting of a device classification panel described in section 513(b) of the FD&C Act; and (3) consideration of comments to a public docket. FDA has held a meeting of a device classification panel described in section 513(b) of the FD&C Act with respect to temporary mandibular condyle prosthesis, and therefore, has met this requirement under section 513(e)(1) of the FD&C Act. As explained further in section II of this document, a meeting of a device classification panel

described in section 513(b) of the FD&C Act took place in 1997 to discuss whether temporary mandibular condyle prosthesis should be reclassified or remain in class III, and the panel recommended that the device be reclassified into class II because there was sufficient information to establish special controls. FDA is not aware of new information since the 1997 panel that would provide a basis for a different recommendation or findings.

FDAMA added section 510(m) to the FD&C Act. Section 510(m) of the FD&C Act provides that a class II device may be exempted from the premarket notification requirements under section 510(k) of the FD&C Act, if the Agency determines that premarket notification is not necessary to assure the safety and effectiveness of the device.

II. Regulatory History of the Device

In 1994, FDA issued a final rule that classified all mandibular condyle prostheses into class III, based on the recommendation of a Dental Products Panel (the Panel) meeting on February 11, 1993 (59 FR 65475; December 20, 1994). In response to a petition dated April 30, 1996 (FDA–1996–P–0253), FDA considered a distinction between temporary and permanent mandibular condyle prostheses and held a February 12, 1997 meeting of the Panel. The Panel recommended that mandibular condyle prostheses indicated for temporary reconstruction of the mandibular condyle in tumor resection patients be reclassified from class III to class II with special controls, include labeling for temporary use not to exceed 2 years, and have patient registries. Based on its review of the data and information contained in the April 30, 1996, petition, the Panel believed that special controls, in addition to general controls, were necessary to provide a reasonable assurance of safety and effectiveness of these devices in patients who have undergone resective procedures to remove malignant or benign tumors, requiring the removal of the mandibular condyle and mandibular bone. On December 30, 1998, FDA issued a final rule calling for PMAs under section 515(b) of the FD&C Act (21 U.S.C. 360e(b)) for permanent mandibular condyle prostheses, and simultaneously announced its intention to reclassify, in accordance with the Panel's recommendations, mandibular condyle prosthesis for temporary reconstruction following surgical ablation of malignant and benign tumors (63 FR 71743).

In 2009, FDA published an order for the submission of information on mandibular condyle prostheses indicated for temporary reconstruction (74 FR 16214; April 9, 2009). In response to that order, FDA received information from several device manufacturers who recommended that these devices be reclassified to class II. The manufacturers stated that the safety and effectiveness of these devices may be reasonably assured by bench testing, biocompatibility testing, sterility testing, expiration date testing, labeling, and performance standards.

On the basis of its review and the recommendations from the Panel and industry, FDA now believes that the use of temporary mandibular condyle prostheses for patients who have undergone any resective surgical procedure requiring removal of the mandibular condyle and mandibular bone does not present a potential unreasonable risk of illness and injury, and that special controls, in addition to general controls, are necessary to provide reasonable assurance of the safety and effectiveness of the device. Although the Panel recommended that class II was appropriate for plates indicated in tumor resection cases only, FDA believes that the special controls proposed in this document are appropriate to provide reasonable assurance of safety and effectiveness for temporary reconstruction of the mandibular condyle in patients who have undergone any resective surgical procedures requiring removal of the mandibular condyle and mandibular bone.

III. Device Description

A mandibular condyle prosthesis is a device that is intended to be implanted in the human jaw to replace the mandibular condyle and to articulate within a glenoid fossa.

FDA is proposing this order to create a new classification for the temporary mandibular condyle prosthesis and rename it the temporary mandibular condyle reconstruction plate (TMCRP) to distinguish it from permanent mandibular condyle prosthesis. TMCRP devices will be identified as:

A TMCRP is a device that is intended to stabilize mandibular bone and provide for temporary reconstruction of the mandibular condyle until permanent reconstruction is completed in patients who have undergone resective surgical procedures requiring removal of the mandibular condyle and mandibular bone. This device is not intended for treatment of temporomandibular joint disorders.

The new classification will be placed under 21 CFR part 872, subpart E—Surgical Devices, as a TMCRP is not intended to permanently replace the function of the mandibular condyle.

IV. Proposed Reclassification

FDA is proposing that temporary mandibular condyle prosthesis be reclassified from class III to class II with a special controls guideline. FDA is also proposing to create a separate classification for these devices, to rename them temporary mandibular condyle reconstruction plate, and place them under 21 CFR part 872, subpart E—Surgical Devices, to differentiate them from permanent mandibular condyle prostheses and clarify that these devices are intended as temporary devices and not permanent replacements of the mandibular condyle. FDA believes that these devices can be utilized to stabilize mandibular bone and provide for temporary reconstruction of the mandibular condyle until permanent reconstruction is completed in patients who have undergone resective surgical procedures requiring removal of the mandibular condyle and mandibular bone.

FDA has considered TMCRPs in accordance with the reserved criteria and determined that these devices require premarket notification. The Agency does not intend to exempt this proposed class II device from premarket notification (section 510(k) of the FD&C Act) submission as provided for under section 510(m) of the FD&C Act.

V. Risks to Health

After considering the information from the reports and recommendations of the Panel for the classification of these devices along with information submitted in response to the section 515(i) order and any additional information that FDA has at its disposal, FDA has identified and evaluated the risks to health associated with the use of TMCRPs. The Panel had identified these risks to health for all mandibular condyle prostheses in a February 11, 1993, meeting; FDA believes that the risks listed in this document are applicable to TMCRPs, a subset of mandibular condyle prostheses, and that these concerns are still relevant today.

- *Loosening, migration, or exposure.* TMCRP screws or plates may loosen if not placed properly. A loose plate can also lead to migration or exposure of the plate or screws through the skin.
- *Mechanical wear of the plate or screws and foreign body reaction.* Some materials used in the construction of a TMCRP may wear and release particles that may result in a foreign body reaction.

• *Structural/mechanical failure.* A TMCRP may loosen, bend, or fracture and result in a structural or mechanical failure of the plate if not placed properly or used longer than intended.

• *Migration or thermal injury from magnetic resonance scans.* A TMCRP is composed of metals. Certain metallic materials that may be used for a TMCRP can be induced to displace or heat up in the presence of a magnetic field, such as is found in magnetic resonance scans.

• *Corrosion.* A TMCRP is composed of metals. Some materials to be used for a TMCRP may corrode, which can lead to failure and adverse tissue reaction.

• *Adverse reaction to a TMCRP.* Placement of a TMCRP may result in an adverse reaction in certain individuals who may be hypersensitive or allergic to the materials of composition of the TMCRP.

• *Infection.* Placement of a TMCRP may result in a postoperative infection due to the surgical procedure or if the plate or screws have not been sterilized appropriately.

• *Degenerative changes to the glenoid fossa surfaces.* A TMCRP may cause degeneration of the opposing bone, which is an inherent risk of a metal-on-bone joint.

• *Malocclusion, changes in mastication and contralateral joint.* A TMCRP may cause an uneven bite, resulting in malocclusion and potential changes in the contralateral joint, which is a unique risk of a bilateral joint.

• *User error.* A TMCRP may be misused if placed incorrectly or if inappropriately used as a permanent prosthesis rather than a temporary reconstruction plate.

• *Transient or chronic pain and facial nerve paresis.* Placement of a TMCRP may cause transient or chronic pain or nerve paresis associated with changes in jaw structure and function as a result of the surgical procedure.

VI. Summary of Reasons for Reclassification

FDA believes that TMCRPs should be reclassified into class II because special controls, in addition to general controls, are necessary to provide reasonable assurance of the safety and effectiveness of the devices. In addition, there is now sufficient information sufficient to establish special controls to provide such assurance.

VII. Summary of Data Upon Which the Reclassification Is Based

FDA believes that the identified special controls, in addition to general controls, are necessary to provide reasonable assurance of safety and effectiveness of these devices. Therefore, in accordance with sections 513(e) and 515(i) of the FD&C Act and 21 CFR 860.130, based on new information with respect to the device, FDA, on its own initiative, is proposing to reclassify this preamendments class III device into class II. The new information includes the history of use of the device and the relative absence of adverse events reports despite the longstanding use of these devices, as discussed in the recommendations for reclassification from the device industry (available in docket FDA–2009–M–0101 at *http://www.regulations.gov*) and the February 12, 1997, Panel. The classification recommendations from the device industry recommend that FDA reclassify these devices to class II based on their history of use without evidence of serious adverse events and the ability of preclinical data to provide predictive performance information. These companies cite their own history of use, their own preclinical testing, and relevant peer-reviewed literature that provide evidence that TMCRPs are effective for temporary reconstruction of the mandible and not associated with complications. (Ref. 1) The Panel also recommended reclassification to class II for these devices and believed that special controls, in addition to general controls, would provide a reasonable assurance of safety and effectiveness for these devices. (Ref. 2) FDA believes that this information constitutes sufficient evidence to demonstrate that the proposed special controls can effectively mitigate the risks to health identified in section V of this document, which are known surgical risks, and that these special controls in addition to the general controls will provide a reasonable assurance of safety and effectiveness for TMCRPs. Although the Panel only recommended that class II was appropriate for plates indicated in tumor resection cases only, FDA believes that the proposed special controls are appropriate to provide reasonable assurance of safety and effectiveness for temporary reconstruction of the mandibular condyle in patients who have undergone any resective surgical procedures requiring removal of the mandibular condyle and mandibular bone. Other clinical instances that may result in mandibular resection include certain traumas, osteoradionecrosis, bisphosphonate-induced osteonecrosis, and osteomyelitis. FDA believes that the risks of using TMCRPs in these instances are the same as the risks in tumor resection cases, and therefore the identified special controls can provide a reasonable assurance of safety and effectiveness for TMCRPs in the following indications: when used to stabilize mandibular bone and provide for temporary reconstruction of the mandibular condyle until permanent reconstruction is completed in patients who have undergone resective surgical procedures requiring removal of the mandibular condyle and mandibular bone.

VIII. Proposed Special Controls—Related Document

FDA believes that the measures set forth in the special controls guideline ''Class II Special Controls Guideline: Temporary Mandibular Condyle Reconstruction Plate'' are necessary, in addition to general controls, to mitigate the risks to health described in section V in this document. As seen in the following table, the special controls set forth in the guideline for this device address each of the identified risks.

TABLE 1—TMCRP RISKS AND MITIGATION MEASURES

Identified risk	Mitigation measure
Loosening, migration or exposure	Section 5—Materials and Performance Data. Section 8—Labeling.
Mechanical wear of the plate or screws and foreign body reaction	Section 5—Materials and Performance Data.
Structural/mechanical failure	Section 5—Materials and Performance Data.
Migration or thermal injury from magnetic resonance scans	Section 5—Materials and Performance Data
Corrosion	Section 5—Materials and Performance Data
Adverse reaction to TMCRP	Section 6—Biocompatibility.
Infection	Section 7—Sterilization.
Degenerative changes to glenoid fossa surfaces	Section 8—Labeling.
Malocclusion, changes in mastication, and contralateral joint	Section 8—Labeling.
User error	Section 8—Labeling.

TABLE 1—TMCRP RISKS AND MITIGATION MEASURES—Continued

Identified risk	Mitigation measure
Transient or chronic pain and facial nerve paresis	Section 8—Labeling.

If this proposed order is finalized, TMCRPs will be reclassified into Class II. As discussed below, the reclassification will be codified in 21 CFR 872.4770. Firms submitting a 510(k) for a TMCRP will need either to (1) comply with the particular mitigation measures set forth in the special controls guideline or (2) use alternative mitigation measures, but demonstrate to the Agency's satisfaction that alternative measures identified by the firm will provide at least an equivalent assurance of safety and effectiveness. Adherence to the criteria in the guideline, when finalized, in addition to the general controls, is necessary to provide a reasonable assurance of the safety and effectiveness of the devices.

IX. Electronic Access to the Special Controls Guideline

Persons interested in obtaining a copy of the draft guideline may do so by using the Internet. A search capability for all Center for Devices and Radiological Health guidelines and guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* The guideline is also available at *http://www.regulations.gov.*

To receive ''Class II Special Controls Guideline: Temporary Mandibular Condyle Reconstruction Plate,'' you may either send an email request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 301–847–8149 to receive a hard copy. Please use the document number 1799 to identify the guidance you are requesting.

X. Environmental Impact

The Agency has determined under 21 CFR 25.34(b) 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.

XI. Paperwork Reduction Act of 1995

This proposed order refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 812 have been approved under OMB control number 0910–0078; the collections of information in part 807, subpart E, have been approved under OMB control number 0910–0120; the collections of information in part 814, subpart B, have been approved under OMB control number 0910–0231; and the collections of information under 21 CFR part 801 have been approved under OMB control number 0910–0485.

XII. Clarifications to Special Controls Guidelines

This special controls guideline reflects changes the Agency is making to clarify its position on the binding nature of special controls. The changes include referring to the document as a ''guideline,'' as that term is used in section 513(a) of the FD&C Act, which the Secretary has developed and disseminated to provide a reasonable assurance of safety and effectiveness for class II devices, and not a ''guidance,'' as that term is used in 21 CFR 10.115. The guideline also clarifies that firms will need either to (1) comply with the particular mitigation measures set forth in the special controls guideline or (2) use alternative mitigation measures, but demonstrate to the Agency's satisfaction that those alternative measures identified by the firm will provide at least an equivalent assurance of safety and effectiveness. Finally, the guideline uses mandatory language to emphasize that firms must comply with special controls to legally market their class II devices. These revisions do not represent a change in FDA's position about the binding effect of special controls, but rather are intended to address any possible confusion or misunderstanding.

XIII. Proposed Effective Date

FDA is proposing that any final order based on this proposed order become effective on the date of its publication in the **Federal Register** or at a later date if stated in the final order.

XIV. Comments

Interested persons may submit either electronic comments regarding this document or the associated Special Controls guideline to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

XV. Codification of Orders

Prior to the amendments by FDASIA, section 513(e) provided for FDA to issue regulations to reclassify devices. Although section 513(e) as amended requires FDA to issue final orders rather than regulations, FDASIA also provides for FDA to revoke previously promulgated regulations by order. FDA will continue to codify classifications and reclassifications in the Code of Federal Regulations (CFR). Changes resulting from final orders will appear in the CFR as changes to codified classification determinations or as newly codified orders. Therefore, pursuant to section 513(e)(1)(A)(i), as amended by FDASIA, in this proposed order, we are proposing to revoke the requirements in 21 CFR 872.3960 related to the classification of TMCRPs as Class III devices and to codify the reclassification of TMCRPs into Class II.

XVI. References

The following references have been placed on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Carlson, E.R., Disarticulation Resections of the Mandible: A Prospective Review of 16 Cases. *Journal of Oral and Maxillofacial Surgery,* vol. 60, pp. 176–181, 2002.

2. Food and Drug Administration, Dental Products Advisory Panel Meeting Transcript, February 12, 1997; *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfAdvisory/details.cfm?mtg=168.*

List of Subjects in 21 CFR Part 872

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner

of Food and Drugs, it is proposed that 21 CFR part 872 be amended as follows:

PART 872—DENTAL DEVICES

■ 1. The authority citation for 21 CFR part 872 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

■ 2. Section 872.3960 is amended by revising paragraph (c) to read as follows:

§ 872.3960 Mandibular condyle prosthesis.

* * * * *

(c) *Date PMA or notice of completion of PDP is required.* A PMA or a notice of completion of a PDP is required to be filed with the Food and Drug Administration on or before March 30, 1999, for any mandibular condyle prosthesis that was in commercial distribution before May 28, 1976, or that has, on or before March 30, 1999, been found to be substantially equivalent to a mandibular condyle prosthesis that was in commercial distribution before May 28, 1976. Any other mandibular condyle prosthesis shall have an approved PMA or a declared completed PDP in effect before being placed in commercial distribution.

■ 3. Section 872.4770 is added to subpart E to read as follows:

§ 872.4770 Temporary mandibular condyle reconstruction plate.

(a) *Identification.* A temporary mandibular condyle reconstruction plate is a device that is intended to stabilize mandibular bone and provide for temporary reconstruction of the mandibular condyle until permanent reconstruction is completed in patients who have undergone resective surgical procedures requiring removal of the mandibular condyle and mandibular bone. This device is not intended for treatment of temporomandibular joint disorders.

(b) *Classification.* Class II (special controls). The special controls is FDA's guideline, ''Class II Special Controls Guideline: Temporary Mandibular Condyle Reconstruction Plate.'' See § 872.1(e) for the availability of this guidance document.

Dated: February 1, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–02688 Filed 2–6–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 226

Osage Negotiated Rulemaking Committee

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Meetings.

SUMMARY: In accordance with the requirements of the Federal Advisory Committee Act, the U.S. Department of the Interior, Bureau of Indian Affairs, Osage Negotiated Rulemaking Committee, will meet as indicated in the **DATES** section of this document.

DATES: *Meetings:* The meetings will be held as follows: *February:* Monday, February 25, 2013, from 8 a.m. to 3:30 p.m.; Tuesday, February 26, 2013, from 8 a.m. to 6 p.m.; and Wednesday, February 27, 2013, from 8 a.m. to 6 p.m. *March:* Wednesday, March 13, 2013, from 8 a.m. to 6 p.m. and Thursday, March 14, 2013, from 8 a.m. to 6 p.m.

ADDRESSES: *February Meeting:* Wah Zha Zhi Cultural Center, 1449 W. Main, Pawhuska, Oklahoma 74056; *March Meeting:* Osage Casino Event Center, 951 W. 36 Street North, Tulsa, Oklahoma 74127.

FOR FURTHER INFORMATION CONTACT: Mr. Eddie Streater, Designated Federal Officer, Bureau of Indian Affairs, Wewoka Agency, P.O. Box 1540, Seminole, OK 74818; telephone (405) 257–6250; fax (405) 257–3875; or email *osageregneg@bia.gov.* Additional Committee information can be found at: *http://www.bia.gov/osageregneg.*

SUPPLEMENTARY INFORMATION: On October 14, 2011, the United States and the Osage Nation (formerly known as the Osage Tribe) signed a Settlement Agreement to resolve litigation regarding alleged mismanagement of the Osage Nation's oil and gas mineral estate, among other claims. As part of the Settlement Agreement, the parties agreed that it would be mutually beneficial ''to address means of improving the trust management of the Osage Mineral Estate, the Osage Tribal Trust Account, and Other Osage Accounts.'' Settlement Agreement, Paragraph 1.i. The parties agreed that a review and revision of the existing regulations is warranted to better assist the Bureau of Indian Affairs (BIA) in managing the Osage Mineral Estate. The parties agreed to engage in a negotiated rulemaking for this purpose. Settlement Agreement, Paragraph 9.b. After the Committee submits its report, BIA will develop a proposed rule to be published in the **Federal Register.**

Meeting Agenda: February: Present and review specific proposed changes to or additions to 25 CFR part 226 in the following categories: General/Definitions, Rents, Royalties & Reporting, Operations, Surface Issues, Bonds, Pentalies & Enforcement. *March:* Follow-up discussions and committee decisions on specific proposed changes to or additions to 25 CFR part 226 in the following categories: General/Definitions, Rents, Royalties & Reporting, Operations, Surface issues, Bonds, Penalties & Enforcement. The final agenda will be posted on *www.bia.gov/osagenegreg* prior to each meeting.

Public Input: All Committee meetings are open to the public. Interested members of the public may present, either orally or through written comments, information for the Committee to consider during the public meeting. Written comments should be submitted, prior to, during, or after the meeting, to Mr. Eddie Streater, Designated Federal Officer, preferably via email, at *osagenegneg@bia.gov,* or by U.S. mail to: Mr. Eddie Streater, Designated Federal Officer, Bureau of Indian Affairs, Wewoka Agency, P.O. Box 1540, Seminole, OK 74818. Due to time constraints during the meeting, the Committee is not able to read written public comments submitted into the record.

Individuals or groups requesting to make oral comments at the public Committee meeting will be limited to 5 minutes per speaker. Speakers who wish to expand their oral statements, or those who had wished to speak, but could not be accommodated during the public comment period, are encouraged to submit their comments in written form to the Committee after the meeting at the address provided above. There will be a sign-up sheet at the meeting for those wishing to speak during the public comment period.

The meeting location is open to the public. Space is limited, however, so we strongly encourage all interested in attending to preregister by submitting your name and contact information via email to Mr. Eddie Streater at *osageregneg@bia.gov.* Persons with disabilities requiring special services, such as an interpreter for the hearing impaired, should contact Mr. Streater at (405) 257–6250 at least seven calendar days prior to the meeting. We will do our best to accommodate those who are unable to meet this deadline.

Dated: February 4, 2013.

Michael S. Black,

Director, Bureau of Indian Affairs.

[FR Doc. 2013–02871 Filed 2–6–13; 8:45 am]

BILLING CODE 4310–02–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2012–0951; FRL– 9778–6]

Approval and Promulgation of Air Quality Implementation Plans; Massachusetts; Revisions to Fossil Fuel Utilization and Source Registration Regulations and Boiler Industrial Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve several State Implementation Plan (SIP) revisions submitted by the State of Massachusetts. The revisions add new monitoring, inspection, maintenance and testing requirements for certain fossil fuel utilization facilities, rename and clarify stationary source emission reporting requirements, and establish compliance and certification standards for new boilers. The intended effect of this action is to propose approval of the state's revised fossil fuel utilization facility regulation, source registration regulation, and new industrial performance standards for boilers. This action is being taken under the Clean Air Act.

DATES: Written comments must be received on or before March 11, 2013.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R01–OAR–2012–0951 by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: mcdonnell.ida@epa.gov.*
3. *Fax:* (617) 918–0653.
4. *Mail:* ''Docket Identification Number EPA–R01–OAR–2012–0951'', Ida E. McDonnell, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Permits, Toxics and Indoor Programs Unit, 5 Post Office Square—Suite 100, (Mail Code OEP05–2), Boston, MA 02109–3912.
5. *Hand Delivery or Courier.* Deliver your comments to: Ida E. McDonnell, Manager, Air Permits, Toxics, and Indoor Programs Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Permits, Toxics and Indoor Programs Unit, 5 Post Office Square—Suite 100, (mail code OEP05–2), Boston, MA 02109–3912. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R01–OAR–2012–0951. 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 through *www.regulations.gov,* or email, information that you consider to be CBI or otherwise protected. 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 electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Permits, Toxics and Indoor Programs, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

In addition, copies of the state submittal and EPA's technical support document are also available for public inspection during normal business hours, by appointment at the Division of Air Quality Control, Department of Environmental Protection, One Winter Street, 7th Floor, Boston, MA 02108.

FOR FURTHER INFORMATION CONTACT: Brendan McCahill, Air Permits, Toxics and Indoor Programs Unit, Office of Ecosystem Protection, U.S. Environmental Protection Agency Region 1, 5 Post Office Square—Suite 100, (Mail code OEP05–2), Boston, MA 02109–3912, Telephone number (617) 918–1652, Fax number (617) 918–0652, Email *McCahill.Brendan@EPA.GOV.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

Organization of this document. The following outline is provided to aid in locating information in this preamble.

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I. What action is EPA proposing in this document?

On June 28, 1990 and July 11, 2001, the Massachusetts Department of Environmental Protection (MassDEP) submitted SIP amendments revising 310 CMR 7.04 ''U Fossil Fuel Utilization Facilities.'' On July 11, 2001, the MassDEP submitted a SIP amendment revising 310 Code of Massachusetts Regulations (CMR) 7.12, ''U Source Registration.'' On September 14, 2006, the MassDEP submitted a SIP amendment adopting 310 CMR 7.26(30)–(37), ''Industrial Performance Standard—U Boilers.'' On February 13, 2008, the MassDEP submitted an additional amendment to revise 310 CMR 7.04 ''U Fossil Fuel Utilization

Facilities'' and to correct several typographical errors and to clarify certain requirements to 310 CMR 7.00, 310 CMR 7.12 and 310 CMR 7.26(30)–(37). On January 18, 2013, the MassDEP submitted a letter withdrawing outdated and obsolete regulation submittals and replaced them with effective versions of the above regulations for approval and inclusion into the SIP.

EPA is proposing to approve the February 13, 2008 revisions to 310 CMR 7.04; the July 11, 2001 and February 13, 2008 revisions to 310 CMR 7.12; the September 14, 2006 and February 13, 2008 revisions to 310 CMR 7.26(30)–(37); and the February 13, 2008 revisions to the list of Massachusetts cities and towns that reflect changes in the MassDEP regional boundaries located at the beginning 310 CMR 7.00.

II. What is the background for the action proposed by EPA in this document?

Section 110 (a)(1) of the Clean Air Act (CAA) requires each state to submit to EPA a plan which provides for the implementation, maintenance and enforcement of each national ambient air quality standard (NAAQS). These plans, generally referred to as the state implementation plans or SIPs, include numerous air quality monitoring, emission inventory, and emission control requirements designed to obtain and maintain the NAAQS within the state. The CAA requires states to adopt SIP revisions into the state regulations and to submit the revisions to EPA for approval. Section 110(l) of the CAA states that EPA shall not approve a revision to the SIP if the revision would interfere with any applicable requirement concerning attainment of the NAAQS and reasonable further progress, or any other applicable requirement of the CAA. Section 193 of the CAA states that EPA shall not approve a revision to any control requirement in effect before November 15, 1990 in an area which is a nonattainment area for any air pollutant unless the modification ensures equivalent or greater emission reductions of that air pollutant.

EPA has over time approved numerous state regulatory revisions into the Massachusetts SIP. Each regulation performs a different function specifically required by the CAA or determined by the state to be necessary to attain and maintain the NAAQS. Among other requirements, the Massachusetts SIP-approved regulations include 310 CMR 7.04, ''Fossil Fuel Utilization Facilities'' and 310 CMR 7.12, ''Source Registration.''

310 CMR 7.04 regulates the use of fossil fuels by fossil fuel utilization facilities in Massachusetts. The regulation establishes smoke density limits; combustion efficiency requirements; and inspection, maintenance and testing requirements for fossil fuel fired facilities. The use of fossil fuels is a significant source of nitrogen oxides (NO_X), sulfur dioxide (SO_2), and particulate matter (PM) emissions. While not specifically required by the CAA, the fossil fuel control requirements in 310 CMR 7.04 reduce the emissions of all the pollutants in Massachusetts.

310 CMR 7.12 requires stationary sources to collect information, keep records and report emissions on a periodic schedule. The MassDEP then uses the emission data to develop the state's emissions inventory and NAAQS emission control planning requirements. Section 182(a)(3)(B) ''Emission Statements'' of the CAA establish the federal requirements for stationary source emissions reporting. The section requires permitting agencies to adopt regulations requiring owners and operators of stationary sources of NO_X or VOC to provide a statement showing the actual emissions of NO_X and VOCs from applicable sources.

310 CMR 7.26(30)–(37) establishes emission limits and operational restrictions for new boilers with heat inputs equal to or greater than 10 million British thermal units per hour (MMBtu/hr) and less than 40 MMBtu/hr. Emission increases from the construction of new boilers are currently subject to the MassDEP's 310 CMR 7.02(4) and (5) ''Plan Approval and Emission Limitations.'' The MassDEP adopted 310 CMR 7.02(4) and (5) in an effort to comply with Sections 110(a)(2)(C) and (D) of the CAA. The CAA requires states to adopt procedures that regulate modification and construction of stationary sources as necessary to ensure that NAAQS are achieved, and in particular to prohibit a new stationary source of emissions, such as a new boiler, from emitting any air pollutant in amounts that would contribute to a violation of a NAAQS or interfere with a NAAQS control strategy. For sources that do not meet federal ''major source'' levels, the requirements for the procedures required by Section 110(a)(2)(C), typically referred to as the ''minor new source review program,'' are codified into the federal regulations at 40 Code of Federal Regulations (CFR) 51.160–164. The MassDEP currently has a SIP-approved minor NSR program (currently entitled ''Regulation 2. Plans Approval and Emissions Limitations,'' approved in 1979), and the state also implements its minor NSR regulations at 310 CMR 7.02(4) and (5).

III. What is EPA's analysis of Massachusetts's SIP revisions?

As discussed above, Section 110(l) of the CAA establishes EPA's standard for approving revisions to a SIP (and, for certain pre-1990 requirements, Section 193 may apply as well). The following analysis explains how the SIP revisions meet these standards and may be approved by EPA.

A. 310 CMR 7.04: U Fossil Fuel Utilization Facilities

The June 28, 1990 SIP amendment includes two new provisions to 310 CMR 7.04(2) ''U Smoke Density Indicator.'' The existing SIP provision in regulation 4.2.1 prohibits the burning of fossil fuel oil or coal in any high pressure fossil fuel utilization facility that is not equipped with a smoke density sensing device. New provision 310 CMR 7.04(2)(a) establishes a new heat input applicability threshold level of 40 MMBtu/hr above which fossil fuel utilization facilities are required to install and operate smoke density sensing instrumentation on or after June 1, 1990. New provision 310 CMR 7.04(2)(b) provides the MassDEP the authority to require fuel utilization facility to be equipped with a smoke density sensing device if, in the opinion of the MassDEP, such a device is necessary.

The July 11, 2001 SIP amendment includes two additional provisions to 310 CMR 7.04(2). New provision 310 CMR 7.04(2)(c) allows fossil fuel utilization facilities with energy inputs equal to or greater than 10 MMBtu/hr but less than 40 MMBtu/hr to discontinue and remove smoke density sensing equipment even if required in a previous plan approval. New provision 310 CMR 7.04(2)(d) states that, notwithstanding the requirements of 310 CMR 7.04(2)(a) and (c), new or modified fossil fuel fired facilities may be required to install instrumentation to monitor opacity if subject to New Source Performance Standards at 40 CFR part 60, subpart D, Da, Db or Dc.

The February 13, 2008 SIP amendment includes a new provision under 310 CMR 7.04(4)(a) that prohibits the operation of fossil fuel fired facilities with heat input capacities equal to or greater than 3 million British thermal units per hour (MMBtu/hr) unless the facility has been inspected and maintained in accordance with manufacturer's recommendations and been tested for efficient operation at least once every calendar year. The new

provisions also require facilities to record the results from the inspection, maintenance and testing and to post the result conspicuously on or near the facility. The provision also includes language that excludes combustion turbines and reciprocating engines from the inspection, maintenance and testing requirements. The inspection, maintenance and testing requirements for these types of sources are already established under state's rules at 310 CMR 7.02(8) and 310 CMR 7.26, ''Industrial Performance Standards.'' Therefore, the inspection, maintenance and testing requirements under 310 CMR 7.04 are redundant and not needed for these source types.

EPA proposes approval of the June 28, 1990, July 11, 2001 and February 13, 2008 SIP amendments to 310 CMR 7.04. EPA has not identified any reason why removing the requirement to operate smoke density sensing devices on small boilers would change how smaller boilers operate or result in any emission increase. In addition, the February 13, 2008 SIP amendment requires boilers with heat inputs capacities over 3 MMBtu/hr to inspect, maintain and test for operational efficiency. This will improve boiler operation and reduce overall emissions. The emission decrease will more than offset any possible emission increase that could result from the June 28, 1990, July 11, 2001 and February 13, 2008 SIP amendments. The amendment is also not inconsistent with the CAA since federal technology-based emission control standards for boilers do not regulate smoke density but rather opacity. EPA finds the amendments together will improve operations at fossil fuel fired facilities, lower emissions for all pollutants, strengthen the SIP, and be consistent with all federal requirements.

B. 310 CMR 7.12: U Source Registration

The July 11, 2001 SIP amendment includes numerous revisions to 310 CMR 7.12. The amendment renames the regulation from ''Certificate Record Keeping and Reporting'' to ''Source Registration.'' The amendment clarifies the regulation's applicability requirements, reporting deadlines, and information submission requirements. The amendment also includes the addition of new source categories and pollutants subject to the regulation's reporting requirements. Finally, the amendment establishes reporting procedures for sources who had not previously filed reports.

The February 13, 2008 SIP amendment includes new provisions that require a facility to file a source registration if it operates under the following: (1) a restricted emission status pursuant to 310 CMR 7.02(9), ''U Restricted emissions Status'' or 7.02(10), ''U Modification of Restricted Emissions Status'' issued since January 1, 1990, or (2) a federal operating permit approval issued under 310 CMR 7.00, Appendix C.

EPA proposes to approve the July 11, 2001 and February 13, 2008 amendments into the SIP. The amendments do not change the underlying SIP-approved requirements but rather strengthens the state regulations by adding new requirements, expanding the applicability requirements, and reorganizing and clarifying current requirements. The Technical Support Document (TSD) for this proposed rulemaking provides a complete list of revisions proposed by MassDEP and how they comply with federal requirements.

C. 310 CMR 7.26(30)–(37): Industrial Performance Standard—U Boilers

310 CMR 7.26(30)–(37) establishes emission limits and operational restrictions for new boilers with heat inputs equal to or greater than 10 MMBtu/hr and less than 40 MMBtu/hr. Emission increases from the construction of new boilers are currently subject to the MassDEP's 310 CMR 7.02(4) and (5) ''Plan Approval and Emission Limitations.'' As noted above, the MassDEP currently has a SIP-approved minor NSR program (currently entitled ''Regulation 2. Plans Approval and Emissions Limitations,'' approved in 1979), and the state also implements its minor NSR regulations at 310 CMR 7.02(4) and (5).

In July, 2000, the MassDEP proposed to replace the existing plan approval procedures for new boilers with heat inputs equal to or greater than 10 MMBtu/hr and less than 40 MMBtu/hr with new performance standards and compliance certifications requirements adopted under the state's Environmental Result Program (ERP). As described in the state's July 2000 Technical Support and Background Document (TSBD) for the proposed amendment, the purpose of the ERP is to develop process-specific performance standards and compliance certifications that simplify the regulatory process, reduce cost and time for compliance while maintaining effective standards and improving environmental results. On September 14, 2006, the MassDEP submitted the proposed performance standards and compliance certifications requirements for boilers under 310 CMR 7.26(30)–(37) ''Industrial Performance Standards—U Boilers'' to EPA as a formal SIP submittal.

The new industrial performance standard establishes emission limits and operational restrictions for new natural gas and/or distillate oil fired boilers. In lieu of obtaining a plan approval under 310 CMR 7.02, owners and operators of a new boiler with heat inputs equal to or greater than 10 MMBtu/hr and less than 40 MMBtu/hr must submit a certification to the MassDEP stating that the new boiler complies with the emission and operational requirements in 310 CMR 7.26(30)–(37).

On February 13, 2008, the MassDEP submitted a SIP amendment revising 310 CMR 7.26(30)–(37). The 2008 SIP amendment includes a new provision that requires an owner or operator of a new boiler subject to 310 CMR 7.26(30)–(37) to submit the certification to the MassDEP prior to installation and operation of the boiler.

The amendments to 310 CMR 7.26(30)–(37) effectively revise Regulation 2, which was approved into the Massachusetts SIP in 1979 in an area that is designated as nonattainment. Consequently, these amendments cannot be approved unless they will ensure equal or greater emission reductions as compared to the existing SIP-approved rules. These rules (specifically, the minor NSR program) must meet the federal minor NSR program requirements at 40 CFR 51.160–164, including the applicability requirements at 40 CFR 51.160(e). Section 51.160(e) requires the MassDEP to describe the types of sources subject to minor NSR and to discuss the basis for determining which facilities will be subject to review.

As discussed in the MassDEP's July 2000 TSBD Document, the proposed Industrial Performance Standard requires the same emission limits, fuel requirements and operational limitations as compared to boilers currently undergoing case-by-case review under 310 CMR 7.02. In addition, the emission limits meet or exceed the requirements for boilers under the federal NSPS and National Emission Standards for Hazardous Air Pollutants (NESHAP) programs.

The proposed boiler regulation also provides protection, similar to 310 CMR 7.02(4) and (5), that ensures the construction of new boilers will not cause or contribute to a violation of an applicable NAAQS or other control strategy. To ensure emissions disperse properly, 310 CMR 7.26(35) requires minimum stack heights for subject boilers. If the stack height is below minimum height requirements, the provision requires the use of an EPA

guideline air quality model to show that the operations of the boiler will not cause the exceedance of a NAAQS. To provide additional safeguards to protect the public, 310 CMR 7.26(35) restricts a subject boiler to the use of inherently low emitting natural gas if the boiler is locating on property adjacent to a street or sidewalk. Section 7.26(35) also provides that ''Stacks shall not be equipped with rain protection of a type that restricts the vertical exhaust flow of the combustion gases as they are emitted to the ambient air. 'Shanty caps', 'egg beaters' and the like are prohibited.'' The terms ''shanty caps'' and ''egg beaters'' refer to devices that are used to prevent precipitation from entering the stack but which restrict the vertical flow of the exhaust gas stream.[1] In accordance with this understanding, EPA proposes that, for purposes of the federal SIP, the prohibition in Section 7.26(35) should be interpreted to apply to any device for stack rain protection that restricts the vertical exhaust flow of the exhaust stream.

In addition, the monitoring, recordkeeping and reporting provisions throughout 310 CMR 7.26(30)–(37) provides adequate compliance requirements for all emission and operational requirements.

Finally, 310 CMR 7.26(32)(b) requires owners or operators of subject boilers to submit a compliance certification before a new boiler is installed and operational. This provision provides the ability for the MassDEP to prevent installation of a boiler if it may violate a NAAQS or other state emission requirement as required by the federal NSR requirements.

Together, these provisions demonstrate that the proposed SIP amendments will not result in increases in emissions above the current SIP-approved rules or interfere with any attainment strategy. In addition, since 310 CMR 7.26(30)–(37) applies equivalent emission and operational limitations as compared to boilers currently undergoing case by case review under the current SIP-approved requirements, the amendment ensures equivalent (or greater) emission reductions than the current SIP-approved minor NSR program. EPA concludes the amendments are consistent with federal requirements and should be approved into the SIP.

D. Miscellaneous Changes

On February 13, 2008, the MassDEP also submitted amendment updating the list of Massachusetts cities and towns to reflect changes in the MassDEP regional boundaries located at the beginning 310 CMR 7.00. EPA is proposing to approve the updated list.

IV. Proposed Action

EPA is proposing to approve the June 28, 1990 and July 11, 2001 SIP amendments to 310 CMR 7.04 ''U Fossil Fuel Utilization Facilities.'' EPA is also proposing to approve the July 11, 2001 SIP amendment to 310 CMR 7.12, ''U Source Registration'' and the September 14, 2006 SIP amendment to 310 CMR 7.26(30)–(37), ''Industrial Performance Standards—U Boiler.'' Finally, EPA is proposing to approve the February 13, 2008 SIP amendment that revises 310 CMR 7.04 ''U Fossil Fuel Utilization Facilities,'' corrects several typographical errors and clarifies certain requirements to 310 CMR 7.12 and 310 CMR 7.26(30)–(37) and updates the list of Massachusetts cities in 310 CMR 7.00.

EPA is soliciting public comments on the issues discussed in this proposal or on other relevant matters. These comments will be considered before EPA takes final action. Interested parties may participate in the Federal rulemaking procedure by submitting written comments to the EPA New England Regional Office listed in the **ADDRESSES** section of this **Federal Register,** or by submitting comments electronically, by mail, or through hand delivery/courier following the directions in the **ADDRESSES** section of this **Federal Register.**

The Agency has reviewed this request for revision of the Federally-approved State implementation plan for conformance with the provisions of the 1990 amendments enacted on November 15, 1990. The Agency has determined that this action conforms with those requirements irrespective of the fact that the submittal preceded the date of enactment.

V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

[1] For example, the MassDEP's ''Boiler Environmental Certification Workbook'' explains that ''Stack heads, devices used to prevent precipitation from entering the stack, must not restrict the vertical flow of the exhaust gas stream. Devices such as 'shanty caps' and 'egg beaters' are prohibited. Coning of the top of the stack and rain sleeves are acceptable. '' *See* MassDEP, Boiler Environmental Certification Workbook, page 11, *available at http://www.mass.gov/dep/service/online/boilwbk.pdf.* EPA has added this document to the administrative record for this action.

Dated: January 31, 2013.

H. Curtis Spalding,

Regional Administrator, EPA New England.

[FR Doc. 2013–02812 Filed 2–6–13; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket No. 10–90; DA 13–69]

Wireline Competition Bureau Seeks Further Comment on Specific Issues Related to the Implementation of the Remote Areas Fund

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Wireline Competition Bureau seeks further comment on specific issues relating to the implementation of the Remote Areas Fund.

DATES: Comments are due on or before February 19, 2013 and reply comments are due on or before March 18, 2013.

ADDRESSES: Interested parties may file comments on or before February 19, 2013 and reply comments on or before March 18, 2013. All pleadings are to reference WC Docket No. 10–90. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.
- *People with Disabilities:* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty).

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Ted Burmeister, Wireline Competition Bureau at (202) 418–7389 or TTY (202) 418–0484, or Heidi Lankau, Wireline Competition Bureau at (202) 418–2876 or TTY (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Public Notice (Notice) in WC Docket No. 10–90; DA 13–69, released January 17, 2013. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160 or (202) 863–2893, facsimile (202) 863–2898, or via Internet at *http://www.bcpiweb.com.*

I. Introduction

1. On November 18, 2011, the Federal Communications Commission (Commission) released the *USF/ICC Transformation Order and FNPRM,* 76 FR 73830, November 29, 2011 and 76 FR 78384, December 16, 2011, which comprehensively reformed and modernized the universal service high-cost and intercarrier compensation systems. The Commission established the Connect America Fund to ensure that voice and broadband service is available throughout the nation. Within Connect America, the Commission created a Remote Areas Fund with a budget of ''at least $100 million annually'' to ensure that even Americans living in the most remote areas of the nation, where the cost of providing terrestrial broadband service is extremely high, can obtain service. In the accompanying *FNPRM,* 76 FR 78384, December 16, 2011, the Commission sought comment on various issues relating to the Remote Areas Fund, including how to define the remote areas eligible for support from the Remote Areas Fund, qualifications for participating providers, the public interest obligations of these providers, as well as administrative issues.

2. Based on the record generated in response to the *FNPRM,* the Bureau now seeks further detailed comment on issues relating to the implementation of the Remote Areas Fund as a portable consumer subsidy program, as proposed by the Commission in the *FNPRM* and supported by a diverse group of commenters. In particular, we seek to further develop the record on a number of specific issues, including defining the areas where Remote Areas funding will be available, how to set the consumer subsidy, consumer eligibility, measures to keep the program within a defined annual budget, service provider participation, performance requirements, and accountability and oversight.

II. Discussion

A. Areas Eligible for Remote Areas Fund Support

3. *Discussion.* We seek to further develop the record on administratively feasible ways to identify areas (both those served by price cap carriers and by rate-of-return carriers) where consumers would be eligible for the Remote Areas Fund.

4. In lieu of using the cost model to define eligible areas, should the Commission use the National Broadband Map to identify unserved census blocks and provide Remote Areas Fund support to those census areas until they become served with broadband that meets the Commission's performance requirements (*i.e.,* speed, capacity, latency) for non-Remote Areas Fund eligible areas?

5. If the Commission chooses to utilize the most current version of the National Broadband Map available at the time it adopts rules for the Remote Areas Fund for the purpose of determining areas eligible for the Remote Areas Fund, should there be a process to contest the classification of areas as unserved or served on the map before Remote Areas funding is provided, and how could that process be implemented in a way to expedite the launch of the Remote Areas Fund? For instance, should the Commission consider any updates to the National Broadband Map gathered in conjunction with Connect America Phase I when finalizing areas eligible for the Remote Areas Fund? Should the Commission implement a process to allow households to self-report if data indicate that certain areas are served, if they contend those areas are unserved?

6. We ask for further comment on other possible data sources that the Commission could use to identify unserved areas. Should the Commission take into consideration the unique characteristics of locations like Alaska or Hawaii in determining areas eligible for Remote Areas funding, and if so, how? To the extent parties advocate use of information other than a cost model or the National Broadband Map to identify remote areas, they should provide specific objective metrics that could be used under such an approach.

7. *Implementing the Remote Areas Fund in Rate-of-Return Areas.* We seek to further develop the record on the suggestion of the National Exchange Carrier Association, Inc. et al. that the Commission take into account the $250 per-line per month cap when identifying areas that are eligible for the Remote Areas Fund. In lieu of relying on a forward looking cost model, should

the Commission identify areas for the Remote Areas Fund based on reported loop cost, such as a rule that all unserved locations in rate-of-return study areas for which the reported loop cost equals or exceeds the 95th percentile for average cost be eligible for Remote Areas Fund support?

8. Alternatively, should the Commission rely on the National Broadband Map to identify rate-of-return census blocks that would be eligible for the Remote Areas Fund, as well as price cap census blocks?

9. We anticipate that rate-of-return carriers would be eligible, as existing eligible telecommunications carriers (ETCs), to seek funding from the Remote Areas Fund and potentially could use alternative technologies, either directly or through resale, to provide broadband to their highest cost customers. To the extent an existing ETC receives funding from the Remote Areas Fund, should any adjustment be made to its receipt of support under other high-cost support mechanisms? Should there be any adjustment to an existing rate-of-return ETC's support if another ETC were to serve some portion of the study area through the Remote Area Fund?

10. Would the ability to serve customers through the Remote Areas Fund address concerns raised by rate-of-return carriers regarding their ability to meet the current rule requiring the deployment of broadband upon reasonable request?

11. To the extent parties argue that a different method for identifying remote areas should be used in areas served by rate-of-return carriers than areas served by price cap carriers, they should present specific alternative proposals of how to identify those areas that would be eligible for such funding.

12. *Transition Issues.* If the Commission were to adopt an approach that relied on the National Broadband Map in lieu of a cost threshold in the forward-looking cost model to designate census blocks eligible for Remote Areas funding, the potential eligibility of specific areas would change over time with the ongoing deployment of broadband-capable infrastructure by existing ETCs receiving support under other universal service mechanisms as well as with expansion by unsubsidized competitors.

13. How should the rules address the transition where an area that is initially classified as unserved, and therefore eligible for Remote Areas Fund support, subsequently becomes served by a terrestrial broadband provider, and how does the answer differ if the Commission chooses to structure the Remote Areas Fund as a one-time payment, as opposed to a monthly subsidy?

14. Would it be a cost-effective use of universal service funds to provide a Remote Areas Fund voucher to a consumer that resides in a location that is expected to receive terrestrial broadband at some point in the future through Connect America Phase I or Phase II? How would a rule identifying all unserved areas as eligible for the Remote Areas Fund, at least until they become served, affect the incentives of existing ETCs to deploy terrestrial broadband? How would it impact carriers' incentives to participate in other universal service programs, such as Connect America Phase II or the Mobility Fund Phase II?

B. Consumer Subsidy

15. *Discussion.* We seek to further develop the record on implementation details regarding how a portable consumer subsidy should be structured, how the amount of the portable consumer subsidy would be set, what restrictions, if any, should be placed on the service contracts that are supported by this subsidy, and how such a program could be designed to stay within a $100 million annual budget. We also seek to further develop the record on the relative advantages and disadvantages of structuring the Remote Areas Fund as a one-time subsidy or a monthly retail subsidy.

1. One-Time Subsidy

16. We seek to further develop the record on setting the subsidy amount for a one-time payment. Satellite and fixed wireless broadband services typically include a combination of upfront and monthly set-up and equipment fees. We note that in its satellite program, RUS awarded Hughes Network Systems (Hughes) a grant of $58,777,306 and Wildblue Communications (Wildblue) a grant of $19,533,444. Based on RUS' estimates of the number of subscribers that would benefit from these grants, Hughes received an award of approximately $227 per subscriber and Wildblue received an award of approximately $177 per subscriber. Would $200 in one-time support per location be an appropriate amount for the Remote Areas Fund one-time subsidy, or should it be higher or lower? How should the Commission account for the fact that in some locations, installation and other upfront costs may be significantly higher (*e.g.,* due to the extreme remoteness of a location or obstacles that may make it difficult for a signal to reach the location)? We encourage commenters to suggest specific dollar amounts and provide specific factual information in support of their assertions.

17. How would adoption of a consumer voucher structured as a one-time payment impact providers' existing practices regarding the amortization of installation costs through monthly rates? Would this approach avoid distorting providers' business decisions regarding the relative amounts of upfront and monthly fees charged to the retail consumer? Would this approach present any unique administrative challenges?

18. Should the Commission set forth pricing and performance requirements that would apply over a minimum period of time to ensure ongoing and acceptable service to the consumer, as a condition of receiving a one-time payment? We note that RUS' BIP program for satellite took such an approach, setting pricing restrictions on basic service packages, prohibiting carriers from requiring customers to enter into extended contracts (subject to certain exceptions), and requiring carriers to offer customer premise equipment at no cost for all their service packages. Would a similar approach be appropriate for the Remote Areas Fund? Should a condition of receiving the one-time payment be that the Remote Areas Fund-supported providers offer voice service at a rate not to exceed the Commission's prior reasonable comparability benchmark for voice service for non-rural carriers, *i.e.,* $36.52? What would be an appropriate amount of time for such pricing and performance requirements?

19. How would structuring the consumer subsidy as a one-time payment affect the nature of competition among potential providers to serve the consumer? Should the Commission adopt any restrictions on the ability of consumers to obtain a new one-time subsidy if they switch providers after some amount of time? Would it be wasteful for the Remote Areas Fund to subsidize the cost of installing a satellite dish or fixed wireless receiver on a home if the consumer previously has used a Remote Areas Fund voucher to install equipment from another provider? What types of reporting or other requirements might the Commission impose to protect against waste, fraud and abuse? For example, in the Lifeline program, consumers must certify that they will notify their service providers within 30 days if they move to a new address. What kinds of burdens might this requirement impose on service providers, and particularly on small businesses?

2. Monthly Retail Subsidy

20. In the *USF/ICC Transformation Order and FNPRM,* the Commission also sought comment on various issues relating to structuring the portable consumer subsidy as ''a monthly amount equal to the difference between the retail price of a 'basic' satellite voice-broadband service and an appropriate reference price for reasonably comparable service in urban areas.'' We seek to further develop the record on what specific figure should be used as the urban reference price, pending implementation of the urban rate survey, if the Commission were to implement a monthly subsidy?

21. We note that the Commission's prior reasonable comparability benchmark for voice service for non-rural carriers was $36.52. On an interim basis, would it be reasonable to set the urban reference price for voice at $37 for purposes of the Remote Areas Fund? We also note that several large fixed terrestrial providers offer broadband at speeds close to the Commission's 4 Mbps downstream/1 Mbps upstream benchmark at prices ranging from $45 to $49.95 per month. Would setting an urban reference price for broadband at a somewhat higher level, such as $60, be a reasonable interim approach for the Remote Areas Fund? Should that figure be lower or higher?

22. We also seek further comment on what should be considered ''basic'' satellite voice-broadband service for the purposes of setting the monthly consumer subsidy amount. Satellite broadband providers offer a variety of service tiers with different usage limits at different prices, with the lowest price offerings currently in the $50 range. Should the Commission deem the lowest price offering to be a ''basic'' broadband offering, and therefore focus on the $50 plan in setting the satellite reference rate? Should consumers be able to use their monthly voucher to purchase services above the basic offering?

23. How, if at all, should the Commission take into account the costs of installation and other upfront costs as part of a monthly retail subsidy? For instance, should the representative retail rate be determined by adding together the monthly service amount plus any upfront fees, amortized over a two-year period?

24. Satellite broadband service rates provide a useful framework for setting the portable consumer subsidy amount because they are generally uniform nationwide. However, we acknowledge that terrestrial wireless or wireline service providers may be viable providers for certain remote areas and may choose to participate in the Remote Areas Fund. Given that these service providers can charge rates that vary by geography, we seek comment on whether, and if so, how to account for these varying rates when setting the rate that will be compared to reasonably comparable services in urban areas.

25. How, if at all, should the usage amounts associated with wireless broadband services in urban areas be factored into such an adjustment?

3. Applying the Subsidy to Consumer Bill

26. Regardless of whether the Commission structures the Remote Areas Fund as a one-time or monthly subsidy, we seek further comment on measures to ensure the consumer receives the full benefit of the subsidy.

27. To discourage service providers from raising their rates in response to the availability of a consumer subsidy, the Commission sought comment in the *USF/ICC Transformation Order and FNPRM* on requiring ''each ETC to establish an 'anchor price' for its basic service offering—including installation and equipment charges—as a condition of eligibility to receive Remote Areas Fund support.'' Should the Remote Areas Fund-supported provider be required to apply the discount to the provider's best available rates, including any discounts or promotions, at the time the consumer subscribes to the service? How could the Commission structure this requirement to prevent service providers from capturing the subsidy and not passing it on to the consumer? How could it be structured so that it could be audited to verify that providers are in fact providing consumers their best available rates?

4. Restrictions on Extended Contracts

28. As the Commission noted in the *FNPRM,* certain satellite providers require that consumers enter into 24-month contracts when they subscribe to their services. We seek to further develop the record on issues relating to the use of extended contracts by Remote Areas Fund-supported providers.

29. If Remote Areas Fund-supported providers are permitted to enter into extended contracts with consumers receiving Remote Areas Fund subsidies, should the maximum permitted contract term be 24 months? We note that in implementing its satellite broadband program, RUS only permitted awardees to enter into one-year contracts in certain circumstances. Does the answer depend on whether the Commission structures the Remote Areas Fund as a one-time payment or a monthly subsidy? If the Commission provides portable consumer subsidies for extended contracts, how should it handle early termination fees?

C. Consumer Eligibility for the Remote Areas Fund

30. *Discussion.* Should the Commission adopt the same definition for household for purposes of the Remote Areas Fund as it did for Lifeline and associated implementing regulations?

31. Should the Commission require consumer self-certifications that they do not have terrestrial broadband available at their home meeting defined requirements (*i.e.,* for capacity, latency, usage, and price) as a precondition to receiving the Remote Areas Fund consumer subsidy? Are there any other specific mechanisms the Commission should adopt to ensure that Remote Areas funding does not go to consumers that already have terrestrial broadband that meets the Commission's requirements?

32. Should consumers be required to self-certify that they are using Remote Areas Fund support at their primary address? If consumers are found to be making false self-certifications, should the Commission impose penalties for such false statements and misrepresentations?

33. If the Commission did require primary address self-certifications, would it be reasonable to employ Lifeline requirements (*e.g.,* 30-day moving notifications, a prohibition on P.O. box addresses, and a requirement that applicants provide both a primary address and billing address) to impose the primary address restriction? How should the Commission account for certain groups like seasonal workers that may make frequent moves between residences?

34. If the Commission requires consumers to submit a certification pursuant to a one Remote Areas Fund subsidy per household or primary address restriction, should the service provider be responsible for collecting and verifying the certification? We note that USAC is in the process of developing a database to verify that households do not receive more than one Lifeline subsidy. Should USAC also develop a database of Remote Areas Fund-eligible households with associated addresses, and could the Lifeline database be expanded for this purpose in a cost-effective way? What steps, if any, should USAC or ETCs take to verify self-certifications in the interim while the database would be developed? We also seek comment on whether the costs to ETCs or the Administrator of

verifying certifications against such a database or other data source would outweigh any potential savings associated with restricting Remote Areas Fund support to one-per-household and/or primary addresses.

35. If a database is employed, should ETCs be required to collect the data for the database from their customers? How can the Commission ensure that data that are submitted to the database by ETCs are uniform? As an alternative to creating a database or utilizing an expanded version of USAC's Lifeline database, are there other types of tools or data sources that USAC or ETCs could rely on to verify consumers' addresses?

D. Designing the Remote Areas Fund Within a Set Budget

36. *Discussion.* Recognizing that the answer depends on the level of subsidy provided, what would be the financial impact of making all census blocks shown as unserved areas on the National Broadband Map eligible for Remote Areas Fund support, until deployment occurs in those areas, whether through support from universal service or through market forces? How likely is it that the Commission would need to limit the number of locations in remote areas that will be eligible for support to stay within a defined budget? If so, what criteria should the Commission use to determine which remote areas will receive support and which will not? If the demand for the Remote Areas Fund were to exceed a defined $100 million annual budget, should the Commission reevaluate and set a higher budget for the following year, or should the Commission adopt a $100 million hard cap in interest of promoting fiscal responsibility and controlling the overall size of the universal service budget?

E. Service Providers Eligible To Receive Support From the Remote Areas Fund

37. *Discussion.* Should the Commission impose requirements to standardize the required showings to be designated an ETC to participate in the Remote Areas Fund, the procedural aspects of the ETC application process, the time states take to review ETC applications, the criteria states use to evaluate ETC applications, and the obligations that states place on ETCs? If so, what specific requirements should be adopted? The National Cable & Telecommunications Association proposes that ETC applications be deemed granted within 30 days of filing; would a more reasonable time frame for such a requirement be 60 or 90 days?

38. ETCs that receive Remote Areas Fund support will be required to provide voice service. We seek to update the record on the quality of the voice service that satellite providers and wireless Internet Service Providers (WISPs) are able to offer today, and over the next twelve months. We note that nothing in the Commission's existing regulations would preclude incumbent voice providers that have already received an ETC designation and who wish to resell satellite broadband services or other wireless broadband services from receiving Remote Areas funding, assuming such services meet specified performance requirements. What is the likelihood that satellite providers and WISPs would enter partnerships with traditional voice providers, *i.e.,* incumbent telephone companies, to fulfill voice obligations in areas eligible for Remote Areas funding?

F. Performance Requirements for Remote Areas Fund-Supported Service Providers

39. *Discussion.* The International Telecommunication Union has noted that while latency delays above 400 milliseconds are unacceptable for network planning, latency up to 300 milliseconds provides acceptable voice quality for most users with an increasing number of users becoming dissatisfied if latency exceeds 300 milliseconds. Based on this information, we seek comment on an appropriate latency standard for the Remote Areas Fund. How should the Commission address the increased latency experienced during double hop calls?

40. We also seek to further develop the record on setting required usage allowances for providers participating in the Remote Areas Fund. We have not yet established minimum usage requirements that will apply to price cap carriers that elect to make a statewide commitment to serve areas in Phase II. Given the Commission's recognition that it may be appropriate to ''modestly relax'' performance requirements in areas supported by the Remote Areas Fund, what downward adjustments would represent an appropriate balancing of the ''economic and technical characteristics of networks'' likely to serve the most remote areas?

41. We note that according to one source, during the second half of 2012, the median monthly data consumption for fixed services in North America was 16.8 GB per-subscriber. And according to recent Commission speed testing data, 75 percent of surveyed DSL subscribers in April 2012 used less than 20 GB per month. Given this historical data and industry forecasts for future usage, what usage allowance should be a required minimum for providers participating in the Remote Areas Fund? Would 20 GB be an appropriate usage allowance requirement for the Remote Areas Fund, at least in its initial implementation? Should the Commission periodically adjust the Remote Areas Fund usage allowance requirement to reflect consumer behavior, and if so, how often?

G. Accountability and Oversight

42. *Discussion.* Should any of the 47 CFR 54.313 reporting requirements not apply or be tailored for Remote Areas Fund recipients? For example, is the requirement that ETCs report detailed information about outages, and the number of complaints they receive per 1,000 connections, reasonable for Remote Areas Fund-supported participants? Is there a need to require a five-year build-out plan in a situation where the subsidy is structured as a consumer subsidy, rather than a supply-side subsidy for deployment? While recognizing there are fundamental differences between the Lifeline program and Connect America high-cost programs, are there lessons that the Commission could learn from Lifeline's administration of consumer subsidies? What measures would the Commission need to put in place to ensure that subsidies are not flowing to consumers that are already served by terrestrial broadband meeting the Commission's broadband speed benchmark? What specific kinds of documents should Remote Areas Fund participants be required to retain in order to facilitate USAC's audits and investigations of funding recipients? Should Remote Areas Fund participants be required to maintain date stamped screen shots of Web site advertisements and/or other documentary evidence of pricing, including both published and unpublished rates available upon request, to facilitate the ability of auditors to ensure that consumers have the benefit of best available rates?

III. Procedural Matters

A. Initial Regulatory Flexibility Act Analysis

43. The *USF/ICC Transformation Order and FNPRM* included an Initial Regulatory Flexibility Analysis (IRFA) pursuant to 5 U.S.C. 603, exploring the potential impact on small entities of the Commission's proposal. We invite parties to file comments on the IRFA in light of this additional notice.

B. Initial Paperwork Reduction Act of 1995 Analysis

44. This Public Notice contains information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13 that were originally proposed in the *USF/ICC Transformation Order and FNPRM.* The *USF/ICC Transformation Order and FNPRM* was submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies were invited to comment on the new information collection requirements contained in that proceeding and referenced in this Public Notice.

C. Filing Requirements

45. Interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments are to reference WC Docket Nos. 10–90 and DA 13–69 and may be filed using the Commission's Electronic Comment Filing System (ECFS). *Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121, May 1, 1998.

▪ *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/.*

▪ *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 St. SW., Room TW–A325, Washington, DC20554. The filing hours are 8:00 a.m. to 7:00 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.

In addition, we request that one copy of each pleading be sent to each of the following:

(1) Ted Burmeister, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street SW., Room 5–A445, Washington, DC 20554; email: *Theodore.Burmeister@fcc.gov;*

(2) Heidi Lankau, Telecommunications Access Policy Division,Wireline Competition Bureau, 445 12th Street SW., Room 5–B511, Washington, DC 20554; email: *Heidi.Lankau@fcc.gov;*

(3) Charles Tyler, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street SW., Room 5–A452, Washington, DC 20554; email: mail to: *Charles.Tyler@fcc.gov.*

46. *People with Disabilities:* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

47. 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 section 1.1206(b). In proceedings governed by rule section 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.

Federal Communications Commission.

Trent B. Harkrader,

Division Chief, Telecommunications Access Policy Division, Wireline Competition Bureau.

[FR Doc. 2013–02686 Filed 2–6–13; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

RIN 0648–BC10

Sea Turtle Conservation; Shrimp Trawling Requirements

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

ACTION: Proposed rule; withdrawal.

SUMMARY: We (NMFS) have determined that a final rule to withdraw the alternative tow time restriction and require all skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) rigged for fishing to use turtle excluder devices (TEDs) in their nets is not warranted at this time. Thus, we are discontinuing our Environmental Review process under the National Environmental Policy Act (NEPA) and do not intend to prepare a Final Environmental Impact Statement for this Action. We therefore withdraw our proposed rule to require TEDs in these vessels published May 10, 2012, in the **Federal Register**.

DATES: The proposed rule published on May 10, 2012 (77 FR 27411), is withdrawn as of February 7, 2013.

FOR FURTHER INFORMATION CONTACT: Michael Barnette, 727–551–5794.

SUPPLEMENTARY INFORMATION:

Background

On May 10, 2012, we published a proposed rule (77 FR 27411) that would require all skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) to use TEDs in their nets. Subsequently, a notice of availability on a Draft Environmental Impact Statement (DEIS) to Reduce Incidental Bycatch and Mortality of Sea Turtles in the Southeastern U.S. Shrimp Fisheries was

published on May 18, 2012 (77 FR 29636). The comment periods for the proposed rule and DEIS ended on July 9 and July 2, 2012, respectively.

We prepared the DEIS and proposed rule in response to elevated sea turtle strandings in the Northern Gulf of Mexico, particularly throughout the Mississippi Sound area, in 2010 and 2011. Necropsy results indicated a significant number of stranded turtles from both the 2010 and 2011 events likely perished due to forced submergence, which is commonly associated with fishery interactions. The most likely cause of the strandings was thought to be the shrimp fisheries, and, in particular, the inshore skimmer trawl fisheries; for the purposes of this notice, skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) will be collectively referred to as skimmer trawls or as the skimmer trawl fisheries. Skimmer trawlers are currently authorized to use alternative tow times in lieu of TEDs, pursuant to 50 CFR 223.206(d)(2)(ii)(A)(*3*). The alternative tow time restrictions limit tow times to a maximum of 55 minutes from April 1 through October 31, and 75 minutes from November 1 through March 31. The DEIS and proposed rule noted compliance issues with the alternative tow time restrictions by skimmer trawl vessels, which could result in mortality of sea turtles. Based on new information discussed below, our previous conclusions regarding the impact of non-compliance with tow time restrictions in the skimmer trawl fleet were likely overly conservative and the DEIS mortality estimates likely do not reflect actual fishery impacts on sea turtles.

At the time the DEIS was prepared, we had extremely limited information on the effects of the skimmer trawl fisheries on sea turtle populations. During this past summer, we shifted observer effort from the offshore otter shrimp trawl fishery to the inshore skimmer trawl fisheries in the Northern Gulf of Mexico to obtain more information on the potential impacts to sea turtle populations. Between May and July 2012, observers reported the capture of 24 sea turtles on skimmer trawl vessels, all of which were Kemp's ridley sea turtles. Tow times ranged from 24 to 128 minutes, with approximately 20 percent being over 70 minutes, with an average tow time of 57 minutes. While only 35 percent of tows were within the required 55-minute tow time limit, all sea turtles were released alive. One turtle was initially comatose but became active while on deck before release. Additionally, all observed sea turtles were small, juvenile specimens, and approximately 58 percent of these turtles had a body depth that could allow them to pass between the required maximum 4-inch bar spacing of a TED.

Using catch per unit effort (CPUE) from the recent summer observer coverage, we completed new estimates of sea turtle captures within the Gulf of Mexico skimmer trawl fisheries. Additionally, we applied a summer mortality rate based on the 2012 observer data to calculate estimated mortalities of sea turtles within the skimmer trawl fisheries currently operating without TEDs. While all observed sea turtle captures were released alive, one turtle was originally boated in a comatose state. Based on National Research Council (1990) recommendations, this turtle was scored as a mortality to be conservative and account for real-world fishery conditions where turtles may not be properly resuscitated before being released.

To evaluate the effects of requiring TEDs in the Gulf of Mexico skimmer trawl fisheries, we modified our approach from the DEIS based on advice from the Southeast Fisheries Science Center's (SEFSC) regarding the utilization and limitations of the summer observer coverage data. The new approach accounted for the significant number of small turtles that might pass between the deflector bars of a TED and back into the bag of the trawl net, and also examined less optimistic compliance scenarios should TEDs be required in the skimmer trawl fisheries. Since the majority of skimmer trawls operate in Louisiana state waters where federal TED requirements are not enforced by Louisiana state law enforcement (due to state legislation and significant resistance to the original sea turtle conservation efforts in the shrimp fishery), we would not expect high compliance immediately following potential rule implementation. While compliance has likely fluctuated over the years, it took the offshore otter trawl fishery over 20 years of implementation and 2 years of intensive outreach and enforcement efforts to achieve an estimated 84 percent TED effectiveness rate. Therefore, we estimated sea turtle captures and mortalities under a potential TED requirement for the skimmer trawl fisheries based on staggered rates of TED effectiveness. Specifically, we assumed TED effectiveness would be 65 percent for years 1–2 following implementation, 75 percent for years 3–4, and, ultimately, 84 percent for year 5 and into the future. To account for the issue of small turtles potentially passing through the deflector bars, we estimated a range, assuming that roughly one-third to one-half of the small turtles would not be excluded by the TED but would pass through the bars and be exposed to a higher mortality rate in the bag of the trawl.

Also, the mortality rate for small turtles that pass through the bars and into the bag of the net, and for other turtles that do not escape the TED due to compliance issues that impact TEDs' effectiveness, was based on long tow times (i.e., 102 minutes) as modeled by Sasso and Epperly (2006). The assumption is that with an installed TED, vessels would not be limited by a 55 or 75 minute tow time (depending on season), and would likely tow for longer periods. However, actual tow times may be dictated by environmental conditions (e.g., debris issues) or navigational requirements (e.g., tight or irregular water bodies, such as bayous along the Louisiana coast). In areas where vessels need to clear their nets of debris or raise their gear to navigate, tow times may be on average shorter than compared to skimmer vessels operating in larger, open water bodies (e.g., Mississippi Sound). Therefore, based on past experience recording tow times prior to the observer coverage, we determined a mortality rate corresponding to a tow time of 102 minutes accounted for the potential changes in fishing behavior as a result of the proposed rule.

The revised capture and mortality estimates indicated the Gulf of Mexico skimmer trawl fisheries result in 1,893 sea turtle mortalities per year as they currently operate (versus 2,066–6,386 sea turtle mortalities estimated for the Gulf of Mexico in the DEIS). Sea turtle mortalities resulting from the Gulf of Mexico skimmer trawl fisheries under a with-TED scenario were estimated to be 1,977–2,219 for years 1–2; 1,576–1,855 for years 3–4; and 1,217–1,530 for years 5 and on.

In contrast to the estimates included in the DEIS, the revised capture and mortality estimates indicate that the potential benefits of a TED requirement in the Gulf of Mexico skimmer trawl fisheries are significantly less than previously estimated in the DEIS. Therefore, given the potentially significant economic ramifications a TED requirement would have on fishermen participating in the inshore skimmer trawl fisheries combined with highly uncertain ecological benefits to sea turtle populations compared to the status quo based on the new observer data, we concluded a final rule to require all skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) in the Gulf of Mexico to use TEDs in their nets is not warranted at this time, and are withdrawing our proposed rule.

Observer coverage has also been initiated in 2012 for the North Carolina skimmer trawl fishery, but new data are currently unavailable. Caution would be prudent when considering the DEIS estimates and conclusions for the North Carolina fishery, given the insight obtained on the skimmer trawl fisheries in the Northern Gulf of Mexico (e.g., average tow times and mortality rates). For instance, estimating sea turtle mortalities based on the proxy of a 102-minute average tow time is most likely overly conservative for the North Carolina fleet given the 57-minute average tow time documented in the summer observer coverage work for the Gulf of Mexico skimmer trawl fisheries. Further, our previous CPUE rates and information on species composition and size classes for North Carolina is extrapolated from only three captures. The observer information from this past summer's work in the Gulf of Mexico significantly changed our understanding of these important variables. Therefore, we believe pursuing a final rule strictly for the North Carolina skimmer trawl fishery is also unwarranted at this time.

We believe additional observer effort is necessary to evaluate the potential effects of the skimmer trawl fisheries on sea turtle populations. In particular, we would like to have information on interactions during winter months, which have not been sampled, and for which we have not been able to update the analysis used in the DEIS. Additionally, extended observer sampling in the Northern Gulf of Mexico during summer months is needed to determine if this year's observed interactions, particularly the prevalence of very small Kemp's ridley sea turtles, were an anomaly based on oceanographic conditions or the impact of strong recruitment from increased nesting success of Kemp's ridley sea turtles, which could be expected to continue into the future. The prevalence of these very small turtles has potentially significant implications for future management directions, and needs to be better understood.

We also expect to explore technological solutions to address the small turtle issue, such as conducting TED feasibility and catch loss studies on TEDs with bar spacing less than 4 inches. Additional observer data and an analysis of the size of turtles interacting with the inshore skimmer trawl fisheries would be pursued to determine TED bar spacing that would maximize benefits to sea turtle conservation. Our objective is to have sufficient information to evaluate a potential proposed rule that would be effective in reducing sea turtle bycatch in the inshore skimmer trawl fisheries in the near future.

Additionally, we believe there is a need to explore if there are better criteria to determine mortality in trawl fisheries. In consultation with relevant experts, the agency will examine this issue and produce a report with our findings and any new criteria that may be developed.

Concurrently, we expect to improve outreach efforts with industry to address compliance issues with tow time requirements observed in the inshore skimmer trawl fisheries. Numerous requests to strengthen outreach, specifically in regards to education on tow time requirements, were received from the public and industry during the comment periods for the proposed rule and DEIS. These outreach efforts would likely improve compliance and, therefore, decrease sea turtle mortality in the inshore skimmer trawl fisheries in the near term.

References

National Research Council. 1990. Decline of the Sea Turtles: Causes and Prevention. National Academy Press, Washington, DC. 259 pp.

Sasso, C.R. and S.P. Epperly. 2006. Seasonal sea turtle mortality risk from forced submergence in bottom trawls. Fisheries Research 81:86–88.

Dated: February 4, 2013.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2013–02786 Filed 2–6–13; 8:45 am]

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Notices

Federal Register

Vol. 78, No. 26

Thursday, February 7, 2013

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0005]

Notice of Decision To Authorize 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.

SUMMARY: We are advising the public of our decision to authorize the importation into the continental United States of fresh litchi, longan, and rambutan fruit from the Philippines. Based on the findings of a pest risk analysis, which we made available to the public for review and comment through a previous notice, 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.

DATES: *Effective Date:* February 7, 2013.

FOR FURTHER INFORMATION CONTACT: Ms. Claudia Ferguson, Regulatory Policy Specialist, Regulations, Permits, and Manuals, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1236; (301) 851–2352.

SUPPLEMENTARY INFORMATION:

Background

Under the regulations in ''Subpart—Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–57, 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 of the regulations contains a performance-based process for approving the importation of commodities that, based on the findings of a pest risk analysis (PRA), can be safely imported subject to one or more of the designated phytosanitary measures listed in paragraph (b) of that section. Under that process, APHIS publishes a notice in the **Federal Register** announcing the availability of the PRA that evaluates the risks associated with the importation of a particular fruit or vegetable. Following the close of the 60-day comment period, APHIS may authorize the importation of the fruit or vegetable subject to the identified designated measures if: (1) No comments were received on the PRA; (2) the comments on the PRA revealed that no changes to the PRA were necessary; or (3) changes to the PRA were made in response to public comments, but the changes did not affect the overall conclusions of the analysis and the Administrator's determination of risk.

In accordance with that process, we published a notice [1] in the **Federal Register** on March 6, 2012 (77 FR 13260–13261, Docket No. APHIS–2012–0005), in which we announced the availability, for review and comment, of a PRA that evaluates the risks associated with the importation into the continental United States of fresh litchi, longan, and rambutan fruit from the Philippines. We solicited comments on the notice for 60 days ending on May 7, 2012. We did not receive any comments by that date.

Therefore, in accordance with the regulations in § 319.56–4(c)(2)(ii), we are announcing our decision to authorize the importation into the continental United States of fresh litchi, longan, and rambutan fruit from the Philippines subject to the following phytosanitary measures:

- 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.

These conditions will be listed in the Fruits and Vegetables Import Requirements database (available at *http://www.aphis.usda.gov/favir*). In addition to these specific measures, fresh litchi, longan, and rambutan fruit from the Philippines will be subject to the general requirements listed in § 319.56–3 that are applicable to the importation of all fruits and vegetables. Further, for fruits and vegetables requiring treatment as a condition of entry, the phytosanitary treatments regulations in 7 CFR part 305 contain administrative and procedural requirements that must be observed in connection with the application and certification of specific treatments.

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 4th day of February 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–02776 Filed 2–6–13; 8:45 am]

BILLING CODE 3410–34–P

[1] To view the notice and the PRA, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2012–0005.*

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2010–0086]

Notice of Availability of a Swine Brucellosis and Pseudorabies Proposed Action Plan

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability and request for comments.

SUMMARY: We are making a proposed action plan describing a potential new approach to managing swine brucellosis and pseudorabies available for public review and comment. Swine brucellosis and pseudorabies have been eliminated from commercial swine herds within the United States, but potential sources of introduction of these diseases exist and we believe program modifications are necessary to address these risks. The proposed action plan presents our current thinking about the program modifications that we are considering.

DATES: We will consider all comments that we receive on or before April 8, 2013.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS–2010–0086–0001*.
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2010–0086, 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–2010–0086* 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) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Dr. Troy Bigelow, National Center for Animal Health Programs, VS, APHIS, Federal Building Room 891, 210 Walnut Street, Des Moines, IA 50309; (515) 284–4121.

SUPPLEMENTARY INFORMATION:

Background

Brucellosis is a contagious disease, caused by bacteria of the genus *Brucella,* that affects both animals and humans. The disease mainly affects cattle, bison, and swine. Swine brucellosis, caused by *Brucella suis,* causes loss of young through spontaneous abortion or birth of weak offspring, reduced lactation, and infertility. There is no economically feasible treatment for brucellosis in swine and other livestock. In humans, brucellosis initially causes flu-like symptoms, but the disease may develop into a variety of chronic conditions, including arthritis. Humans can be treated for brucellosis with antibiotics.

Pseudorabies is a contagious, communicable disease of livestock, primarily swine, and other animals. The disease, also known as Aujeszky's disease, is caused by a herpes virus. The disease does not affect humans, and, for livestock, several pseudorabies vaccines exist.

The regulations contained in 9 CFR part 78 (referred to below as the swine brucellosis regulations) provide, among other things, conditions under which swine may be considered reactors for or exposed to swine brucellosis, and conditions under which the Animal and Plant Health Inspection Service (APHIS) would validate a herd or State as free of the disease. The swine brucellosis regulations also specify requirements for the interstate movement of breeding swine. These requirements are predicated on whether the swine originate from a herd or a State validated by APHIS as free of swine brucellosis, and, if not, whether the swine are brucellosis reactors or brucellosis exposed.

The regulations in 9 CFR part 85 (referred to below as the pseudorabies regulations) provide, among other things, conditions under which swine may be considered infected with or exposed to pseudorabies. The pseudorabies regulations also contain requirements for the interstate movement of swine that are known to be infected with or exposed to pseudorabies, requirements for the interstate movement of swine vaccinated for pseudorabies but not known to be infected with or exposed to the disease, and requirements for the interstate movement of all other swine. The regulations presuppose widespread testing of commercial swine for pseudorabies.

The swine brucellosis and pseudorabies regulations are intended to prevent the spread of swine brucellosis and pseudorabies through the interstate movement of diseased or exposed swine or through their contact with unaffected swine during or following movement from their premises of origin. APHIS established the swine brucellosis and pseudorabies regulations when the diseases were prevalent in the commercial swine herd within the United States.

This is no longer the case; both swine brucellosis and pseudorabies have been eliminated from commercial herds within the United States. As a result, in recent years, our swine brucellosis and pseudorabies program activities have placed an increased emphasis on monitoring the risk that these diseases will be introduced into swine herds.

These monitoring activities have identified feral swine as reservoirs of the two diseases. In recent years, APHIS has identified several swine herds throughout the United States that were infected with swine brucellosis or pseudorabies. In each case, it was determined that the swine became infected through contact with feral swine at their premises.

Feral swine populations are known to exist in at least 38 States. While the exact distribution and density of each population is unknown, the populations are believed to be growing. In each State in which feral swine are known to exist, APHIS considers the commercial swine within the State at risk of becoming exposed to or infected with swine brucellosis or pseudorabies. APHIS considers States or Tribes that border or obtain swine from States with feral swine populations to face similar, but lower, risks. The current swine brucellosis and pseudorabies regulations do not account for these risks.

Accordingly, in this document, APHIS announces the availability of a proposed action plan for a new approach for the swine brucellosis and pseudorabies programs. The proposal, titled ''A New Approach for Managing Swine Brucellosis and Swine Pseudorabies Virus: Veterinary Services' Proposed Action Plan,'' may be viewed on the Regulations.gov Web site or in our reading room. (A link to Regulations.gov and information on the location and hours of the reading room are provided under the heading **ADDRESSES** at the beginning of this notice.) In addition, copies may be obtained by calling or writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**. The proposed action plan is also available on APHIS' Web site, at *http://www.aphis.usda.gov/animal_health/animal_dis_spec/swine/.*

While commenters are invited to address any aspects of the plan in their comments, we specifically request comment regarding the following topics:

- *Risk.* The new approach outlined in the plan considers feral swine to be reservoirs of swine brucellosis and

pseudorabies and to present a significant risk of introducing the diseases into commercial swine populations. Does the plan accurately present the risk that feral swine pose of transmitting these diseases? Are there other significant potential sources of introduction that APHIS should consider?

• *Responsibility.* The plan outlines an approach in which States and Tribes would play a significant role in identifying and monitoring possible sources of introduction of pseudorabies or swine brucellosis into the commercial swine herd in their State or Tribe, with the ultimate goals of quickly identifying and responding to outbreaks and thereby preventing the spread of swine brucellosis or pseudorabies through the interstate movement of commercial swine. What role should a State or Tribe have for ensuring that swine moved from the State or Tribe do not spread these diseases? What role lies with APHIS, or with the commercial swine industry?

• *Swine Health Plan.* Would the Swine Health Plan concept described in the action plan be sufficient to prevent the spread of swine brucellosis and pseudorabies through the interstate movement of diseased swine? If the plan concept would be sufficient, do States and Tribes currently have sufficient personnel and resources to draft and implement such a plan? How long is it likely to take a State or Tribe to draft such a plan and arrange resources as specified in their plan?

• *Program consolidation.* The action plan considers consolidating the swine brucellosis and pseudorabies programs, and the regulations pertaining to these programs, into one domestic swine health program. Does such a consolidation make sense? If not, how would the two regulatory programs need to differ?

• *Indemnity.* The plan considers consolidating the existing regulations governing indemnity paid for swine destroyed because they are known to be infected with swine brucellosis with those governing indemnity paid for swine destroyed because they are known to be infected with pseudorabies, as well as streamlining certain provisions of the regulations. Does such a consolidation make sense?

We will consider all comments that we receive as we continue to explore potential new approaches to managing swine brucellosis and pseudorabies.

Done in Washington, DC, this 4th day of February 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–02772 Filed 2–6–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Nez Perce-Clearwater National Forests; ID; Clear Creek Integrated Restoration Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: This is a corrected notice. This notice updates information about proposed actions in the Clear Creek Integrated Restoration Draft Environmental Impact Statement (DEIS). The DEIS will include two site-specific, nonsignificant amendments of the Nez Perce Forest Plan (1987). The proposed amendments would clarify the Forest's interpretation of old growth standards found in the Nez Perce Forest Plan, and would adopt the Regional soils standard for the Clear Creek Integrated Restoration project area. The original notice was published in the **Federal Register** on January 6, 2012, pages 775 and 776. The Forest Service gives notice of its intent to prepare an Environmental Impact Statement for the Clear Creek Integrated Restoration Project. The Proposed action would use a combination of timber harvest, pre-commercial thinning, prescribed fire and reforestation to achieve the desired range of age classes, size classes, vegetative species distributions, habitat complexity (diversity) and landscape patterns across the forested portions of the project area. Road decommissioning, culvert replacements and road improvements are also proposed to improve watershed health. The EIS will analyze the effects of the proposed action and alternatives. The Nez Perce-Clearwater Forest invites comments and suggestions on the issues to be addressed. The agency gives notice of the National Environmental Policy Act (NEPA) analysis and decision making process on the proposal so interested and affected members of the public may participate and contribute to the final decision.

DATES: The Draft Environmental Impact Statement is expected in March 2013, and will be followed by a 45-day public comment period. The Final Environmental Impact Statement is expected in November 2013.

ADDRESSES: Send written or electronic comments to Lois Hill, Interdisciplinary Team Leader; Kamiah Ranger Station; 903 3rd Street; Kamiah, ID 83536; FAX 208–935–4257; Email *comments-northern-nezperce-moose-creek@fs.fed.us.* Include your name, address, organization represented (if any), and the name of the project for which you are submitting comments. Electronic comments will be accepted in MS Word, Word Perfect, or Rich Text formats. Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered; however, anonymous comments will not provide the Agency with the ability to provide the respondent with subsequent environmental documents.

FOR FURTHER INFORMATION CONTACT: Lois Hill, Interdisciplinary Team Leader, (208) 935–4258.

SUPPLEMENTARY INFORMATION: The objective of the Clear Creek Integrated Restoration Project is to manage forest vegetation to restore natural disturbance patterns; improve long term resistance and resilience at the landscape level; reduce fuels; improve watershed conditions; improve elk habitat effectiveness; improve habitat for early seral species; and maintain habitat structure, function, and diversity. Timber outputs from the proposed action would be used to offset treatment costs and support the economic structure of local communities and provide for regional and national needs.

Purpose and Need for the Proposal

Vegetation and Wildlife Habitat Improvement

Purpose: Trend vegetation species composition, structure, and distributions toward desired conditions described in the Forest Plan.

Need: There is a need to change tree species composition by retaining and planting early seral species, such as ponderosa pine, western larch and western white pine. The project area has a high proportion of grand fir/Douglas fir habitat. These habitats tend to be more susceptible to insects and diseases. Grand fir is unlikely to survive a wildfire. There is a need to trend the area toward a more diverse and resilient forest structure by creating a range of age classes, size classes, habitat complexity (diversity) and disturbance patterns that more closely emulate natural mixed severity disturbance.

Increasing early seral species in managed areas would help trend the area toward, or maintain, desired habitat conditions and would make these habitats more resistant and resilient to change agents such as insects, diseases, and fire.

There is a need to increase diversity within previously harvested areas to begin restoring long-term habitat quality for sensitive and old growth associated species. Historic logging practices and fire suppression have created a landscape that is more highly fragmented than would be expected to result from natural disturbances. Ladder fuels have increased and there has been a shift to shade tolerant species. Habitat structure and patch sizes of young forests are simplified and smaller than would be expected to result from natural disturbances. Edges of patches are straight and even.

There is a need to increase young forest habitats on this landscape. Age classes are dominated by middle-aged and mature forest habitats. Forest management would increase high quality early seral wildlife habitats by retaining large trees and promoting establishment of tall shrubs and hardwood tree species by using variable retention regeneration harvest. In the short term, this would benefit wildlife species that use early seral habitats, such as neotropical migratory birds, resident birds, small mammals, and big game species. In the long term, large tree retention would help maintain habitat structure and complexity needed by old growth associated species.

Goods and Services

Purpose: To utilize timber outputs produced through restoration activities to support the economic structure of local communities and provide for regional and national needs (Forest Plan page II–1).

Need: There is a need to provide a sustained yield of resource outputs, as directed by the Forest Plan. Much of the area consists of grand fir dominated stands that have insect and disease infestations that are contributing to increased tree mortality, or are at risk from stand replacing events. Stands proposed for treatment are currently losing volume and value due to insects and diseases. Harvest of the timber would provide materials to local industries.

Fire Regime/Natural Disturbance Restoration and Fuel Reduction

Purpose: Reduce ladder fuels created by shade-tolerant species and create more natural patch sizes by emulating mixed severity fire (Forest Plan page II–2).

Need: There is a need to increase patch sizes to shift age and size class distributions to increase high quality early seral wildlife habitats. Effective fire suppression in this area began in the 1930's. As a result, there has been a vegetative shift to less fire resistant species, and an increase in ladder fuels that can contribute to the risk of high intensity and potentially resource damaging wildfire. Some portions of the project area have been identified as being up to five times outside of their normal fire return intervals. Past harvest patterns do not emulate natural disturbance patterns nor do they emulate natural habitat structure. Landscape burning and timber harvest that mimics natural fire would help increase forest resilience, help reduce risk of wildfires, and help create high quality habitats that would benefit neotropical migratory birds, resident birds, small mammals, and big game species. Fire dependent wildlife species would benefit from landscape burning.

Watershed Improvement

Purpose: Reduce potential sediment inputs into the aquatic ecosystem from roads.

Need: There is a need to drain roadside ditchline water away from streams by installing cross drain pipes near live stream crossings. The cross drain pipes collect ditchline water and direct it onto the forest floor. There is also a need to replace existing undersized, damaged, or rusting culverts on streams to minimize failure potential.

There are 283 miles of road within the project area, 200 of which are needed for current and future management. The remaining 83 miles of road have been cleared for decommissioning under the South Fork-West Fork Clear Creek Road Decommissioning Environmental Assessment (2011). The roads needed for management can contribute sediment to streams through road surface erosion and potential culvert failures. Surface erosion occurs during spring snowmelt and rain events. Dirt coming off roads is diverted into ditchlines which are often directed into streams. Preliminary surveys show most roads in the area are drained by ditches. Culvert failures can result from undersized, damaged or rusting culverts which can plug with debris and then fail as water saturates the surrounding fill. Failures can contribute large pulses of sediment into streams. Surveys indicate at least 60 miles of road with culverts that are in need of replacement or cleaning. There is a minimum of 40 high or moderate priority culverts in need of replacement, and 12 in need of cleaning. There are an additional 40 low priority culverts in need of replacement and 15 in need of cleaning. The surveyed roads pose the highest risk to streams in the project area.

The desired condition for roads is to have ditchlines that drain road surface water away from streams and onto forest the forest floor. All culverts at stream crossings are appropriately sized to allow for the passage of material within minimal risk of plugging.

The Proposed Action would:

Improve Forest Health, Provide Goods and Services, Reduce Fuels and Improve Wildlife Habitat

- Conduct ''variable retention'' regeneration harvest and post harvest burning activities on up to 2,500 acres to create early sucessional plant communities and improve wildlife habitat while re-establishing long-lived early seral tree species. Variable retention harvest would include areas of full retention (clumps), irregular edges, and retention of snags and legacy trees to provide structure and a future source of woody debris. Openings will likely exceed 40 acres.
- Commercially thin approximately 7,810 acres to reduce stand densities improve forest health and reduce the chance of crown fire.
- Apply improvement harvest to approximately 311 acres (thin from below) to remove encroachment and ladder fuels from ponderosa pine dominated stands.
- Construct a minimum temporary road system to carry out the proposed action. Roads would be decommissioned after use.
- Pre-commercially thin approximately 1,865 acres to reduce stand densities improve forest health and reduce fuels.
- Restore approximately 42 acres of bunchgrass communities through prescribed burning and revegetation with native grasses to improve wildlife winter range through reestablishment of native grasses and forbs.
- Apply approximately 1,400 acres of low and mixed severity prescribed fire within the Clear Creek Roadless area to restore natural fire regimes, reduce fuels, improve wildlife habitat and create mosaic forest conditions. Proposed activities are consistent with Idaho Roadless Rule. There is no timber cutting planned within the Clear Creek Roadless area.
- Site-specifically amend the Nez Perce Forest Plan (1987) to clarify the Forest's interpretation of old growth features described in the Forest Plan.

The amendment would replace the definitions for old growth found in Appendix N of the Forest Plan with the definitions found in ''Old Growth Forest Types of the Northern Region'' (Green, et al., 1992, errata corrected 02/05, 12/07, 10/08, 12/11).

Reduce Sediment Production and Address Transportation Needs

- Conduct maintenance on or improve 100–130 miles of system roads including culvert installation or replacement, ditch cleaning, and riprap placement for drainage improvement. It may also include gravel placement, road grading and dust abatement.
- Additional site specific maintenance or improvements would occur to improve watershed conditions on up to 20 miles of roads outside of proposed treatment areas.
- Decommission 2–5 miles of system roads no longer considered necessary for transportation needs.
- Site-specifically amend the Nez Perce Forest Plan (1987) to adopt the Region 1 soil standard of 15% for detrimentally compacted, displaced, or puddled soils for the Clear Creek Integrated Restoration project area.

Possible Alternatives the Forest Service will consider include a no-action alternative, which will serve as a baseline for comparison of alternatives. The proposed action will be considered along with additional alternatives that will be developed to meet the purpose and need for action, and to address significant issues identified during scoping.

The Responsible Official is Rick Brazell, Nez Perce-Clearwater Forest Supervisor, Clearwater National Forest Supervisor's Office, 12730 Highway 12, Orofino, ID 83544.

The Decision To Be Made is whether to adopt the proposed action, in whole or inpart, or another alternative; and what mitigation measures and management requirements will be implemented.

The Scoping Process for the EIS was initiated with the original notice published on January 6, 2012. The scoping process identifies issues to be analyzed in detail and leads to the development of alternatives to the proposal. The Forest Service is seeking information and comments from other Federal, State, and local agencies; Tribal Governments; and organizations and individuals who may be interested in or affected by the proposed action. Comments received in response to this notice, including the names and addresses of those who comment, will be a part of the project record and available for public review.

Early Notice of Importance of Public Participation in Subsequent Environmental Review: A Draft Environmental Impact Statement (DEIS) will be prepared for comment. The next major opportunity for public input will be when the DEIS is published. The comment period for the DEIS will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**. The Draft EIS is anticipated to be available for public review in March 2013.

Dated: January 28, 2013.

Joyce E. Thompson,

Acting Forest Supervisor.

[FR Doc. 2013–02750 Filed 2–6–13; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Proposed New Fee Sites

AGENCY: Bighorn National Forest, Forest Service, USDA.

ACTION: Notice of Proposed New Fee Sites.

SUMMARY: The Bighorn National Forest is proposing to charge new fees at two recreation rental sites under the Federal Lands Recreation Enhancement Act, (Title VIII, Pub. L. 108–447). Fees are assessed based on the level of amenities and services provided, costs of operation and maintenance, market assessment, and public comment. Funds from the fees will be retained locally and used for the operation and maintenance of these recreation sites.

The Sheep Mountain Fire Lookout on the Powder River Ranger District will be available for overnight rental. The facility is located approximately 25 miles southwest of Buffalo, Wyoming, at the end of Forest Road 28. The lookout offers an extraordinary experience in a historical structure. Renting a historical lookout is widely popular on national forests. The fee proposed for this facility is $50 per night. The lookout can accommodate two to four people. A single vault toilet will be available nearby; water and electricity are not available. This facility will be available from approximately Memorial Day to the end of October, weather permitting.

The Powder River Ranger District is also proposing rental of the Pole Creek cabin, located off Forest Road 456. The cabin is located along both a winter snowmobile trail and a trail within the Pole Creek Cross Country Ski Area. The cabin can accommodate up to four people; water and electricity are not available. A single vault toilet is located nearby. The proposed fee for this site is $35 per night. The Pole Creek Cabin will be available all year.

An analysis of nearby private cabins and recreation rental facilities with similar amenities indicates that the proposed fees are comparable with similar sites in the area.

DATES: Send any comments about these fee proposals by August 1, 2013, so comments can be compiled, analyzed, and shared with a Recreation Resource Advisory Committee. New fees would begin in late summer 2013.

ADDRESSES: Comments should be sent by regular mail to Bill Bass, forest supervisor, 2013 Eastside 2nd Street, Sheridan, WY 82801 or by email to *comments-Bighorn@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Questions about the proposal should be addressed to Brian Boden, natural resource specialist, Powder River Ranger District, 1415 Fort Street, Buffalo, WY 82834, *bboden@fs.fed.us*, or 307.684.7806. Information about the proposed fee sites can also be found on the Bighorn National Forest Web site at *www.fs.usda.gov/bighorn/.*

SUPPLEMENTARY INFORMATION: The Federal Recreation Lands Enhancement Act (Title VII, Pub. L. 108–447) directed the Secretary of Agriculture to publish a six month advance notice in the **Federal Register** whenever new recreation fee areas are established.

This new fee will be reviewed by a Recreation Resource Advisory Committee prior to a final decision and implementation.

People wanting to rent Pole Creek Cabin or Sheep Mountain Lookout would do so through the National Recreation Reservation Service at *www.recreation.gov* or by calling 877.444.6777, when the facilities become available. The National Recreation Reservation Service charges a $9 fee for reservations.

Dated: January 31, 2013.

William T Bass,

Forest supervisor.

[FR Doc. 2013–02577 Filed 2–6–13; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

Bureau of Economic Analysis

[Docket No. 130129086–3086–01]

XRIN 0691–XC010

Annual Survey of U.S. Direct Investment Abroad

AGENCY: Bureau of Economic Analysis, Commerce.

ACTION: Notice of reporting requirements.

SUMMARY: By this Notice, the Bureau of Economic Analysis, Department of Commerce, is informing the public that it is conducting the mandatory survey titled BE–11, Annual Survey of U.S. Direct Investment Abroad. This mandatory survey is conducted under the authority of the International Investment and Trade in Services Survey Act (22 U.S.C. 3101–3108, as amended). This Notice constitutes legal notification to all United States persons (defined below) who meet the reporting requirements set forth in this Notice that they must respond to, and comply with, the survey. A completed report covering a reporting company's fiscal year ending during the previous calendar year is due by May 31. The BE–11 survey forms and instructions are available on the BEA Web site at *www.bea.gov/dia.*

Definitions

(a) *United States,* when used in a geographic sense, means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and all territories and possessions of the United States.

(b) *Foreign,* when used in a geographic sense, means that which is situated outside the United States or which belongs to or is characteristic of a country other than the United States.

(c) *Person* means any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization (whether or not organized under the laws of any State), and any government (including a foreign government, the United States Government, a State or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government-sponsored agency).

(d) *Business enterprise* means any organization, association, branch, or venture that exists for profit making purposes or to otherwise secure economic advantage, and any ownership of any real estate.

Who Must Report: Reports are required from each U.S. person that has a direct and/or indirect ownership interest of at least 10 percent of the voting stock in an incorporated foreign business enterprise or an equivalent interest in an unincorporated foreign business enterprise and that meets the additional conditions detailed in Form BE–11. Entities required to report will be contacted individually by the Bureau of Economic Analysis (BEA). Entities not contacted by BEA have no reporting responsibilities.

What To Report: The survey collects information on the operations of U.S. parent companies and their foreign affiliates.

How To Report: Reports can be filed using BEA's electronic reporting system at www.bea.gov/efile. Copies of the survey forms and instructions, which contain complete information on reporting procedures and definitions, may be obtained at the BEA Web site given above in the Summary. Inquiries can be made to BEA at (202) 606–5566 or by sending an email to *be10/11@bea.gov.*

When To Report: A completed report covering a reporting company's fiscal year ending during the previous calendar year is due by May 31.

Paperwork Reduction Act Notice: This data collection has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act and assigned control number 0608–0053. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB. The estimated average public reporting burden for this collection of information is 86 hours per response. Send comments regarding this burden estimate to Director, Bureau of Economic Analysis (BE–1), U.S. Department of Commerce, Washington, DC 20230; and to the Office of Management and Budget, Paperwork Reduction Project 0608–0053, Washington, DC 20503.

J. Steven Landefeld,

Director, Bureau of Economic Analysis.

[FR Doc. 2013–02638 Filed 2–6–13; 8:45 am]

BILLING CODE 3510–06–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Firms for Determination of Eligibility to Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration, Department of Commerce.

ACTION: Notice and Opportunity for Public Comment.

Pursuant to Section 251 of the Trade Act 1974, as amended (19 U.S.C. 2341 *et seq.*), the Economic Development Administration (EDA) has received petitions for certification of eligibility to apply for Trade Adjustment Assistance from the firms listed below. Accordingly, EDA has initiated investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each of these firms contributed importantly to the total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

LIST OF PETITIONS RECEIVED BY EDA FOR CERTIFICATION ELIGIBILITY TO APPLY FOR TRADE ADJUSTMENT ASSISTANCE

[12/29/2012 through 1/31/2013]

Firm name	Firm address	Date accepted for investigation	Product(s)
Associated Machine Design, Inc.	610 Baeten Road, Green Bay, WI 54324.	1/3/2013	Firm manufactures paper manufacturing machinery for the paper industry.
C.E.S. Machine Products, Inc.	8880 Double Diamond Parkway, Reno, NV 89521.	1/9/2013	Firm manufactures components in bicycle and other cycle related shock absorbers, and mechanical parts and mountings for gaming machines.

Any party having a substantial interest in these proceedings may request a public hearing on the matter. A written request for a hearing must be submitted to the Trade Adjustment Assistance for Firms Division, Room 7106, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than ten (10) calendar days following publication of this notice.

Please follow the requirements set forth in EDA's regulations at 13 CFR 315.9 for procedures to request a public hearing. The Catalog of Federal Domestic Assistance official number and title for the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance for Firms.

Dated: February 1, 2013.

Miriam Kearse,

Eligibility Examiner.

[FR Doc. 2013–02735 Filed 2–6–13; 8:45 am]

BILLING CODE 3510–WH–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 30–2011]

Foreign-Trade Zone 141—Rochester, NY; Application for Manufacturing Authority; Firth Rixson, Inc. d/b/a Firth Rixson Monroe; Extension of Comment Period on Revised Preliminary Recommendation

The comment period provided to allow interested parties to respond to the examiner's revised preliminary recommendation issued to the applicant in December 2012 (see, 78 FR 2657–2658, 1–14–2013) is being extended to March 13, 2013, to allow interested parties additional time in which to comment. Rebuttal comments may be submitted during the subsequent 15-day period, until March 28, 2013. Submissions shall be addressed to the Board's Executive Secretary at the following address: Office of the Executive Secretary, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002.

FOR FURTHER INFORMATION CONTACT: Pierre Duy at *Pierre.Duy@trade.gov* or (202) 482–1378.

Dated: February 1, 2013.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2013–02824 Filed 2–6–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–943]

Certain Oil Country Tubular Goods From the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2010–2011

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: Effective February 6, 2013.

FOR FURTHER INFORMATION CONTACT: Paul Stolz, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4474.

SUPPLEMENTARY INFORMATION:

Background

On December 17, 2012, the Department of Commerce (''Department'') published the final results of the antidumping duty administrative review of certain oil country tubular goods (''OCTG'') from the People's Republic of China (''PRC''), covering the period May 19, 2010, through April 30, 2011.[1] On December 18, 2012, U.S. Steel Corporation (a petitioner) and American Tubular Products, LLC (''ATP'') (an importer of subject merchandise), submitted ministerial error allegations and requested, pursuant to 19 CFR 351.224(c), that the Department correct the alleged ministerial errors in the calculation of the weighted-average dumping margin for Jiangsu Chengde Steel Tube Share Co., Ltd. (''Jiangsu Chengde''), Taizhou Chengde Steel Tube Co., Ltd. (''Taizhou Chengde''), and Yangzhou Chengde Steel Tube Co., Ltd. (''Yangzhou Chengde'') (collectively ''the Chengde Group''). As a result of a transcription error, the version of this notice released to interested parties on January 14, 2013, incorrectly stated the weight-averaged dumping margin calculated for the Chengde Group. This notice corrects this error. Because this error was discovered prior to publication in the **Federal Register,** this amended final results is being published in place of the original version released on January 14, 2013.

[1] *See Certain Oil Country Tubular Goods From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010–2011,* 77 FR 74644 (December 17, 2012) (''*Final Results*'').

Scope of the Order

For a full description of the products covered by the antidumping duty order on OCTG from the PRC, *see* the *Final Results.*

Ministerial Errors

A ministerial error as defined in section 751(h) of the Tariff Act of 1930, as amended (''the Act''), includes ''errors in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial.'' [2]

After analyzing all interested party comments we have determined, in accordance with section 751(h) of the Act and 19 CFR 351.224(e), that we made certain ministerial errors in our calculations for the *Final Results.* For a detailed analysis of these alleged ministerial errors, *see* ''First Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods From the People's Republic of China: Analysis of Ministerial Error Allegations,'' dated concurrently with this notice.

The amended weighted-average dumping margin is as follows:

OCTG FROM THE PRC

Exporter(s)	Weighted-average dumping margin (percent)
Jiangsu Chengde, Yangzhou Chengde, Taizhou Chengde ...	162.69

These amended final results are published in accordance with sections 751(a)(1), 751(h) and 777(i)(1) of the Act.

Dated: February 1, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2013–02801 Filed 2–6–13; 8:45 am]

BILLING CODE 3510–DS–P

[2] *See also* 19 CFR 351.224(f).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–823; A–834–807; A–307–820]

Silicomanganese From India, Kazakhstan, and Venezuela: Final Results of the Expedited Second Sunset Reviews of the Antidumping Duty Orders

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* February 7, 2013.

SUMMARY: On October 1, 2012, the Department of Commerce (''Department'') initiated the second sunset reviews of the antidumping duty orders on silicomanganese from India, Kazakhstan, and Venezuela. The Department finds that revocation of these antidumping duty orders would be likely to lead to continuation or recurrence of dumping at the rates identified in the ''Final Results of Reviews'' section of this notice.

FOR FURTHER INFORMATION CONTACT: Sean Carey, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone (202) 482–3964.

SUPPLEMENTARY INFORMATION:

Background

The antidumping duty orders on silicomanganese from India, Kazakhstan, and Venezuela were published on May 23, 2002. *See Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Orders: Silicomanganese from India, Kazakhstan, and Venezuela,* 67 FR 36149 (May 23, 2002).

On October 1, 2012, the Department initiated the second sunset reviews of these orders, pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''). *See Initiation of Five-Year (''Sunset'') Review,* 77 FR 59897 (October 1, 2012) (''notice of initiation''). The Department received a notice of intent to participate from the following domestic parties: Eramet Marietta, Inc. and Felman Production, LLC (collectively, ''domestic interested parties''), within the deadline specified in 19 CFR 351.218(d)(1)(i). Each of these companies is a manufacturer of a domestic-like product in the United States and, accordingly, is a domestic interested party pursuant to section 771(9)(C) of the Act.

On October 31, 2012, the Department received adequate substantive responses to the notice of initiation from the domestic interested parties within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i). In the sunset review of the antidumping order on silicomanganese from India, we received one response from a respondent interested party, Nava Bharat Ventures Limited (''Nava Bharat'') [1] on November 7, 2012, and found that Nava Bharat provided an inadequate response because it did not export subject merchandise to the United States over the five calendar years preceding the initiation of this review.[2] The Department received no responses from other respondent interested parties. On the basis of notices of intent to participate and adequate substantive responses filed on behalf of domestic interested parties, and the inadequate response from the only respondent interested party to have filed a submission, Nava Bharat, the Department has conducted expedited sunset reviews of these orders pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C). As a result of these sunset reviews, the Department finds that revocation of the antidumping duty orders is likely to lead to continuation or recurrence of dumping at the rates indicated in the ''Final Results of Reviews'' section of this notice.

Scope of the Orders

For purposes of these orders, the products covered are all forms, sizes and compositions of silicomanganese, except low-carbon silicomanganese, including silicomanganese briquettes, fines and slag. Silicomanganese is a ferroalloy composed principally of manganese, silicon and iron, and normally contains much smaller proportions of minor elements, such as carbon, phosphorous and sulfur. Silicomanganese is sometimes referred to as ferrosilicon manganese. Silicomanganese is used primarily in steel production as a source of both silicon and manganese. Silicomanganese generally contains by weight not less than 4 percent iron, more than 30 percent manganese, more than 8 percent silicon and not more than 3 percent phosphorous. Silicomanganese is properly classifiable under subheading 7202.30.0000 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Some silicomanganese may also be classified under HTSUS subheading 7202.99.5040.

The low-carbon silicomanganese excluded from this scope is a ferroalloy with the following chemical specifications: Minimum 55 percent manganese, minimum 27 percent silicon, minimum 4 percent iron, maximum 0.10 percent phosphorus, maximum 0.10 percent carbon and maximum 0.05 percent sulfur. Low-carbon silicomanganese is used in the manufacture of stainless steel and special carbon steel grades, such as motor lamination grade steel, requiring a very low carbon content. It is sometimes referred to as ferromanganese-silicon. Low-carbon silicomanganese is classifiable under HTSUS subheading 7202.99.5040.

This scope covers all silicomanganese, regardless of its tariff classification. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope remains dispositive.

Analysis of Comments Received

All issues raised in these reviews are addressed in the Issues and Decision Memorandum (''Decision Memorandum'') from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, dated January 31, 2013, which is hereby adopted by this notice. The issues discussed in the Decision Memorandum include the likelihood of continuation or recurrence of dumping and the magnitude of the margins of dumping likely to prevail if the orders were revoked. Parties can find a complete discussion of all issues raised in these reviews and the corresponding recommendations in this public memorandum, which is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and is available to all parties in the Central Records Unit in room 7046 of the main Commerce building. In addition, a complete version of the Decision Memorandum can be accessed directly on the Internet at *http://ia.ita.doc.gov/frn/.* The signed Decision Memorandum and electronic versions of the Decision Memorandum are identical in content.

[1] On October 19, 2012, Nava Bharat requested an extension of time to file its substantive response. The Department granted an extension until November 7, 2012.

[2] *See* Memorandum from Sunset Team to Barbara E. Tillman, Director, Office of AD/CVD Operations 6 regarding ''Sunset Review of the Antidumping Duty Order on Silicomanganese from India: Adequacy Determination,'' dated November 23, 2012.

Final Results of Reviews

Pursuant to sections 752(c)(1) and (3) of the Act, we determine that revocation of the antidumping duty orders on silicomanganese from India, Kazakhstan, and Venezuela would be likely to lead to continuation or recurrence of dumping, and that the magnitude of the margins of dumping likely to prevail if the order were revoked are as follows:

Exporters/producers	Rate (percent)
India	
Nava Bharat Ventures, Ltd.	15.32
Universal Ferro and Allied Chemicals, Ltd.	20.53
All Others Rate	17.74
Kazakhstan	
Alloy 2000, S.A.	247.88
Kazakhstan-Wide Rate	247.88
Venezuela	
Hornos Eléctricos de Venezuela, S.A.	24.62
All Others Rate	24.62

This notice also serves as the only reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective orders is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing the final results and notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act.

Dated: January 31, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2013–02822 Filed 2–6–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Renewal and Revision of a Previously Approved Information Collection; Comment Request; State Broadband Data and Development Grant Program

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on continuing and revising this information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before April 8, 2013.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Anne Neville, Director, State Broadband Initiative, National Telecommunications and Information Administration (NTIA), Room 4898, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington DC 20230 (or via email to *aneville@ntia.doc.gov*).

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension and revision of a currently approved information collection.

In 2009 and 2010, under the Broadband Data Improvement Act and the American Recovery and Reinvestment Act of 2009, NTIA awarded grants to states, or their designees, to gather and verify state-specific broadband data, including the the maximum advertised speed, technology type and spectrum (if applicable) for each broadband provider offering service in each census block, or, in census blocks greater than two square miles, each road segment (*See* 74 FR 32545, July 8, 2009 and 74 FR 46573, Sept. 10, 2009). Additionally, grants included funding to collect the maximum advertised speed and technology type to which various classes of Community Anchor Institutions (CAIs) subscribe. Recipients are funded to conduct this activity until approximately December 31, 2014.

The recipients gather and verify data twice per year, submitting the information to NTIA each October 1 and April 1. States use the data to populate state broadband maps, and NTIA uses the data to populate the National Broadband Map. The data is also freely available for stakeholders to use, via Application Programming Interfaces (APIs) and in various file formats. Numerous public and private stakeholders currently use the data to inform funding, policy and commercial decisions. Consumers and businesses use the data to identify where broadband is available, the advertised speeds and other information.

Despite the importance of broadband to the U.S. economy, information about broadband availability was not widely available until NTIA and the states developed this dataset. The data collected will continue to provide critical information for grant-making, regulatory and policy-making efforts, and to improve the quality of state-level broadband information.

NTIA proposes to revise the currently approved reporting requirements to include with each submission of data several ''best practices'' documents including a document describing each recipient's methodology for collecting and verifying data, a document that summarizes any major changes or corrections to data from the previous submission and a short text file (also known as a ''readme'' file) that summarizes basic, technical information for the dataset. Recipients began providing this information to NTIA as a best practice because it provided more transparency into their process and supported the efficient review of data. Note that at this time, NTIA is not proposing to revise the broadband availability or CAI adoption data that each recipient collects, though it may consider changes at a future date.

II. Method of Collection

Awardees will continue to submit all reports via the Internet.

III. Data

OMB Control Number: 0660–0032.

Form Number: None.

Type of Review: Regular submission (revision and extension of a currently approved collection).

Affected Public: States, territories and the District of Columbia or their designees. Subrespondents include facilities-based providers of broadband connections, incumbent and competitive local exchange carriers, facilities-based mobile telephony service providers and wireless Internet service providers.

Estimated Number of Total Respondents: 56 respondents; 2,000 subrespondents.

Estimated Time per Response: 3,123 hours for respondents; 50 hours for subrespondents.

Estimated Total Annual Burden Hours: 549,776.

Estimated Total Annual Cost to the Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection. Comments will also become a matter of public record.

Dated: February 1, 2013.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–02713 Filed 2–6–13; 8:45 am]

BILLING CODE 3510–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2013–OS–0018]

Proposed Collection; Comment Request

AGENCY: United States of America Vietnam War Commemoration; OSD/DA&M, DoD.

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of Commemorations under the Secretary of Defense announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 8, 2013.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to The United States of America Vietnam War Commemoration, Attn: Yvonne Schilz, 1101 Wilson Boulevard Suite 810, Arlington, VA 22209 or call at 703–697–4919.

Title; Associated Form; and OMB Number: Vietnam War Commemoration Planned Commemorative Events; DD Form 2956; OMB Number 0704–TBD.

Needs and Uses: The information collection is necessary to notify the United States of America Vietnam War Commemoration's Commemorative Partner Program of Commemorative Partner's planned events for inclusion on the Commemoration's events calendar, and to request event support from the program. The Commemorative Partner Program (CPP) is designed to support federal agencies, State, local, civilian and military communities, international governments, veterans' organizations, civic groups, industries, educational institutions, libraries, museums, business and other organizations in assisting a grateful nation in commemorating the Vietnam War. Commemorative Partners are asked to plan and conduct at least two appropriate events and activities each year during the 2015–2017 timeframe that will ''thank and honor'' our veterans and their families in a memorable, but dignified and honorable manner. Events and activities must meet one or more of the Congressionally-mandated objectives of the program.

Affected Public: Business of other for-profit; Not-for-profit institutions; Federal Government; State, local or tribal government.

Annual Burden Hours: 2,500.

Number of Respondents: 10,000.

Responses per Respondent: One (1) on average. Responses are voluntary and thus the number of responses will vary among respondents. We estimate an average of one annual response per respondent.

Average Burden per Response: 15 minutes.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The United States of America Vietnam War Commemoration Commemorative Partner Program is a voluntary program for organizations to assist a grateful nation in thanking and honoring our Vietnam Veterans and their families. Requests for event support and notification of planned events are purely voluntary, but will inform the program as to the nationwide effort and success to thank and honor our Vietnam Veterans. Information to be collected includes: Commemorative Partner Program Organization name; Event Point of Contact; Year; Tentative Date(s); Planned Event; Planned Activities; and Requested Support (materials).

Dated: February 4, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–02741 Filed 2–6–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2013–OS–0017]

Proposed Collection; Comment Request

AGENCY: United States of America Vietnam War Commemoration; OSD/DA&M, DoD.

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of Commemorations under the Secretary of Defense announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the

agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 8, 2013.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

• *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to The United States of America Vietnam War Commemoration, Attn: Yvonne Schilz, 1101 Wilson Boulevard, Suite 810, Arlington, VA 22209 or call at 703–697–4919.

Title; Associated Form; and OMB Number: Vietnam War Commemoration After-Action Report; DD Form 2957; OMB Number 0704–TBD.

Needs and Uses: The information collection requirement is necessary to notify the United States of America Vietnam War Commemoration's Commemorative Partner Program of Commemorative Partner's results of their event. The form will be used by both civilian and military organizations. The Commemorative Partner Program (CPP) is designed to support federal agencies, State, local, civilian and military communities, international governments, veterans' organizations, civic groups, industries, educational institutions, libraries, museums, business and other organizations in assisting a grateful nation in commemorating the Vietnam War. Commemorative Partners are asked to plan and conduct at least two appropriate events and activities each year during the 2015–2017 timeframe that will ''thank and honor'' our veterans and their families in a memorable, but dignified and honorable manner. Events and activities must meet one or more of the Congressionally-mandated objectives of the program.

Affected Public: Business or other for-profit; Not-for-profit institutions; Federal Government; State, local or tribal government

Annual Burden Hours: 1,250.

Number of Respondents: 5,000.

Responses per Respondent: One (1) on average. Responses are voluntary and thus the number of responses will vary among respondents. We estimate an average of one annual response per respondent.

Average Burden per Response: 15 minutes.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The United States of America Vietnam War Commemoration Commemorative Partner Program is a voluntary program for organizations to assist a grateful nation in thanking and honoring our Vietnam Veterans and their families. After-Action Reports on events held by Commemorative Partners are purely voluntary, but will inform the program as to the nationwide effort and success to thank and honor our Vietnam Veterans. Information to be collected includes: Commemorative Partner Program Organization Name; Address of Organization; Date(s) of Event; Location(s) of Event; Estimated Attendance; Number of Vietnam Veterans Recognized; Number of Vietnam Veteran Families Recognized; and additional comments such as ''lessons learned'' as a result of conducting the event.

Dated: February 4, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–02738 Filed 2–6–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Meeting of the Uniform Formulary Beneficiary Advisory Panel

AGENCY: Assistant Secretary of Defense (Health Affairs), Department of Defense.

ACTION: Notice of meeting.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C. Appendix, as amended) and the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended) the Department of Defense (DoD) announces the following Federal Advisory Committee Meeting of the Uniform Formulary Beneficiary Advisory Panel (hereafter referred to as the Panel).

DATES: March 7, 2013, from 9:00 a.m. to 1:00 p.m.

ADDRESSES: Naval Heritage Center Theater, 701 Pennsylvania Avenue NW., Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: CDR Joseph Lawrence, Designated Federal Officer (DFO), Uniform Formulary Beneficiary Advisory Panel, 4130 Stanley Road, Suite 208, Building 1000, San Antonio, TX 78234–6012, Telephone: (210) 295–1271 Fax: (210) 295–2789, Email Address: *Baprequests@tma.osd.mil.*

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: The Panel will review and comment on recommendations made to the Director of TRICARE Management Activity, by the Pharmacy and Therapeutics Committee, regarding the Uniform Formulary.

Meeting Agenda:

1. Sign-In
2. Welcome and Opening Remarks
3. Public Citizen Comments
4. Scheduled Therapeutic Class Reviews (Comments will follow each agenda item)

a. Topical Pain Agents
b. Pulmonary—2 Agents: COPD
c. Anticoagulants
d. Designated Newly Approved Drugs in Already-Reviewed Classes
e. Pertinent Utilization Management Issues

5. Panel Discussions and Vote

Meeting Accessibility: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is limited and will be provided only to the first 220 people signing-in. All persons must sign-in legibly.

Administrative Work Meeting: Prior to the public meeting, the Panel will conduct an Administrative Work Meeting from 7:30 a.m. to 9:00 a.m. to discuss administrative matters of the Panel. The Administrative Work Meeting will be held at the Naval Heritage Center, 701 Pennsylvania Avenue NW., Washington, DC 20004. Pursuant to 41 CFR 102–3.160, the Administrative Work Meeting will be closed to the public.

Written Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may

submit written statements to the membership of the Panel at any time or in response to the stated agenda of a planned meeting. Written statements should be submitted to the Panel's DFO. The DFO's contact information can be obtained from the General Services Administration's Federal Advisory Committee Act Database at *https://www.fido.gov/facadatabase/public.asp.*

Written statements that do not pertain to the scheduled meeting of the Panel may be submitted at any time. However, if individual comments pertain to a specific topic being discussed at a planned meeting, then these statements must be submitted no later than 5 business days prior to the meeting in question. The DFO will review all submitted written statements and provide copies to all the committee members.

Public Comments: In addition to written statements, the Panel will set aside 1 hour for individuals or interested groups to address the Panel. To ensure consideration of their comments, individuals and interested groups should submit written statements as outlined in this notice; but if they still want to address the Panel, then they will be afforded the opportunity to register to address the Panel. The Panel's DFO will have a ''Sign-Up Roster'' available at the Panel meeting for registration on a first-come, first-serve basis. Those wishing to address the Panel will be given no more than 5 minutes to present their comments, and at the end of the 1 hour time period, no further public comments will be accepted. Anyone who signs-up to address the Panel, but is unable to do so due to the time limitation, may submit their comments in writing; however, they must understand that their written comments may not be reviewed prior to the Panel's deliberation.

To ensure timeliness of comments for the official record, the Panel encourages that individuals and interested groups consider submitting written statements instead of addressing the Panel.

Dated: February 4, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–02759 Filed 2–6–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Office of the Secretary of the Air Force Acceptance of Group Application Under Public Law 95–202 and Department of Defense Directive (DODD) 1000.20: U.S. and Foreign Employees of Air America, Inc.

Under the provisions of Section 401, Public Law 95–202 and DoD Directive 1000.20, the Department of Defense Civilian/Military Service Review Board has accepted an application on behalf of a group known as: ''U.S. and Foreign Employees of Air America, Inc. who operated fixed wing or helicopter aircraft in support of U.S. Army Special Forces in Laos as part of Operation Hot Foot and Operation White Star from 1959–1963; and the U.S. and Foreign Employees of Air America, Inc., who operated fixed wing and helicopter aircraft in direct support of the U.S. Air Force operating in Laos in the Steve Canyon Program (Ravens), SAR and direct support for the Site 85 operation, High Altitude Relay Project (HARP), Photo Reconnaissance collaboration with 7th/13th Air Force and CIA, and with the Search and Rescue (SAR) Operations for U.S. Military flight crews from 1964 through 1974, who were necessary to support those missions and held supervisory positions.'' Persons with information or documentation pertinent to the determination of whether the service of this group should be considered active military service to the Armed Forces of the United States are encouraged to submit such information or documentation within 60 days to the DoD Civilian/Military Service Review Board, 1500 West Perimeter Road, Suite 3700 Joint Base Andrews NAF, MD 20762–7002.

FOR FURTHER INFORMATION CONTACT: Mr. Bruce T. Brown, Executive Secretary, DoD C/MSRB, at 240–612–5364, *bruce.brown@afncr.af.mil.* Copies of documents or other materials submitted cannot be returned.

Bao-Anh Trinh,

Air Force Federal Register Liaison Officer.

[FR Doc. 2013–02725 Filed 2–6–13; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF ENERGY

Electricity Advisory Committee Meeting

AGENCY: Office of Electricity Delivery and Energy Reliability, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Electricity Advisory Committee (EAC). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register.**

DATES: Wednesday, March 6, 2013, 12:15 p.m.–5:45 p.m. (EST); Thursday, March 7, 2013, 8:00 a.m.–3:40 p.m. (EST).

ADDRESSES: National Rural Electric Cooperative Association, 4301 Wilson Boulevard, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: Matthew Rosenbaum, Office of Electricity Delivery and Energy Reliability, U.S. Department of Energy, Forrestal Building, Room 8G–017, 1000 Independence Avenue SW., Washington, DC 20585; Telephone: (202) 586–1060 or Email: *matthew.rosenbaum@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: The Electricity Advisory Committee (EAC) was established in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App. 2, to provide advice to the U.S. Department of Energy (DOE) in implementing the Energy Policy Act of 2005, executing the Energy Independence and Security Act of 2007, and modernizing the Nation's electricity delivery infrastructure.

Tentative Agenda: The meeting of the EAC is expected to include discussion of the activities of the Energy Storage Technologies Subcommittee, the Smart Grid Subcommittee, and the Transmission Subcommittee, as well as discussions of cyber security issues in the power sector, resiliency, customer acceptance of Smart Grid technology issues, and the DOE's Utility of the Future Initiative.

Tentative Agenda: March 6, 2013

12:15 p.m.–1:15 p.m. Registration
1:15 p.m.–1:30 p.m. Welcome and Developments since the October 2012 Meeting
1:30 p.m.–2:00 p.m. Update on DOE Office of Electricity Delivery and Energy Reliability (OE) 2013 Current Programs and Initiatives
2:00 p.m.–2:50 p.m. Briefing on Special DOE Initiative: Utility of the Future and EAC Member Discussion
2:50 p.m.–3:00 p.m. Break
3:00 p.m.–4:40 p.m. Key Federal Roles to Enhance Cyber Security in the Power Sector Panel and EAC Member Discussion

4:40 p.m.–5:40 p.m. EAC Storage Subcommittee Activities and Plans for 2013 and EAC Member Discussion
5:40 p.m.–5:45 p.m. Wrap up Day One
5:45 p.m. Adjourn Day One of March 2013 EAC Meeting

Tentative Agenda: March 7, 2013

8:00 a.m.–9:40 a.m. Post Hurricane Sandy: Lessons for Grid Resilience Panel and EAC Member Discussion
9:40 a.m.–10:50 a.m. EAC Transmission Subcommittee Papers and Work Plan for 2013, EAC Member Discussion
10:50 a.m.–11:00 a.m. Break
11:00 a.m.–12:40 p.m. Customer Acceptance Issues for the Smart Grid Panel and EAC Member Discussion
12:40 p.m.–2:00 p.m. Lunch (Local Restaurants)
2:00 p.m.–3:10 p.m. EAC Smart Grid Subcommittee Paper and Work Plans for 2013, EAC Member Discussion
3:10 p.m.–3:20 p.m. Status of June EAC Meeting—Webinar vs. In-Person
3:20 p.m.–3:35 p.m. Public Comments (Must register to comment at time of check-in)
3:35 p.m.–3:40 p.m. Wrap Up of March 2013 EAC Meeting
3:40 p.m. Adjourn March 2013 EAC Meeting

The meeting agenda may change to accommodate EAC business. For EAC agenda updates, see the EAC Web site at: *http://energy.gov/oe/services/electricity-advisory-committee-eac.*

Public Participation: The EAC welcomes the attendance of the public at its meetings. Individuals who wish to offer public comments at the EAC meeting may do so on Thursday, March 7, 2013, but must register at the registration table in advance. Approximately 15 minutes will be reserved for public comments. Time allotted per speaker will depend on the number who wish to speak but is not expected to exceed three minutes. Anyone who is not able to attend the meeting, or for whom the allotted public comments time is insufficient to address pertinent issues with the EAC, is invited to send a written statement to Mr. Matthew Rosenbaum. You may submit comments, identified by ''*Electricity Advisory Committee Open Meeting*'', by any of the following methods:

• *Mail/Hand Delivery/Courier:* Matthew Rosenbaum, Office of Electricity Delivery and Energy Reliability, U.S. Department of Energy, Forrestal Building, Room 8G–017, 1000 Independence Avenue SW., Washington, DC 20585.

• *Email: matthew.rosenbaum@hq.doe.gov.* Include ''Electricity Advisory Committee Open Meeting'' in the subject line of the message.

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. *Instructions:* All submissions received must include the agency name and identifier. All comments received will be posted without change to *http://energy.gov/oe/services/electricity-advisory-committee-eac,* including any personal information provided.

• *Docket:* For access to the docket, to read background documents or comments received, go to *http://energy.gov/oe/services/electricity-advisory-committee-eac.*

The following electronic file formats are acceptable: Microsoft Word (.doc), Corel Word Perfect (.wpd), Adobe Acrobat (.pdf), Rich Text Format (.rtf), plain text (.txt), Microsoft Excel (.xls), and Microsoft PowerPoint (.ppt). If you submit information that you believe to be exempt by law from public disclosure, you must submit one complete copy, as well as one copy from which the information claimed to be exempt by law from public disclosure has been deleted. You must also explain the reasons why you believe the deleted information is exempt from disclosure. DOE is responsible for the final determination concerning disclosure or nondisclosure of the information and for treating it in accordance with the DOE's Freedom of Information regulations (10 CFR 1004.11).

Note: Delivery of the U.S. Postal Service mail to DOE may be delayed by several weeks due to security screening. DOE, therefore, encourages those wishing to comment to submit comments electronically by email. If comments are submitted by regular mail, the Department requests that they be accompanied by a CD or diskette containing electronic files of the submission.

Minutes: The minutes of the EAC meeting will be posted on the EAC Web page at *http://energy.gov/oe/services/electricity-advisory-committee-eac.* They can also be obtained by contacting Mr. Matthew Rosenbaum at the address above.

Issued in Washington, DC, on February 1, 2013.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2013–02764 Filed 2–6–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. DW–010]

Notice of Petition for Waiver of BSH Corporation From the Department of Energy Residential Dishwasher Test Procedure, and Grant of Interim Waiver

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of petition for waiver, notice of grant of interim waiver, and request for comments.

SUMMARY: This notice announces receipt of and publishes the BSH Corporation (BSH) petition for waiver (hereafter, ''petition'') from specified portions of the U.S. Department of Energy (DOE) test procedure for determining the energy consumption of dishwashers. Today's notice also grants an interim waiver of the dishwasher test procedure. Through this notice, DOE also solicits comments with respect to the BSH petition.

DATES: DOE will accept comments, data, and information with respect to the BSH petition until March 11, 2013.

ADDRESSES: You may submit comments, identified by case number DW–010, by any of the following methods:

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

• *Email: AS_Waiver_Requests@ee.doe.gov.* Include ''Case No. DW–010'' in the subject line of the message.

• *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Petition for Waiver Case No. DW–010, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. Please submit one signed original paper copy.

• *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

Docket: For access to the docket to review the background documents relevant to this matter, you may visit the U.S. Department of Energy, 950 L'Enfant Plaza SW., Washington, DC, 20024; (202) 586–2945, between 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays. Available documents include the following items: (1) This notice; (2) public comments received; (3) the petition for waiver and

application for interim waiver; and (4) prior DOE waivers and rulemakings regarding similar dishwasher products. Please call Ms. Brenda Edwards at the above telephone number for additional information.

FOR FURTHER INFORMATION CONTACT: Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–0371. Email: *Bryan.Berringer@ee.doe.gov*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, Forrestal Building, 1000 Independence Avenue SW, Washington, DC 20585–0103. Telephone: (202) 586–7796. Email: *Elizabeth.Kohl@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6291–6309, as codified) established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances, which includes dishwashers.[1] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results which measure energy efficiency, energy use, or estimated operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for dishwashers is contained in 10 CFR part 430, subpart B, appendix C.

The regulations set forth in 10 CFR 430.27 contain provisions that enable a person to seek a waiver from the test procedure requirements for covered consumer products. A waiver will be granted by the Assistant Secretary for Energy Efficiency and Renewable Energy (the Assistant Secretary) if it is determined that the basic model for which the petition for waiver was submitted contains one or more design characteristics that prevents testing of the basic model according to the prescribed test procedures, or if the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(l). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. The Assistant Secretary may grant the waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(l). Waivers remain in effect pursuant to the provisions of 10 CFR 430.27(m).

The waiver process also allows the Assistant Secretary to grant an interim waiver from test procedure requirements to manufacturers that have petitioned DOE for a waiver of such prescribed test procedures. 10 CFR 430.27(a)(2) An interim waiver must be granted if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination of the petition for waiver. (10 CFR 430.27(g)) An interim waiver remains in effect for 180 days or until DOE issues its determination on the petition for waiver, whichever is sooner. DOE may extend an interim waiver for an additional 180 days. 10 CFR 430.27(h)

II. Application for Interim Waiver and Petition for Waiver

On January 21, 2013, BSH submitted the petition for waiver and interim waiver from the test procedure applicable to dishwashers set forth in 10 CFR part 430, subpart B, appendix C. In every respect except the introduction of new model numbers, the petition is identical to petitions submitted by BSH on February 4, 2011, December 7, 2011 and March 27, 2012. DOE granted the February 4th petition on June 29, 2011 (76 FR 38144), the December 7th and March 27th petitions on October 1, 2012 (77 FR 59916 and 77 FR 59918 respectively), and the November 30th petition on December 31, 2012 (77 FR 77064).

BSH states that ''hard'' water can reduce customer satisfaction with dishwasher performance resulting in increased pre-rinsing and/or hand washing as well as increased detergent and rinse agent usage. According to BSH, a dishwasher equipped with a water softener will minimize pre-rinsing and rewashing, and consumers will have less reason to periodically run their dishwasher through a clean-up cycle. BSH also states that the amount of water consumed by the regeneration operation of a water softener in a dishwasher is very small, but that it varies significantly depending on the adjustment of the softener. The regeneration operation takes place infrequently, and the frequency is related to the level of water hardness.

In its petition, BSH requests that constant values of 47.6 gallons per year for water consumption and 8.0 kWh per year for energy consumption be used to estimate the water and energy consumption resulting from water softener regeneration. BSH included calculations showing this water and energy use, which was derived using the same method as that used by Whirlpool in its petition for waiver, which was granted by DOE. (75 FR 62127, Oct. 7, 2010).

DOE has determined that BSH's application for interim waiver does not provide sufficient market, equipment price, shipments, and other manufacturer impact information to permit DOE to evaluate the economic hardship BSH might experience absent a favorable determination on its application for interim waiver. DOE has also determined, however, that it is likely BSH's petition will be granted, and that it is desirable for public policy reasons to grant BSH relief pending a determination on the petition. Based on the information provided by BSH and Whirlpool, use of the DOE test procedure may provide materially inaccurate comparative data. In addition, the constant values submitted by BSH provide a reasonable estimate of the energy and water used during water softener regeneration for the basic model set forth in this petition and BSH's previous petition.

Based on these considerations, and the waivers granted to BSH and Whirlpool for similar models, it appears likely that the petition for waiver will be granted. DOE also believes that the energy efficiency of similar products should be tested and rated in the same manner. As a result, DOE grants BSH's application for interim waiver for the basic models of dishwashers specified in its petition for waiver, pursuant to 10 CFR 430.27(g). Therefore, *it is ordered that:*

The application for interim waiver filed by BSH is hereby granted for the specified BSH dishwasher basic models, subject to the specifications and conditions below.

BSH shall be required to test and rate the specified dishwasher products according to the alternate test procedure as set forth in section III, ''Alternate Test Procedure.''

[1] For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

The interim waiver applies to the following basic model groups:

Bosch brand:

- Basic Model—SHE43T5###
- Basic Model—SHX43T5###
- Basic Model—SHE33T5###

Kenmore brand:

- Basic Model—S38KML4###
- Basic Model—S48KML2###
- Basic Model—S48KML3###
- Basic Model—S38KML5###
- Basic Model—S37KMK2###

Gaggenau brand:

- Basic Model—DF261761
- Basic Model—DF260761

DOE makes decisions on waivers and interim waivers for only those models specifically set out in the petition, not future models that may be manufactured by the petitioner. BSH may submit a subsequent petition for waiver and request for grant of interim waiver, as appropriate, for additional models of clothes washers for which it seeks a waiver from the DOE test procedure. In addition, DOE notes that grant of an interim waiver or waiver does not release a petitioner from the certification requirements set forth at 10 CFR part 429.

III. Alternate Test Procedure

EPCA requires that manufacturers use DOE test procedures to make representations about the energy consumption and energy consumption costs of products covered by the statute. (42 U.S.C. 6293(c)) Consistent representations are important for manufacturers to use in making representations about the energy efficiency of their products and to demonstrate compliance with applicable DOE energy conservation standards. Pursuant to its regulations applicable to waivers and interim waivers from the relevant test procedures, set forth at 10 CFR 430.27, DOE will consider setting an alternate test procedure for BSH in a subsequent Decision and Order.

During the period of the interim waiver granted in this notice, BSH shall test its dishwasher basic models according to the existing DOE test procedure at 10 CFR part 430, subpart B, appendix C with the modification set forth below.

Under appendix C, the water energy consumption, W or Wg, is calculated based on the water consumption as set forth in Sect. 4.3:

§ 4.3 *Water consumption.* Measure the water consumption, V, expressed as the number of gallons of water delivered to the machine during the entire test cycle, using a water meter as specified in section 3.3 of this Appendix.

Where the regeneration of the water softener depends on demand and water hardness, and does not take place on every cycle, BSH shall measure the water consumption of dishwashers having water softeners without including the water consumed by the dishwasher during softener regeneration. If a regeneration operation takes place within the test, the water consumed by the regeneration operation shall be disregarded when declaring water and energy consumption. Constant values of 47.6 gallons/year of water and 8 kWh/year of energy shall be added to the values measured by appendix C.

Please note that on October 31, 2012, DOE published a test procedure final rule (77 FR 65941) to include measures of energy and water consumption due to periodic water softener regeneration. The rule is effective on December 17, 2012 and requires compliance on or after May 13, 2013. Products tested on or after May 13, 2013, must be tested with the new DOE test procedure.

IV. Summary and Request for Comments

Through today's notice, DOE announces receipt of BSH's petition for waiver from certain parts of the test procedure that apply to dishwashers and grants an interim waiver. DOE is publishing BSH's petition for waiver in its entirety. The petition contains no confidential information. The petition includes a suggested alternate test procedure, in which the reported energy and water consumption would include an estimate of the energy and water consumption of dishwashers with water softeners during softener regeneration.

DOE solicits comments from interested parties on all aspects of the petition. Any person submitting written comments to DOE must also send a copy of such comments to the petitioner.

The contact information for the petitioner is Mike Edwards, Senior Engineer, Performance and Consumption, BSH Home Appliances Corporation (FNbG), 100 Bosch Blvd., Building 102, New Bern, NC 28562–6924. All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

Issued in Washington, DC, on February 1, 2013.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

January 21, 2013
Dr. David T. Danielson
Assistant Secretary, Energy Efficiency & Renewable Energy
U.S. Department of Energy
Mail Station EE–1
1000 Independence Avenue SW.,
Washington, DC 20585
David.Danielson@ee.doe.gov
Via email (*David.Danielson@ee.doe.gov*) and overnight mail
Re: Petition for Waiver and Application for Interim Waiver concerning the measurement of water and energy used in the water softening regeneration process of Dishwasher having an Integrated Water Softener

Dear Assistant Secretary Danielson:

BSH Home Appliance Corporation (''BSH'') hereby submits this Petition for Waiver and Application for Interim Waiver pursuant to 10 CFR 430.27, concerning the test procedure for measuring energy consumption of Dishwashers.

BSH is the manufacturer of household appliances bearing the brand names of Bosch, Thermador, and Gaggenau. Its appliances include dishwashers, washing machines, clothes dryers, refrigerator-freezers, ovens, and microwave ovens, and are sold worldwide, including in the United States. BSH's United States operations are headquartered in Irvine, California.

10 CFR 430.27(a)(1) provides that any interested person may submit a petition to waive for a particular basic model any requirement of Section 430.23, or of any appendix to this subpart, upon grounds that the basic model contains one or more design characteristics which either prevent testing of the basic model according to the prescribed test procedures, or the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics, or water consumption characteristics as to provide materially inaccurate comparative data. Additionally, 10 CFR 430.27(b)(2) allows any applicant of a Petition of Waiver to also request an Interim Waiver if it can be demonstrated the likely success of the Petition for Waiver, while addressing the economic hardship and/or competitive disadvantage that is likely to result absent a favorable determination on the Application for Interim Waiver.

This request for Waiver is directed to Dishwashers containing a built-in or integrated water softener, specifically addressing the energy and water used in the regeneration process of the integrated water softener. This request is similar to several previously approved waivers (such as Waiver Case Number DW–005). Further, the water softening technology used in these models is identical to the models that were previously approved.

Based on the reasoning indicated herein, BSH submits that the testing of Dishwashers

equipped with a water softener under the current DOE test procedure may lead to information that could be considered misleading to consumers.

1. Identification of Basic Models

The Dishwasher models manufactured by BSH which contain an integrated water softener and were not included in previous Waiver applications is as follows:

Bosch brand:
- Basic Model—SHE43T5###
- Basic Model—SHX43T5###
- Basic Model—SHE33T5###

Kenmore brand:
- Basic Model—S38KML4###
- Basic Model—S48KML2###
- Basic Model—S48KML3###
- Basic Model—S38KML5###
- Basic Model—S37KMK2###

Gaggenau brand:
- Basic Model—DF261761
- Basic Model—DF260761

2. Background

The design characteristic that is unique among the above listed models is an integrated water softener. The primary function of a water softener is to reduce the high mineral content of ''hard'' water. Hard water reduces the effectiveness of detergents leading to additional detergent usage. Hard water also causes increased water spots on dishware, resulting in the need to use more rinse aid to counterbalance this effect. ''Hard'' water can reduce customer satisfaction with Dishwasher performance resulting in increased pre-rinsing and/or hand washing as well as increased detergent and rinse agent usage.

The water softening process requires water usage for both the regeneration process and to flush the system. For purposes of this Waiver request, the term ''regeneration'' will include the water and energy used in both the flushing and regeneration process of the water softener. The water used in the regeneration process is in addition to the water used in the dish washing process. The water used in the regeneration process does not occur with each use of the Dishwasher. The frequency of the regeneration process is dependent upon an adjustable water softener setting that is controlled by the end user, and based on the home water hardness. Regeneration frequency will vary greatly depending upon the customer setting of the water softener. Data from the U.S. Geological Survey shows considerable variation in the water hardness within the U.S. and for many locations the use of a water softener is not necessary. Water hardness varies throughout the U.S. with the mean hardness of 217 mg/liter or 12.6 grains/gallon (based on information provided by the U.S. Geological Survey located at *http://water.usgs.gov/owq/hardness-alkalinity.html).*

Calculations

Water Use

- Based on the DOE Energy Test for Dishwashers, the BSH Dishwashers listed in this waiver with an internal water softener use an average of approximately 9 liters of water per dish cleaning cycle.
- Based on an average U.S. water hardness of 12.6 grains/gallon, the internal BSH Dishwasher water softener system would be set on ''3''.
- Based on a BSH Dishwasher internal water softening system setting of ''3'' and the dishwasher using 9 liters of water per run, the water regeneration process would occur every 6th cycle.
- When using the Dishwasher 215 times per year (per DOE test procedure), the regeneration process would occur 35.8 times (36).
- The internal BSH water softening system uses approximately 5.0 per regeneration cycle.
- Water usage calculation based on above data.
  - $36 \times 5 = 180$ liters per year (47.6 gallons) or .84 liters (.22 gallons) each time the dishwasher is used.

Energy Used in kWh

- Formula $W = V \times T \times K$
  - V = Weighted Average Water Usage per DOE
  - T = Nominal water heater temperature rise of 39° C
  - K = Specific heat of water 0.00115
- Calculated Energy use—$180 \times 39 \times .00115 = 8.0$ kWh/yr

Summary

- A Dishwasher built by BSH with an integrated water softener in a home with a 12.6 grain per gallon water hardness would be cycled through the water softening regeneration process approximately every 6 dish cleaning cycles. When the water used in the water softener regeneration process is apportioned evenly over all dishwasher runs, the amount of energy and water usage per cycle is very low. Based on the assumptions provided, BSH estimates the typical water used in the internal Dishwasher water softener regeneration process at .84 liters (.22 gallons) per use; furthermore, using about 8.0 kWh per year to heat this water in the home hot water heater.

3. Requirements Sought To Be Waived

Dishwashers are subjected to test methods outlined in 10 CFR Part 430, Subpart B, App. C, Section 4.3, which specifies the method for the water energy calculation.

- BSH is requesting approval to estimate the water and energy used in the water softening process based on the design of the BSH Dishwasher and the calculations and assumptions outlined above.

4. Grounds for Waiver and Interim Waiver

10 CFR 430.27(a)(1) provides that a Petition to waive a requirement of 430.23 may be submitted upon grounds that the basic model contains one or more design characteristics which either prevent testing of the basic model according to the prescribed test procedures, or the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data.

If a water softener regeneration process was to occur while running an energy test, the water usage would be overstated. In this case, the water energy usage would be unrepresentative of the product providing inaccurate data resulting in a competitive disadvantage to BSH.

Granting of an Interim Waiver in this case is justified since the prescribed test procedures would potentially evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. In addition, a similar Interim Waiver and Waiver have previously been granted to BSH.

5. Manufacturers of Similar Products and Affected Manufacturers

Web based research shows that at least two other manufacturers are currently selling dishwashers with an integrated water softener, Miele Inc. and Whirlpool Corporation (Waiver Granted).

Manufacturers selling dishwashers in the United States include AGA Marvel, Arcelik A.S., ASKO Appliances, Inc., Electrolux North America, Inc., Fagor America, Inc., Fisher & Paykel Appliances, GE Appliances and Lighting, Haier America, Indesit Company Sa, Teka USA, Inc., LG Electronics USA, Miele, Inc., Samsung Electronics Co., Viking Range Corporation and Whirlpool Corporation.

BSH will notify all companies listed above (as well as AHAM), as required by the Department's rules, providing them with a copy of this Petition for Waiver and Interim Waiver.

6. Conclusion

BSH Home Appliances Corporation hereby requests approval of the Waiver petition and Interim Waiver. By granting said Waivers the Department of Energy will further ensure that water energy is measured in the same way by all Dishwasher Manufacturer's that have a integrated water softener. Further, BSH would request that these Waivers be in good standing until such time that the test procedure can be formally modified to account for integrated water softeners.

BSH Home Appliances certifies that all manufacturers of domestic Dishwashers as listed above have been notified by letter.

With Best Regards,

Mike Edwards
Senior Engineer, Performance and Consumption
BSH Home Appliances Corporation (FNbG)
100 Bosch Blvd., Building 102
New Bern, NC 28562–6924
mike.edwards@bshg.com
Phone (252) 672–9161
Fax (949) 809 6177

[FR Doc. 2013–02751 Filed 2–6–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Request for Information (RFI) for Commercial Building Energy Asset Score

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice for Request for Information.

SUMMARY: The U.S. Department of Energy (DOE) has developed a preliminary commercial building energy asset score (hereinafter ''score''). The score provides information regarding the efficiency of a building's major energy consuming systems and is intended to enable greater understanding of building performance and potential savings. DOE is developing this voluntary program as part of its effort to achieve a 20 percent improvement in the energy efficiency of commercial buildings by 2020.

DATES: Comments may be submitted on or before March 11, 2013.

ADDRESSES: Submit comments via email to *asset.score@ee.doe.gov* or send mail to: Joan Glickman, Attn: Commercial Building Asset Score RFI, EE–2J, 1000 Independence Ave., SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Joan Glickman, *asset.score@ee.doe.gov.*

SUPPLEMENTARY INFORMATION: The methodology used to score buildings and generate other relevant information is described in detail in the document entitled ''Commercial Building Energy Asset Score: Program Overview and Technical Protocol Version 1.0'' (hereinafter ''the Protocol''). This request for information (RFI) seeks input on the following three components of the Protocol:

1. Data collection and validation;
2. The asset score report; and
3. Score durability.

This RFI provides an overview of the three program components. Additional detail on each of the three topics is provided in the Protocol. Stakeholders are encouraged to download the Protocol, which is available at the following link: *http://www1.eere.energy.gov/buildings/commercial_initiative/pdfs/energy_asset_score_technical_protocol_phase1.pdf*

This is the second RFI that DOE has issued related to the score. On August 8, 2011, DOE issued an RFI seeking input to inform overall development of the voluntary program. In addition, DOE conducted market research and outreach to better understand the perspective of industry and other interested groups. These efforts, along with initial pilot testing of the score with commercial building owners and operators in 2012, informed the development of the current score. More information on the asset score development process can be found at this site: *http://www1.eere.energy.gov/buildings/commercial/assetscore.html.*

DOE plans to continue to work with commercial building owners and operators to pilot test the score in 2013, including application of the score to additional building types. During this testing period, DOE will continue to refine the program as well as conduct additional analysis to inform future program development. Future development of the program will continue to be guided by previously established principles, as described in Section 2.2 of the Protocol. In brief, the system must produce credible scores and useful information at an affordable cost.

1. Data Collection and Validation

To obtain an energy asset score using the tool, building owners must input at least the minimum required set of information about a building. This ''simple-level'' use of the tool requires filling in approximately 20–30 data fields. Based on this information, the tool produces a preliminary report not intended to be used for official purposes such as public display or a real estate transaction. DOE recommends that building owners who want to display a report publicly or use the score for transactional purposes obtain an advanced report, which requires completion of approximately 60–80 fields of data and will likely also require that the data is validated and submitted by a person qualified to collect this information. When a user leaves a non-required data entry field blank, the tool uses a default value (an estimate based on the building type, location, and age) to complete the energy model.

A preliminary data input list for the simple and the advanced use levels can be found in Appendix C of the Protocol. DOE is collecting feedback on the data collection process through pilot testing. The full list will not be finalized until after a pilot period, during which users can respond to the usefulness of the results and the difficulty of data collection. The total time required for the simple-level score is estimated to be 6–8 hours; the total time required for the advanced-level data collection is estimated to be less than 20 hours. The simple-level time estimate was tested during the first pilot project in 2012 and will be further tested during the second pilot project in 2013. DOE invites comments from respondents on the preliminary data classification, data collection time, and method that can be used to maintain a balance between reasonable cost of data collection and acceptable accuracy of results.

In addition to seeking input on data required for the simple and advanced scores, DOE also invites input on methods that can be used to validate scores in cases where a score is being used for official purposes (e.g., marketing to lessees, real estate sales). Considerations might include assessor qualification requirements, methods for verifying or testing assessor qualifications, as well as quality assurance requirements and implementation options.

2. Energy Asset Score Report

The energy asset scoring tool produces a report that includes four sections: A whole-building score, a system evaluation, identified opportunities for improvement, and a description of building assets. The primary modeling output of the energy asset scoring tool is the energy use intensity (EUI), which is used to generate the energy asset score. No baseline buildings are needed because the calculated EUI is placed on a fixed scale. Two sets of scores and associated modeled EUIs are presented on the same energy asset score scale: Current score and potential score.

System evaluations are provided for building components, including envelope (roof, wall, window), lighting, heating, cooling, and service hot water systems. This information can help users identify parts of the building in need of attention. Two buildings with the same energy asset score may have different system evaluations. These evaluations can give users insight into their building's strengths and weaknesses. Based on the entered building information, the energy asset scoring tool also identifies potential improvement opportunities in each system evaluated.

Section 5 of the Protocol provides detailed descriptions of the score calculations, system evaluations methods, and the generation of a cost-effective upgrade package. DOE welcomes comments on critical information to be included in the energy asset score report and the methodology used to evaluate systems and generate recommendations.

3. Durability of Energy Asset Score

DOE expects that a building's score will remain current for at least 10 years, as long as the building does not undergo significant infrastructure changes including replacement of asset-related energy systems. If DOE makes any significant changes to the scoring methodology or tool, users will be notified and can receive an updated energy asset score report based on the latest version of the scoring tool.

After establishing 100-point scales for all relevant building types, DOE expects

that the scales can remain static for at least 10 years. The overall efficiency of the U.S. building stock is not expected to change dramatically enough to warrant scale revisions within 10 years.

Although building equipment will degrade over time, equipment performance is affected by multiple factors, most of which are related to operation and maintenance. Given this combination of influences, equipment degradation is not accounted for in the score and will not affect the durability of the score.

DOE will incorporate new software releases of EnergyPlus as they are developed. However, DOE expects that most new features that extend modeling capability or increase simulation speed will have little effect on the energy asset score. If a software update of EnergyPlus or other updates to the scoring tool result in a change of the modeling results, prior users of the tool will receive an updated score report.

More information about the score durability is described in Section 3.2.4 of the Protocol. DOE welcomes stakeholder comments on the durability of the energy asset score scale and the period for which a building should be able to maintain its score.

Submitting Comments to DOE

DOE invites comments on all elements discussed above, as well as additional issues that respondents deem important. Specifically, DOE requests comments on (1) Data classification for the simple and advanced levels of tool use as well as score validation methods; (2) critical information to be included in the energy asset score report; and (3) durability of the energy asset scores.

Comments may be submitted in writing via direct mail or email within on or before March 11, 2013. Please limit comments to no more than 3 pages per program area, not to exceed a total of 8 pages.

Disclaimer and Important Notes

This is an RFI issued solely for information and program planning purposes; this RFI does not constitute a formal solicitation for proposals or abstracts. Your response to this notice will be treated as information only. DOE will not provide reimbursement for costs incurred in responding to this RFI. Respondents are advised that DOE is under no obligation to acknowledge receipt of the information received or provide feedback to respondents with respect to any information submitted under this RFI. Responses to this RFI do not bind DOE to any further actions related to this topic.

Confidential Business Information

According to 10 CFR 1004.11, any person submitting information he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery/courier two well-marked copies: One copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

Issued in Washington, DC, on February 1, 2013.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

[FR Doc. 2013–02753 Filed 2–6–13; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9777–4]

Adequacy Status of the Motor Vehicle Emission Budgets for Metropolitan Washington DC Area (DC–MD–VA) 1997 8-Hour Ozone Non-Attainment Area's 2009 Attainment Plan and 2010 Contingency Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of adequacy.

SUMMARY: In this notice, EPA is notifying the public that the Motor Vehicle Emissions Budgets (MVEBs) for volatile organic compounds (VOCs) and nitrogen oxides (NO_X) in the 2009 Attainment Plan and 2010 Contingency Plan submitted as a State Implementation Plan (SIP) revision on June 4, 2007 by the Maryland Department of the Environment (MDE) and June 12, 2007 by both the Virginia Department of Environmental Quality (VADEQ) and the District of Columbia Department of Health (DCDOH) are adequate for transportation conformity purposes. As a result of EPA's finding, the Washington DC–MD–VA Nonattainment Area for the 1997 8-Hour Ozone National Ambient Air Quality Standard (the Metropolitan Washington Area) must use the MVEBs from the June 4, 2007 and June 12, 2007 Attainment Plan and Contingency Plan for future conformity determinations for the 1997 8-hour ozone standard.

DATES: The adequacy finding for MVEBs for VOCs and NO_X is effective February 22, 2013.

FOR FURTHER INFORMATION CONTACT: Martin Kotsch, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103 at (215) 814–3335 or by email at: *kotsch.martin@epa.gov.* The finding is available at EPA's conformity Web site: *http://www.epa.gov/otaq/stateresources/transconf/currsips.htm.*

SUPPLEMENTARY INFORMATION: The word ''budgets'' refers to the motor vehicle emission budgets for VOCs and NO_X. The word ''SIP'' in this document refers to the Attainment Plan and Contingency Plan for the Metropolitan Washington Area, 1997 8-Hour Ozone Nonattainment Area submitted to EPA as a SIP revision on June 4, 2007 by MDE and June 12, 2007 by VADEQ and DCDOH.

Today's notice is simply an announcement of a finding that EPA has already made. In this notice, EPA is notifying the public that we have found that the MVEBs in the 2009 Attainment Plan and 2010 Contingency Plan, submitted on June 4, 2007 by MDE and June 12, 2007 by VADEQ and DCDOH, are adequate for transportation conformity purposes. As a result of EPA's finding, the Metropolitan Washington Area must use the MVEBs from the 2009 Attainment Plan and 2010 Contingency Plan for future conformity determinations for the 1997 8-hour ozone standard. This finding has also been announced on EPA's conformity Web site: *http://*

www.epa.gov/otaq/stateresources/transconf/pastsips.htm. The adequate MVEBs are shown in the following table:

METROPOLITAN WASHINGTON AREA MVEBS 2009 ATTAINMENT PLAN AND 2010 CONTINGENCY PLAN

Milestone year	VOCs (tons per day)	NO_X (tons per day)
2009	66.5	146.1
2010	N/A	144.3

Transportation conformity is required by section 176(c) of the Clean Air Act, as amended in 1990. EPA's conformity rule requires that transportation plans, programs and projects conform to state air quality implementation plans and establishes the criteria and procedures for determining whether or not they do. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards. The criteria by which EPA determines whether a SIP's MVEBs are adequate for conformity purposes are outlined in 40 CFR 93.118(e)(4). EPA has described the process for determining the adequacy of submitted SIP budgets in 40 CFR 93.118(f) and has followed this rule in making its adequacy determination.

Dated: January 25, 2013.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2013–02808 Filed 2–6–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9528–1]

Agency Information Collection Activities OMB Responses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This document announces the Office of Management and Budget (OMB) responses to Agency Clearance requests, in compliance with the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

FOR FURTHER INFORMATION CONTACT: Rick Westlund (202) 566–1682, or email at *westlund.rick@epa.gov* and please refer to the appropriate EPA Information Collection Request (ICR) Number.

SUPPLEMENTARY INFORMATION:

OMB Responses to Agency Clearance Requests

OMB Approvals

EPA ICR Number 0161.12; Foreign Purchaser Acknowledgment Statement of Unregistered Pesticides; 40 CFR part 168, subpart D; was approved on 01/04/2013; OMB Number 2070–0027; expires on 01/31/2016; Approved without change.

EPA ICR Number 2263.04; NSPS for Petroleum Refineries for which Construction, Reconstruction, or Modification Commenced after May 14, 2007; 40 CFR part 60, subparts A and Ja; was approved on 01/07/2013; OMB Number 2060–0602; expires on 12/31/2015; Approved without change.

EPA ICR Number 1718.09; Fuel Quality Regulations for Diesel Fuel Sold in 2001 and Later Years; Tax-Exempt (Dyed) Highway Diesel Fuel; and Non-Road Locomotive and Marine Diesel Fuel (Renewal); 40 CFR 80.561 and 80.597; and 40 CFR part 80 subpart I; was approved on 01/19/2013; OMB Number 2060–0308; expires on 01/31/2016; Approved with change.

EPA ICR Number 2450.01; EPA's Design for the Environment (DfE) Partner of the Year Awards Program; was approved on 01/23/2013; OMB Number 2070–0184; expires on 01/31/2016; Approved with change.

EPA ICR Number 1901.05; NSPS for Emission Guidelines and Compliance Times for Small Municipal Waste Combustion Units Constructed on or before August 30, 1999; 40 CFR part 60, subparts A and BBBB; was approved on 01/29/2013; OMB Number 2060–0424; expires on 01/31/2016; Approved without change.

EPA ICR Number 1061.12; NSPS for the Phosphate Fertilizer Industry; 40 CFR part 60, subparts T, U, V, W and X; was approved on 01/30/2013; OMB Number 2060–0037; expires on 01/31/2016; Approved without change.

EPA ICR Number 1935.04; Standardized Permit for RCRA Hazardous Waste Management Facilities (Renewal); 40 CFR part 267; 40 CFR 270.290, 270.300–270.315; was approved on 01/30/2013; OMB Number 2050–0182; expires on 01/31/2016; Approved with change.

EPA ICR Number 2323.05; NESHAP for Chemical Manufacturing Area Sources; 40 CFR part 63, subparts A and VVVVVV; was approved on 01/30/2013; OMB Number 2060–0621; expires on 01/31/2016; Approved without change.

John Moses,

Director, Collections Strategies Division.

[FR Doc. 2013–02761 Filed 2–6–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OA–2012–0033; FRL–9527–8]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Willingness To Pay Survey for Chesapeake Bay Total Maximum Daily Load: Instrument, Pre-Test, and Implementation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), ''Willingness to Pay Survey for Chesapeake Bay Total Maximum Daily Load: Instrument, Pre-test, and Implementation'' (EPA ICR No. 2456.01, OMB Control No. 2010–NEW) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a request for approval of a new collection. Public comments were previously requested via the **Federal Register** (77 FR 31006) on May 24, 2012 during a 60-day comment period, which was later extended for an additional 30 days (77 FR 43822). This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. 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.

DATES: Additional comments may be submitted on or before March 11, 2013.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OA–2012–0033, to (1) EPA online using *www.regulations.gov* (our preferred method); by email to *oei.docket@epa.gov*; by fax at (202) 566–9744; or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB via email to *oira_submission@omb.eop.gov*. Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public

docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Dr. Nathalie Simon, National Center for Environmental Economics, Office of Policy, (1809T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: 202–566–2347; fax number: 202–566–2363; email address: *simon.nathalie@epa.gov*.

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW. Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets*.

Abstract: The Clean Water Act (CWA) directs EPA to coordinate Federal and State efforts to improve water quality in the Chesapeake Bay. In 2009, Executive Order (E.O.) 13508 reemphasized this mandate, directing EPA to define the next generation of tools and actions to restore water quality in the Bay and describe the changes to be made to regulations, programs, and policies to implement these actions. The Chesapeake Bay watershed encompasses 64,000 square miles in parts of six states and the District of Columbia. It is the largest estuary in the United States and the third largest in the world. The Chesapeake Bay's unique set of ecological and cultural elements has motivated efforts to preserve and restore its condition for more than 25 years. Significant progress has been made over that period however, pollution budgets, called Total Maximum Daily Loads (TMDLs), are necessary to continue progress toward the goal of a healthy Bay. The watershed states of New York, Pennsylvania, Delaware, West Virginia, Virginia, and Maryland, as well as the District of Columbia, have developed Watershed Implementation Plans (WIPs) detailing the steps each will take to meet its obligations under the TMDL.

As part of the next phase of this effort, EPA is undertaking an assessment of the costs and benefits of meeting Total Maximum Daily Loads (TMDLs), of nitrogen, phosphorus, and sediment for the Chesapeake Bay. As an input to the TMDL benefits study, EPA's National Center for Environmental Economics (NCEE) is seeking approval to conduct a stated preference survey to collect data on households' use of Chesapeake Bay and its watershed, preferences for a variety of water quality improvements likely to follow from pollution reduction programs, and demographic information. If approved, the survey would be administered by mail in two phases to a sample of 9,140 residents living in the Chesapeake Bay states, Chesapeake Bay watershed, and other east coast states.

Benefits from meeting the TMDL for the Chesapeake Bay will accrue to those who live near the Bay or visit for recreation, those who live near or visit lakes and rivers in the watershed, and those who live further away and/or may never visit the Bay but have a general concern for the environment. While benefits from the first two categories can be measured using hedonic property value, recreational demand, and other revealed preference approaches, only stated preference methods can capture nonuse benefits (i.e., benefits to those who may never visit the Bay).

Transferring estimates from other studies based in other estuaries is not advised as these results are unlikely to accurately or completely capture willingness to pay for TMDL-related improvements in the Chesapeake Bay Watershed given the unique character of this water resource and the goods and services it provides. Further, there are limited stated preference studies in the published literature focusing on the Chesapeake Bay, and no studies specifically addressing the environmental improvements predicted under the TMDL. This study will provide policy makers with additional information on the public's preferences for improvements to the Chesapeake Bay and lakes in the watershed. NCEE will use the survey responses to estimate willingness to pay for changes related to reductions in nitrogen, phosphorous, and sediment loadings to the Bay and lakes in the Chesapeake Bay watershed. The analysis relies on state of the art theoretical and statistical tools for non-market welfare analysis. The results of this study will inform the public and policy makers about the benefits of improvements to the Chesapeake Bay and lakes in the watershed. A non-response survey will also be administered to inform the interpretation and validation of survey responses. Participation in the survey will be voluntary and the identity of the respondents will be kept confidential to the extent provided by law.

The project is being undertaken pursuant to section 104 of the Clean Water Act which authorizes and directs the EPA Administrator to conduct research into a number of subject areas related to water quality, water pollution, and water pollution prevention and abatement. This section also authorizes the EPA Administrator to conduct research into methods of analyzing the costs and benefits of programs carried out under the Clean Water Act.

Form Numbers: None.

Respondents/affected entities: Individuals 18 years of age or older residing in one of 17 east coast U.S. states and the District of Columbia.

Respondent's obligation to respond: Voluntary.

Estimated number of respondents: 2,742 total to full survey total (includes 150 from pretest and 2,592 from main survey. An additional 770 total to non-response follow-up survey (50 from pretest and 720 from full survey administration).

Frequency of response: One time collection.

Total estimated burden: 887 hours. Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $20,682 (per year), includes $0 annualized capital or operation & maintenance costs.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2013–02763 Filed 2–6–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2012–0655; FRL–9527–9]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NSPS for Ammonium Sulfate Manufacturing Plants (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before March 11, 2013.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2012–0655, to: (1) EPA online, using *www.regulations.gov* (our preferred method), or by email to: *docket.oeca@epa.gov,* or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 28221T, 1200 Pennsylvania Avenue NW., Washington, DC 20460; and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Learia Williams, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; email address: *williams.learia@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On October 17, 2012 (77 *FR* 63813), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to both EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2012–0655, which is available for either public viewing online at either *http://www.regulations.gov*, or in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov* to either submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov*, as EPA receives them and without change, unless the comment contains copyrighted material, Confidentiality of Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov.*

Title: NSPS for Ammonium Sulfate Manufacturing Plants (Renewal).

ICR Numbers: EPA ICR Number 1066.07, OMB Control Number 2060–0032.

ICR Status: This ICR is scheduled to expire on April 30, 2013. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the Provisions specified at 40 CFR part 60, subpart PP.

Owners or operators of the affected facilities must submit an initial notification report, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports are required semiannually at a minimum.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 71 hours per response. ''Burden'' means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously- applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Owners or operator of ammonium sulfate manufacturing plants.

Estimated Number of Respondents: 2.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 284.

Estimated Total Annual Cost: $27,449, which includes $27,449 in labor costs, and neither capital/startup costs, nor operation and maintenance (O&M) costs.

Changes in the Estimates: There is an increase in burden hours for both the respondents and the Agency due to a correction in the calculation methodology. The previous ICR assumed the hours per occurrence for each burden activity included technical, managerial, and clerical hours. This ICR assumes these hours per occurrence are for technical hours only, and calculates additional managerial and clerical hours as 5 and 10 percent of technical hours. There is also an increase in the respondent burden costs due to a change in labor rates. This ICR uses updated labor rates from the Bureau of Labor Statistics to calculate respondent burden costs.

Additionally, there is a decrease in burden costs for the Agency from the most recently approved ICR due to a correction in labor rates. The previous ICR incorrectly used civilian rates to calculate Agency burden. This ICR uses rates from OPM, which results in an overall reduction in the Agency cost estimates.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2013–02762 Filed 2–6–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9777–9]

Public Water System Supervision Program Revision for the State of Texas

AGENCY: United States Environmental Protection Agency (EPA).

ACTION: Notice of tentative approval.

SUMMARY: Notice is hereby given that the State of Texas is revising its approved Public Water System Supervision Program. Texas has adopted three EPA drinking water rules, namely the: (1) Long Term 2 Enhanced Surface Water Treatment Rule (LT2), (2) the Stage 2 Disinfectants and Disinfection Byproducts Rule (DBP2), and (3) the Public Notification Rule minor revisions (PN/MR). EPA has determined that the proposed LT2, DBP2, and the PN/MRs submitted by Texas are no less stringent than the

corresponding federal regulations. Therefore, EPA intends to approve this program revision.

DATES: All interested parties may request a public hearing. A request for a public hearing must be submitted by March 11, 2013 to the Regional Administrator at the EPA Region 6 address shown below. Frivolous or insubstantial requests for a hearing may be denied by the Regional Administrator. However, if a substantial request for a public hearing is made by March 11, 2013, a public hearing will be held. If no timely and appropriate request for a hearing is received and the Regional Administrator does not elect to hold a hearing on his own motion, this determination shall become final and effective on March 11, 2013. Any request for a public hearing shall include the following information: The name, address, and telephone number of the individual, organization, or other entity requesting a hearing; a brief statement of the requesting person's interest in the Regional Administrator's determination and a brief statement of the information that the requesting person intends to submit at such hearing; and the signature of the individual making the request, or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

ADDRESSES: All documents relating to this determination are available for inspection between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, at the following offices: Texas Commission on Environmental Quality, Water Supply Division, Public Drinking Water Section (MC–155), Building F, 12100 Park 35 Circle, Austin, TX 78753; and United States Environmental Protection Agency, Region 6, Drinking Water Section (6WQ–SD), 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202.

FOR FURTHER INFORMATION CONTACT: Damon McElroy, EPA Region 6, Drinking Water Section at the Dallas address given above, or by telephone at (214) 665–7159, or by email at *mcelroy.damon@epa.gov.*

Authority: Section 1413 of the Safe Drinking Water Act, as amended (1996), and 40 CFR part 142 of the National Primary Drinking Water Regulations.

Dated: January 28, 2013.

Ron Curry,

Regional Administrator.

[FR Doc. 2013–02804 Filed 2–6–13; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Agency Information Collection Activities; Elementary-Secondary Staff Information Report; Cancellation of Hearing

AGENCY: Equal Employment Opportunity Commission.

ACTION: Cancellation of hearing.

SUMMARY: Notice is hereby given that the Commission is cancelling the public hearing on the above proposed information collection—extension without change: The Elementary-Secondary Staff Information Report (EEO–5). (77 FR 65548, October 29, 2012). No requests to present oral testimony at a hearing concerning the information collection were received from the public. Therefore, it will not be necessary to hold the hearing.

FOR FURTHER INFORMATION CONTACT: Ronald Edwards, Director, Program, Research and Surveys Division, 131 M Street NE., Room 4SW30F, Washington, DC 20507; (202) 663–4949 (voice) or (202) 663–7063 (TTY).

For the Commission.

Dated: January 31, 2013.

Jacqueline A. Berrien,

Chair.

[FR Doc. 2013–02744 Filed 2–6–13; 8:45 am]

BILLING CODE 6570–01–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Agency Information Collection Activities: Proposed Collection; Submission for OMB Review: Elementary-Secondary Staff Information Report

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final Notice of Submission for OMB Review—Extension Without Change.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA), the Equal Employment Opportunity Commission (EEOC or Commission) hereby gives notice that it has submitted to the Office of Management and Budget (OMB) a request for a three-year extension of an existing collection (Elementary-Secondary Staff Information Report (EEO–5). On July 2, 2012, the EEOC published a notice stating it was requesting approval from OMB for a revision to the previously approved EEO–5 under the PRA's emergency processing procedures. 77 FR 39238 (July 2, 2012). At that time, EEOC requested approval to revise the race and ethnicity categories on the EEO–5 report to conform to OMB's *Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity.* OMB has approved the revised EEO–5 through February 2013. EEOC is now requesting a regular extension without change of the revised EEO–5. The Commission has requested an extension of an existing collection as listed below.

DATES: Written comments on this notice must be submitted on or before March 11, 2013.

ADDRESSES: Comments on this final notice must be submitted to Chad A. Lallemand, Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Room 10235, New Executive Office Building, Washington, DC 20503 or electronically mailed to *Chad_A._Lallemand@omb.eop.gov.* A copy of this ICR and applicable supporting documentation submitted to OMB for this review may be obtained from: Ronald Edwards, Director, Program Research and Surveys Division, 131 M Street NE., Room 4SW30F, Washington, DC 20507.

Copies of comments should be sent to Bernadette Wilson, Acting Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street NE., Washington, DC 20507. As a convenience to commenters, the Executive Secretariat will accept comments totaling six or fewer pages by facsimile (''FAX'') machine. This limitation is necessary to assure access to the equipment. The telephone number of the fax receiver is (202) 663–4114. (This is not a toll-free number).

Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663–4070 (voice) or (202) 663–4074 (TTD). (These are not toll-free telephone numbers.)

Instead of sending written comments to EEOC, you may submit comments and attachments electronically at *http://www.regulations.gov*, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments. All comments received through this portal will be posted without change, including any personal information you provide.

Copies of comments submitted by the public to EEOC directly or through the Federal eRulemaking Portal will be available for review, by advance appointment only, at the Commission's library between the hours of 9:00 a.m.

and 5:00 p.m. EST or can be reviewed at *http://www.regulations.gov.* To schedule an appointment to inspect the comments at EEOC's library, contact the library staff at (202) 663–4630 (voice) or (202) 663–4641 (TTY). (These are not toll-free numbers.)

FOR FURTHER INFORMATION CONTACT: Ronald Edwards, Director, Program Research and Surveys Division, 131 M Street NE., Room 4SW30F, Washington, DC 20507; (202) 663–4958 (voice) or (202) 663–7063 (TTY).

SUPPLEMENTARY INFORMATION: A notice that EEOC would be submitting this request was published in the **Federal Register** on October 29, 2012 allowing for a 60-day public comment period. There were no comments received from the public.

Overview of Information Collection

Type of Review: Extension—No change.

OMB Control No.: 3046–0003.

Collection Title: Elementary-Secondary Staff Information Report (EEO–5).

Frequency of Report: Biennial.

Type of Respondent: Certain public elementary and secondary school districts.

Description of Affected Public: Certain public elementary and secondary school districts.

Number of Responses: 6,190.

Estimated Burden Hours: 15,475.

Cost to the Respondents: 0.

Federal Cost: $190,000.

Number of Forms: 1.

Form Number: EEOC Form 168A.

Abstract: Section 709(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e–8(c), requires employers to make and keep records relevant to a determination of whether unlawful employment practices have been or are being committed, to preserve such records, and to produce reports as the Commission prescribes by regulation or order. Accordingly, the EEOC issued regulations, Title 29, Chapter XIV, Subpart F, § 1602.39–45, prescribing the reporting requirements for elementary and secondary public school districts. The EEOC uses EEO–5 data to investigate charges of employment discrimination against elementary and secondary public school districts. The data also are used for research. The data are shared with the Department of Education (Office for Civil Rights) and the Department of Justice. Pursuant to Section 709(d) of Title VII of the Civil Rights Act of 1964, as amended, EEO–5 data also are shared with state and local Fair Employment Practices Agencies (FEPAs).

When the EEO–5 form was previously approved by OMB in April 2012, it utilized the following race and ethnicity categories: White, Black, Hispanic, Asian or Pacific Islander, and American Indian or Alaska Native. OMB has recently approved use of a revised EEO–5 form through February 2013. The revised form utilizes the following race and ethnicity categories: Hispanic or Latino; White; Black or African American; Asian; Native Hawaiian or Other Pacific Islander; American Indian or Alaska Native; and Two or More Races. EEOC is now requesting a regular extension without change of the revised EEO–5 Form.

Burden Statement: The estimated number of respondents included in the biennial EEO–5 survey is 6,190 public elementary and secondary school districts. The form is estimated to impose 15,475 burden hours biennially.

Dated: January 31, 2013.

For the Commission.

Jacqueline A. Berrien,

Chair.

[FR Doc. 2013–02748 Filed 2–6–13; 8:45 am]

BILLING CODE 6570–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Proposed Collection Renewal; Comment Request Re Forms Relating to Processing Deposit Insurance Claims

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of proposed information collection renewal and comment request.

SUMMARY: The FDIC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity, as required by the Paperwork Reduction Act of 1995 (4 U.S.S. chapter 35), to comment on renewal of its information collection entitled, ''Forms Related to Processing Deposit Insurance Claims'' (OMB No. 3064–0143).

DATES: Comments must be submitted on or before April 8, 2013.

ADDRESSES: Interested parties are invited to submit written comments. All comments should refer to the name of the collection. Comments may be submitted by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/propose.html.*
- *Email: comments@fdic.gov.*
- *Mail:* Leneta G. Gregorie (202.898.3719), Counsel, Federal Deposit Insurance Corporation, 550 17th Street NW., Room NY–5050, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

A copy of the comments may also be submitted to the FDIC Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: For further information about this information collection, please contact Leneta G. Gregorie, by telephone at (202) 898–3719 or by mail at the address identified above. In addition, copies of the forms contained in the collection can be obtained at the FDIC's Web site: *http://www.fdic.gov/regulations/laws/FORMS/claims.html.*

SUPPLEMENTARY INFORMATION: The FDIC is requesting OMB approval to renew the following information collection:

Title: Forms Related to Processing of Deposit Insurance Claims.

Forms Currently In Use:

Declaration for Public Unit Deposit, Form 7200/04
Declaration for Trust, Form 7200/05
Declaration of Independent Activity, Form 7200/06
Declaration of Independent Activity for Unincorporated Association, Form 7200/07
Declaration for Joint Ownership Deposit, Form 7200/08
Declaration for Testamentary Deposit (Multiple Grantors), Form 7200/09
Declaration for Defined Contribution Plan, Form 7200/10
Declaration for IRA/KEOGH Deposit, Form 7200/11
Declaration for Defined Benefit Plan, Form 7200/12
Declaration of Custodian Deposit, Form 7200/13
Declaration for Health and Welfare Plan, Form 7200/14
Declaration for Plan and Trust, Form 7200/15
Declaration for Irrevocable Trust, Form 7200/18

Estimated Number of Respondents and Burden Hours for Forms in Use:

FDIC document	Hours per response	Number of respondents	Burden hours
Declaration for Public Unit Deposit, Form 7200/04	0.50	500	250
Declaration for Trust, Form 7200/05	0.50	900	450
Declaration of Independent Activity, Form 7200/06	0.50	25	12.5
Declaration of Independent Activity for Unincorporated Association, Form 7200/07	0.50	25	12.5
Declaration for Joint Ownership Deposit, Form 7200/08	0.50	25	12.5
Declaration for Testamentary Deposit, Form 7200/09	0.50	1,500	750
Declaration for Defined Contribution Plan, Form 7200/10	1.0	50	50
Declaration for IRA/KEOGH Deposit, Form 7200/11	0.50	50	25
Declaration for Defined Benefit Plan, Form 7200/12	1.0	200	200
Declaration of Custodian Deposit, Form 7200/13	0.50	50	25
Declaration for Health and Welfare Plan, Form 7200/14	1.0	200	200
Declaration for Plan and Trust, Form 7200/15	0.50	1300	650
Declaration for Irrevocable Trust, Form 7200/18	0.50	200	100
Sub-total		5025	2,738
Additional Burden for Deposit Brokers Only		70	137
Total		5095	2,875

General Description of Collection: The collection involves forms used by the FDIC to obtain information from individual depositors and deposit brokers necessary to supplement the records of failed depository institutions to make determinations regarding deposit insurance coverage for depositors of failed institutions. The information provided allows the FDIC to identify the actual owners of an account and each owner's interest in the account.

Request for Comment

Comments are invited on: (a) Whether these collections of information are necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimate of the burden of the information collection, 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 information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 1st day of February, 2013.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2013–02693 Filed 2–6–13; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS13–04]

Appraisal Subcommittee Notice of Meeting

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of Meeting.

Description: In accordance with Section 1104(b) of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) will meet in closed session:

Location: OCC–400 7th Street SW., Washington, DC 20024.

Date: February 13, 2013.

Time: Immediately following the ASC open session.

Status: Closed.

Matters to be Considered:

January 23, 2013 minutes—Closed Session.

Preliminary discussion of State Compliance Reviews.

Dated: February 1, 2013.

James R. Park,

Executive Director.

[FR Doc. 2013–02733 Filed 2–6–13; 8:45 am]

BILLING CODE P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS13–03]

Appraisal Subcommittee Notice of Meeting

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of Meeting.

Description: In accordance with Section 1104(b) of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) will meet in open session for its regular meeting:

Location: OCC—400 7th Street SW., Washington, DC 20024.

Date: February 13, 2013.

Time: 10:30 a.m.

Status: Open.

Matters To Be Considered

Summary Agenda

January 23, 2013 minutes—Open Session.

(No substantive discussion of the above items is anticipated. These matters will be resolved with a single vote unless a member of the ASC requests that an item be moved to the discussion agenda.)

Discussion Agenda

Appraisal Complaint National Hotline.

Missouri Compliance Review.

How To Attend and Observe an ASC Meeting

Email your name, organization and contact information to *meetings@asc.gov.*

You may also send a written request via U.S. Mail, fax or commercial carrier to the Executive Director of the ASC, 1401 H Street NW., Ste 760, Washington, DC 20005. The fax number is 202–289–4101. Your request must be received no later than 4:30 p.m., ET, on the Monday prior to the meeting. Attendees must have a valid government-issued photo ID and must

agree to submit to reasonable security measures. The meeting space is intended to accommodate public attendees. However, if the space will not accommodate all requests, the ASC may refuse attendance on that reasonable basis. The use of any video or audio tape recording device, photographing device, or any other electronic or mechanical device designed for similar purposes is prohibited at ASC meetings.

Dated: February 1, 2013.

James R. Park,

Executive Director.

[FR Doc. 2013–02732 Filed 2–6–13; 8:45 am]

BILLING CODE P

FEDERAL MARITIME COMMISSION

[Docket No. 13–01]

Order of Investigation and Hearing: United Logistics (Lax) Inc.—Possible Violations of the Shipping Act of 1984

AGENCY: Federal Maritime Commission.

DATES: The Order of Investigation and Hearing was served January 25, 2013.

ACTION: Notice of Order of Investigation and Hearing.

Authority: 46 U.S.C. 41302.

SUPPLEMENTARY INFORMATION: On January 25, 2013 the Federal Maritime Commission instituted an Order of Investigation and Hearing entitled United Logistics (LAX) Inc.—Possible Violations of Sections 10(a)(1) and 10(b)(2)(A) of the Shipping Act of 1984. Acting pursuant to Section 11 of the Shipping Act, 46 U.S.C. 41302, that investigation is instituted to determine:

(1) Whether United Logistics (LAX) Inc. violated section 10(a)(1) of the Shipping Act, 46 U.S.C. 41102(a) by knowingly and willfully, directly or indirectly, obtaining transportation at less than the rates and charges otherwise applicable by the device or means of unlawfully accessing service contracts to which it was neither a signatory nor an affiliate;

(2) whether United Logistics (LAX) Inc. violated section 10(b)(2)(A) of the Shipping Act, 46 U.S.C. 41104(2)(A), by providing transportation in the liner trade that was not in accordance with the rates, charges, classifications, rules, and practices contained in its published tariff;

(3) whether, in the event violations of section 10 of the Shipping Act are found, civil penalties should be assessed against United Logistics (LAX) Inc. and, if so, the amount of the penalties to be assessed;

(4) whether, in the event violations of section 10(b)(2)(A) of the Shipping Act are found, the tariff of United Logistics (LAX) Inc. should be suspended pursuant to section 13 of the Shipping Act, 46 U.S.C. 41108(a);

(5) whether the Ocean Transportation Intermediary license of United Logistics (LAX) Inc. should be suspended or revoked pursuant to section 19 of the Shipping Act, 46 U.S.C. 40903; and

(6) whether, in the event violations are found, an appropriate cease and desist order should be issued as authorized by section 14 of the Shipping Act, 46 U.S.C. 41304.

The Order may be viewed in its entirety at *http://www.fmc.gov/13-01.*

Karen V. Gregory,

Secretary.

[FR Doc. 2013–02819 Filed 2–6–13; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 22, 2013.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Baylake Corporation,* Sturgeon Bay, Wisconsin; to engage *de novo* through its subsidiary, Admiral Asset Management, LLC, Green Bay, Wisconsin, in conducting registered investment advisory services, pursuant to section 225.28(b)(6).

Board of Governors of the Federal Reserve System, February 4, 2013.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2013–02767 Filed 2–6–13; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the proposed information collection project: ''Improving Sickle Cell Transitions of Care through Health Information Technology Phase 1.'' In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501–3521, AHRQ invites the public to comment on this proposed information collection.

DATES: Comments on this notice must be received by April 8, 2013.

ADDRESSES: Written comments should be submitted to: Doris Lefkowitz, Reports Clearance Officer, AHRQ, by email at *doris.lefkowitz,AHRQ.hhs.gov.*

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by email at *doris.lefkowitz@AHRQ.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Project

Improving Sickle Cell Transitions of Care Through Health Information Technology Phase 1

This project is the first phase in AHRQ's effort toward the development of a health information technology (HIT) enabled tool designed to aid adolescents and young adults with sickle cell disease (SCD) during transitions of care. SCD is a serious, genetic blood disorder that affects approximately 70,000–100,000 Americans, including one out of every 500 African American and one

out of every 36,000 Hispanic American births. Persons with SCD produce abnormal, ''sickle-shaped'' red blood cells that obstruct blood vessels, leading to life-long anemia, organ damage, increased potential for infections, chronic episodes of pain, and substantially shortened life spans. SCD has been noted to be understudied relative to its prevalence resulting in a lack of knowledge about the important variables and domains that determine health outcomes for patients. Furthermore, patients with SCD, typically young, minority, and often of lower income status, have had few opportunities to voice their needs and concerns about their health and health care.

As recently as 30 years ago, children with SCD usually did not survive into adulthood. Now, as a result of advances in screening and treatment, more than 90 percent of individuals with SCD reach adulthood, and life expectancy is typically into the fifth decade. Persons with SCD experience multiple transitions of care as a result of the chronicity of SCD, frequency of both acute and chronic events requiring care, as well as the advancements in life expectancy. Transitions of care occur when either the setting of care changes (e.g., from home-based to hospital-based care) or the focus of care changes (e.g., from pediatric-focused to adult-focused care). When transitions of care occur, a need to share medical history and other types of health information arises. Transitions of care are more likely to be successful when this health information is accurate, tailored to the type of transition taking place, and communicated effectively.

Times of care transitions are particularly fraught for patients with SCD and currently, few patients have access to effective transition programs for SCD. In a 2010 survey of pediatric SCD providers, the majority claimed to have transition programs in place but they were often newly formed and without the ability to transfer care to adult providers with specific expertise in SCD.

Preliminary evidence suggests that HIT can be helpful for SCD and similar conditions. In particular, a technology-based tool has already been used successfully by patients with SCD to help with some aspects of disease management. In one study, a handheld wireless device was used to implement a pain management protocol and found to result in high rates of participation and satisfaction. Technology-based tools or applications—''apps''—have also been effective in improving care transitions for other chronic diseases such as diabetes and HIV, which can serve as models for this tool.

Improving transitions of care is the focus of AHRQ's plans to respond to the Department of Health and Human Services' (HHS') SCD Initiative announced in 2011. The overall HHS SCD initiative, which is aligned with AHRQ's mission, aims to improve the health of persons with SCD through various activities, including developing and disseminating evidence-based guidelines, increasing the availability of medical homes that provide SCD care, and supporting research in areas such as pain and disease management, all of which could also be supported through the use of an effective HIT enabled tool.

The goals of this project are to:

(1) Gain the necessary background knowledge including qualitative information from key stakeholders, to establish a set of requirements that would guide the design and development of a HIT-enabled tool in future phases of work that meets patients,' families,' and providers' needs to aid adolescents and young adults with sickle cell disease during transitions of care.

(2) Develop an understanding of the environmental context, current facilitators and barriers, health data use and needs of key stakeholders affected by sickle cell disease, including patients, families, and providers.

This study is being conducted by AHRQ through its contractor, The Lewin Group, pursuant to AHRQ's authority to conduct and support research on healthcare and on systems for the delivery of such care, including activities with respect to the quality, effectiveness, efficiency, appropriateness and value of healthcare services and health care technologies. 42 U.S.C. 299a(a)(1), (2) and (5).

Method of Collection

To achieve the goals of this project, the following activities and data collections will be implemented:

(1) *Environmental Scan* — AHRQ will execute a literature review to identify potentially relevant scientific literature and information from other literature and sources as well as complete a search for existing tools that aid transitions of care for persons with SCD or similar conditions. This will provide contextual background about the current state of the field with regards to tool development and use, identify key issues of patients with SCD related to care transitions, and understand the context of care delivered and health data information needs to inform the content, design and functionality of a tool. This activity does not impose a burden on the public and is not included in the burden estimates in Exhibit 1.

(2) *Focus Groups* — AHRQ will facilitate ten focus groups of key stakeholder groups including: parents/caregivers of patients with SCD; health care providers (e.g. SCD specialists, primary care physicians (PCPs), hospitalists and emergency room (ER) physicians); IT developers; SCD patients ages 9–13; SCD patients ages 14–17; SCD patients 18 and older; and SCD patients of mixed ages; to gather qualitative information on stakeholder experiences with SCD and care transitions, barriers to quality care, and use of technology to inform tool design and functionality. Each group will consist of 10 participants and will be asked to describe their particular experiences with health care transitions, communication practices, information needs and technology use in order to develop relevant ''use cases'' which will be used by investigators and tool developers for the later phases of the project. The in-person nature of focus groups allows for a more in-depth and targeted discussion, including participant experiences, impressions and priorities in a detailed fashion.

(3) *Demographic Questionnaire* — AHRQ will implement a short demographic questionnaire at the start of each of the ten focus groups to collect basic demographic information to allow the team to contextualize findings from each focus group. Questionnaires are tailored to each focus group category: parents/caregivers of patients with SCD; providers, hospitalists and ER physicians); IT developers; SCD patients ages 9–13; SCD patients ages 14–17; SCD patients 18 and older; and SCD patients of mixed ages.

(4) *Key Informant Interviews* — AHRQ will conduct eight key informant interviews with stakeholders such as State Medicaid representatives, attorneys with expertise in privacy and security issues, representatives from the Office of the National Coordinator for Health Information Technology (ONC), Office of Chief Scientist, and other relevant policy makers. Qualitative information gained will contribute to tool development recommendations particularly in terms of cost, issues related to reimbursement by payers, needs for proof of effectiveness, sustainability, and potential vehicles for facilitating and funding tool development and implementation. Five of these stakeholders will be Federal government employees and therefore are excluded from the burden estimates in Exhibit 1 below.

The information gained from the focus groups and key informant interviews will be used to understand if and how a patient-centered, HIT-enabled tool can improve the health of individuals with SCD during care transitions.

Focus groups as a form of qualitative research are an important vehicle for gathering and explicating insight from the field, especially if, as in this case, the important domains are not yet understood, and need to be outlined by respondents, rather than suggested by investigators. Thus active recruitment and qualitative techniques are a means to incorporate this necessary and important perspective into the derivation of effective interventions. The primary objective of the focus groups is to gather more richly nuanced information from sickle cell disease stakeholders. The in-person nature of focus groups allows for a more in-depth and targeted discussion, including participant experiences, impressions and priorities in a detailed fashion.

Estimated Annual Respondent Burden

Exhibit 1 shows the estimated annualized burden hours for the respondents' time to participate in this research. The demographic questionnaire will be completed by each focus group participant and takes 6 minutes to complete. All of the focus groups and key informant interviews will last 2 hours except for the IT developer focus group which will last 4 hours. Each focus group will consist of 10 persons. There will be two focus groups with providers, three with parents/caregivers, one group for IT developers, and one focus group with each of the four patient groups. Key informant interviews will be conducted with eight individuals. The total burden is estimated to be 236 hours annually.

Exhibit 2 shows the estimated annualized cost burden associated with the respondents' time to participate in this research. The total cost burden is estimated to be $7,646 annually.

EXHIBIT 1—ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours
Demographic Questionnaire	100	1	6/60	10
Provider Focus Groups	20	1	2	40
Parent/Caregiver Focus Groups	30	1	2	60
IT Developer Focus Group	10	1	4	40
Patients 9–13 Focus Group	10	1	2	20
Patients 14–17 Focus Group	10	1	2	20
Patients 18 & older Focus Group	10	1	2	20
Patients mixed ages Focus Group	10	1	2	20
Key Informant Interviews	3	1	2	6
Total	203	na	na	236

* Five interview participants will be Federal government employees and therefore are excluded from the burden estimates.

EXHIBIT 2—ESTIMATED ANNUALIZED COST BURDEN

Form name	Number of respondents	Total burden hours	Average hourly wage rate *	Total cost burden
Demographic Questionnaire	100	10	[a] $26.89	$269
Provider Focus Groups	20	40	[b] 88.7	3,551
Parent/Caregiver Focus Groups	30	60	[a] 21.74	1,304
IT Developer Focus Group	10	40	[d] 44.27	1,771
Patients 9–13 Focus Group	10	20	[e] 0	0
Patients 14–17 Focus Group	10	20	[e] 0	0
Patients 18 & older Focus Group	10	20	[a] 21.74	435
Patients mixed ages Focus Group	10	20	[e] 0	0
Key Informant Interviews	3	6	[f] 52.72	316
Total	203	236	na	7,646

[a] Based on the mean wages for Physicians & Surgeons, All other (29–1069), All Occupations (00–0000), Software Developer (15–1132). Wages for children averaged in as $0.
[b] Based on the mean wages for Physicians & Surgeons, All other (29–1069).
[c] Based on the mean wages for All Occupations (00–0000).
[d] Based on the mean wages for Software Developer (15–1132).
[e] No wage data for children.
[f] Based on the mean wages for Lawyers (23–1011), Social and Community Service Managers (11–9151), Medical and Health Services Managers (11–9111), and Computer and Information System Managers (11–3021).
* National Compensation Survey: Occupational wages in the United States May 2011, ''U.S. Department of Labor, Bureau of Labor Statistics.'' *http://www.bls.gov/oes/current/oes_nat.htm#15-0000.*

Request for Comments

In accordance with the Paperwork Reduction Act, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ health care research and health care information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) of information; (c) ways to

enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: January 23, 2013.

Carolyn M. Clancy,

Director.

[FR Doc. 2013–02549 Filed 2–6–13; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket Number NIOSH–144]

Issuance of Final Guidance Publication

AGENCY: National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of issuance of final guidance publication.

SUMMARY: The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), announces the availability of the following publication: ''NIOSH Criteria for a Recommended Standard: Occupational Exposure to Hexavalent Chromium'' [2013–128].

ADDRESSES: This document may be obtained at the following link: Web site: *http://www.cdc.gov/niosh/docs/2013-128/.*

FOR FURTHER INFORMATION CONTACT: Kathleen MacMahon, NIOSH, Robert A. Taft Laboratories, MS–C14, 4676 Columbia Parkway, Cincinnati, OH 45226, telephone (513) 533–8547.

Dated: January 28, 2013.

John Howard,

Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 2013–02743 Filed 2–6–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

National Institute for Occupational Safety and Health Respiratory Protection for Healthcare Workers: Stakeholder Meeting

AGENCY: The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of public meeting.

SUMMARY: The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC) announces the following public meeting: ''Stakeholder Meeting on Respiratory Protection for Healthcare Workers''.

Stakeholder Meeting Time and Date: 8 a.m.–5:15 p.m. EDT, June 18, 2013.

Place: CDC Tom Harkin Global Communications Center located at 1600 Clifton Road, Building 19, Atlanta, Georgia 30333. This meeting will also be available by videoconference at select CDC locations.

Purpose of the Meeting: This meeting is being held to exchange ideas and solutions to improve healthcare worker compliance with personal protective technologies (PPT), with a focus on respiratory protection. Stakeholder feedback is sought to (1) provide input to future updates of the NIOSH PPT program research agenda and (2) assess progress toward better respirators for healthcare workers.

This meeting will include presentations and moderated roundtable discussions on ''Improving the Evidence Base to Support Guidance on the Appropriate Level of Respiratory Protection'', ''Healthcare Worker Observational Studies of Respirator Use & New Educational Resources'', ''Considerations for Extending Respirator Supplies During an Outbreak or Pandemic'', ''Standards & Test Methods for Improved Respirators for Healthcare Workers'', and ''Advances toward Improved Respirators for Healthcare Workers''.

Status: The meeting is open to the public, limited only by the capacity (100) of the conference room. Registration will be accepted on a first come first served basis. Participants are encouraged to consider attending by video conference, which will be provided at select CDC locations (to be announced). Registration for both in person and video conference attendance is available on the NIOSH NPPTL Web site, *www.cdc.gov/niosh/npptl.* Preregistration is required on or before May 31, 2013, even for remote attendees and US citizens. Non-US citizens need to register on or before May 18, 2013, to allow sufficient time for mandatory CDC facility security clearance procedures to be completed. An email confirming registration will be sent from NIOSH and will include details needed to participate. A government issued photo ID will be required to obtain entrance to any of the CDC locations.

Background: The NIOSH PPT program publishes and periodically updates its research agenda on personal protective equipment (PPE) for healthcare workers (*http://www.cdc.gov/niosh/docket/archive/docket129.html*). The research agenda, last updated in 2010, describes the near term and long term strategy for the PPT program's influenza pandemic research, development, and investigative testing activities. Recently, the Institute of Medicine (IOM) published a report (*http://www.iom.edu/Reports/2011/Preventing-Transmission-of-Pandemic-Influenza-and-Other-Viral-Respiratory-Diseases.aspx*) that assessed the nation's progress on improving PPE for healthcare personnel exposed to infectious respiratory diseases and made recommendations to address research gaps. Furthermore, a chapter in the recent HHS 2009 H1N1 Influenza Improvement Plan (*http://www.phe.gov/Preparedness/mcm/h1n1-retrospective/Documents/2009-h1n1-improvementplan.pdf*) discusses research needs for respiratory protective devices as part of a broader non-vaccine medical countermeasures strategy. A key area of discussion at this stakeholder meeting will be progress on research gaps identified in the 2011 IOM and 2012 HHS reports and how NIOSH can use this information to update the 2010 PPT research agenda.

The current version of PPT program research agenda for healthcare worker PPE focuses on conducting research to design and promote the appropriate use of PPE. Compliance with appropriate respirator use practices is important because healthcare workers often wear them incorrectly or fail to use them at all. Poor compliance has been linked to safety culture, workload issues, time constraints, risk perception, effectiveness concerns, availability, discomfort, interference with patient care, and communication difficulties. One strategy taken to improve healthcare worker compliance is to develop better respirators. In this

stakeholder meeting, progress toward better respirators for healthcare workers will be discussed.

FOR FURTHER INFORMATION CONTACT: Dr. Ronald E. Shaffer, Senior Scientist, NIOSH NPPTL Office of the Director at *NPPTLEventsHealthcar@cdc.gov,* telephone (412) 386–6111, fax (412) 386–6617.

Dated: January 29, 2013.

John Howard,

Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 2013–02742 Filed 2–6–13; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Initial review

The meeting announced below concerns Epidemiology, Prevention and Treatment of Influenza and other Respiratory Infections in Panama and Central America Region, Funding Opportunity Announcement (FOA) IP13–002; and Strengthening Global Animal-Human Interface Activities for Avian Influenza and other Zoonotic Diseases, FOA CK13–002, initial review.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

Time and Date: 1:00 p.m.–3:00 p.m., March 28, 2013 (Closed).

Place: Teleconference.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to ''Epidemiology, Prevention and Treatment of Influenza and other Respiratory Infections in Panama and Central America Region, FOA IP13–002; and Strengthening Global Animal-Human Interface Activities for Avian Influenza and other Zoonotic Diseases, FOA CK13–002''.

Contact Person for More Information: Gregory Anderson, M.S., M.P.H., Scientific Review Officer, CDC, 1600 Clifton Road NE., Mailstop E60, Atlanta, Georgia 30333, Telephone: (404) 718–8833.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2013–02791 Filed 2–6–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Initial Review

The meeting announced below concerns Building Healthcare Practitioner Capacity Around HPV Vaccine Communication, Funding Opportunity Announcement (FOA) IP13–001, initial review.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

Time and Date: 11:00 a.m.–5:00 p.m., April 10, 2013 (Closed).

Place: Teleconference.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to ''Building Healthcare Practitioner Capacity around HPV Vaccine Communication, FOA IP13–001''.

Contact Person For More Information: Gregory Anderson, M.S., M.P.H., Scientific Review Officer, CDC, 1600 Clifton Road NE., Mailstop E60, Atlanta, Georgia 30333, Telephone: (404) 718–8833.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2013–02790 Filed 2–6–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

National Center for Health Statistics (NCHS), Classifications and Public Health Data Standards Staff, Announces the Following Meeting

NAME: ICD–9–CM Coordination and Maintenance Committee (C&M) meeting.

TIME AND DATE: 9:00 a.m.–5:00 p.m., March 5, 2013.

PLACE: Centers for Medicare and Medicaid Services (CMS) Auditorium, 7500 Security Boulevard, Baltimore, Maryland 21244.

STATUS: Open to the public, limited only by the space available. The meeting room accommodates approximately 240 people. The meeting will be broadcast live via Webcast at *http://www.cms.gov/live/*

SECURITY CONSIDERATIONS: Due to increased security requirements CMS has instituted stringent procedures for entrance into the building by non-government employees. Attendees will need to present valid government-issued picture identification, and sign-in at the security desk upon entering the building. Attendees who wish to attend a specific ICD–9–CM C&M meeting on March 5, 2013, must submit their name and organization by February 22, 2013, for inclusion on the visitor list. This visitor list will be maintained at the front desk of the CMS building and used by the guards to admit visitors to the meeting.

Participants who attended previous ICD–9–CM C&M meetings will no longer be automatically added to the visitor list. You must request inclusion of your name prior to each meeting you attend.

Please register to attend the meeting on-line at: *http://www.cms.hhs.gov/apps/events/*. Please contact Mady Hue (410–786–4510 or *Marilu.hue@cms.hhs.gov*), for questions about the registration process.

PURPOSE: The ICD–9–CM Coordination and Maintenance (C&M) Committee is a public forum for the presentation of proposed modifications to the International Classification of Diseases, Ninth Revision, Clinical Modification, the International Classification of Diseases, Tenth Revision, Clinical Modification and ICD–10—Procedure Coding System

MATTERS TO BE DISCUSSED: Agenda items include:

March 5, 2013

ICD–9–CM Topics

Infusion of Prothrombin Complex Concentrate

Transprostatic Guided Implantable Struts

ICD–10 Topics

ICD–10 Implementation Announcements

ICD–10 Update on National Coverage Determinations

ICD–10 Impact Analysis

Transprostatic Guided Implantable Struts

ICD–10 HAC Translations

ICD–10–PCS Addendum

ICD–10–CM Diagnosis Topics

Complications of urinary devices (representation)

Gluten sensitivity

Salter Harris fractures

ICD–10–CM Addendum

Agenda items are subject to change as priorities dictate.

Note: CMS and NCHS will no longer provide paper copies of handouts for the meeting. Electronic copies of all meeting materials will be posted on the CMS and NCHS Web sites prior to the meeting at *http://www.cms.hhs.gov/ICD9ProviderDiagnosticCodes/03_meetings.asp#TopOfPage* and *http://www.cdc.gov/nchs/icd/icd9cm_maintenance.htm.*

CONTACT PERSONS FOR ADDITIONAL INFORMATION: Donna Pickett, Medical Systems Administrator, Classifications and Public Health Data Standards Staff, NCHS, 3311 Toledo Road, Room 2337, Hyattsville, Maryland 20782, email dfp4@cdc.gov, telephone 301–458–4434 (diagnosis); Mady Hue, Health Insurance Specialist, Division of Acute Care, CMS, 7500 Security Boulevard, Baltimore, Maryland, 21244, email *marilu.hue@cms.hhs.gov*, telephone 410–786–4510 (procedures).

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention, and the Agency for Toxic Substances and Disease Registry.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2013–02792 Filed 2–6–13; 8:45 am]

BILLING CODE 4160–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10464]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) 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:* New Collection; *Title of Information Collection:* Agent/broker data collection in Federally Facilitated Health Insurance Exchanges; *Use:* CMS will collect data, including licensure and personally identifiable information, from agent/brokers to register them with the federally-facilitated exchange (FFE) through the Exchange Portal. A key component of the registration process requiring data collection is verifying the agent/broker's licensure status, as well as any issuer appointments. Agents/brokers will enter basic identifying information on the Exchange Portal during the initial registration phase. Once registration is successfully completed, agent/brokers will be routed to CMS' LMS to access and complete required training and exams. The user names and zip codes that agent/brokers provided during training will be used to record their training history through CMS LMS, and communicate training results with the Exchange Portal. As accompanying modules demonstrate, the training and exams will ensure agent/brokers possess the basic knowledge required to enroll individuals and small business health options plan (SHOP) employers/employees through the Exchange.

Additionally, CMS will use the collected data for oversight and monitoring of agent/brokers, and to ensure compliance with the ACA provisions under 45 CFR 155.220. If CMS detects anomalies, CMS will follow-up to resolve issues, as necessary. *Form Number:* CMS–10464 (OCN: 0938–NEW); *Frequency:* Annually; *Affected Public:* Private Sector: Business or other for-profits; *Number of Respondents:* 254,095; *Total Annual Responses:* 254,095; *Total Annual Hours:* 1,206,951. (For policy questions regarding this collection contact Barry Brauth at 301–492–4299. 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 Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by April 8, 2013:

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: CMS–10464/OCN–0938–NEW, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: February 3, 2013.

Martique Jones,

Deputy Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2013–02714 Filed 2–6–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3276–NC]

Medicare Program; Request for Information on the Use of Clinical Quality Measures (CQMs) Reported Under the Physician Quality Reporting System (PQRS), the Electronic Health Record (EHR) Incentive Program, and Other Reporting Programs

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

ACTION: Request for information.

SUMMARY: This request for information solicits ways in which an eligible professional (EP) might use the clinical quality measures (CQM) data reported to specialty boards, specialty societies, regional health care quality organizations or other non-federal reporting programs to also report under the Physician Quality Reporting System (PQRS), as well as the Electronic Health Record (EHR) Incentive Program. It also solicits ways by which the entities already collecting CQM data for other reporting programs to submit this data on behalf of EPs and group practices for reporting under the PQRS and the EHR Incentive Program. It also requests information regarding section 601(b) of the American Taxpayer Relief Act of 2012 which provides for treating an EP as satisfactorily reporting data on quality measures if the EP is satisfactorily participating in a qualified clinical data registry. We are requesting information from medical specialty societies, boards, and registries, other third party registry vendors, eligible professionals using registries to report quality measures, and any other party interested in providing information on this request for information.

DATES: The information solicited in this notice must be received at the address provided below, no later than 5 p.m. eastern standard time (e.s.t) April 8, 2013.

ADDRESSES: In commenting, refer to file code CMS–3276–NC. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov*. Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3276–NC, P.O. Box 8013, Baltimore, MD 21244–8013.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3276–NC, Mail Stop S3–02–01, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* Alternatively, you may deliver (by hand or courier) your written comments ONLY to the following addresses:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, call telephone number (410) 786–9994 in advance to schedule your arrival with one of our staff members.

Comments erroneously mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Christine Estella, 410–786–0485.

SUPPLEMENTARY INFORMATION:

I. Background

A. Maintenance of Certification

Twenty-four member boards of the American Board of Medical Specialties (ABMS) currently recertify physician specialists through the ABMS Maintenance of Certification (MOC) process.[1] The MOC assesses physicians' commitment to lifelong learning according to the following six core competencies for quality patient care: (1) Patient care; (2) medical knowledge; (3) practice-based learning and improvement; (4) interpersonal and communications skills; (5) professionalism; and (6) systems-based practice. Generally speaking, the MOC incorporates these six core competencies through a four-part process:

- Part I: Licensure and Professional Standing
- Part II: Lifelong Learning and Self-Assessment
- Part III: Cognitive Expertise
- Part IV: Practice Performance Assessment [2]

Within this four-part process, particularly in Part IV, certain member boards require the reporting of quality measures data using a registry or other method associated with a member board. More information on the ABMS MOC can be found at *http://www.abms.org/Maintenance_of_Certification/ABMS_MOC.aspx.*

A. The Physician Quality Reporting System

The Physician Quality Reporting System (PQRS), as set forth in subsections (a), (k) and (m) of section 1848 of the Social Security Act (the Act) and as amended by section 601(b) of the American Taxpayer Relief Act of 2012, is a quality pay-for-reporting program that provides incentive payments through 2014, and beginning in 2015, payment adjustments to eligible professionals (EPs) based on whether or not they satisfactorily report data on quality measures for covered professional services furnished during a specified reporting period. The PQRS (formerly the Physician Quality Reporting Initiative or PQRI) was first implemented in 2007 pursuant to the Tax Relief and Health Care Act (TRHCA) of 2006. Although the PQRS is a quality pay-for-reporting program, the PQRS is currently used as the basis for other CMS programs that measure performance. For example, the application of the Value-Based Payment Modifier in 2015 will be dependent on the group practice's participation in the PQRS in 2013. (For additional information, see the Calendar Year (CY) 2013 Medicare Physician Fee Schedule (PFS) final rule with comment period (77 FR 69306).).

[1] *http://www.abms.org/Maintenance_of_Certification/ABMS_MOC.aspx.*

[2] *http://www.abms.org/Maintenance_of_Certification/ABMS_MOC.aspx.*

The claims-based reporting mechanism was the only reporting mechanism available for reporting PQRS individual quality measures data under the 2007 PQRS. However, the PQRS has evolved to offer multiple reporting mechanisms, reporting periods, and criteria for satisfactory reporting for purposes of reporting PQRS quality measures data.

In 2008, the PQRS introduced use of the registry-based reporting mechanism. The registry-based reporting mechanism has proven to be popular among eligible professionals, and the number of eligible professionals that participate in PQRS via registry reporting continues to increase. According to the 2010 PQRS and e-Prescribing (eRx) Experience Report, in 2008, 31 of 32 qualified registries submitted data on behalf of nearly 12,000 eligible professionals. The number of eligible professionals for which data was submitted by a registry increased to 33,411 in 2009 (from 69 of 74 qualified registries) and to 56,214 in 2010 (from 89 of the 96 qualified registries). Historically, eligible professionals using the registry-based reporting mechanism have been more successful at meeting the criteria for satisfactory reporting of the PQRS data than through the claims-based reporting mechanism.

1. Qualification Requirement for Registries Submitting PQRS Quality Measures Data on Behalf of Eligible Professionals and Group Practices

The PQRS requires every registry that wishes to submit data on PQRS quality measures on behalf of its eligible professionals to become ''qualified'' under the PQRS. The final qualification process for registries that wish to become qualified to submit PQRS quality measures data for 2013 and subsequent years can be found in the CY 2013 Medicare PFS final rule with comment period (77 FR 69178). Generally, the registry qualification process for 2013 and subsequent years requires a registry to possess certain characteristics and submit a self-nomination statement that indicates that the registry has these characteristics and of the registry's intent to submit PQRS CQMs data on behalf of its eligible professionals for the respective year.

2. Registries Classified as EHR Data Submission Vendors

In lieu of serving as a registry under the PQRS, registries that have access to an EHR system may instead serve as an EHR data submission vendor. Beginning in 2014, a registry acting as an EHR data submission vendor must have its EHR system certified under the program established by the Office of the National Coordinator for Health Information Technology (ONC) as certified EHR technology (CEHRT). (For more information see the CY 2013 Medicare PFS final rule with comment period (77 FR 69185).)

3. PQRS Reporting Options Using the Registry-Based Reporting Mechanism

Since the inception of the registry-based reporting mechanism in 2008, we have developed multiple criteria for satisfactory reporting for individual eligible professionals, and, beginning in 2013, group practices participating in the group practice reporting option (GPRO), using the registry-based reporting mechanism to report PQRS quality measures data. For example, we previously have adopted criteria for satisfactory reporting using qualified registries in which eligible professionals or group practices must report data on a minimum of three measures or, for individual eligible professionals only, one measures group, a certain percentage or number of cases. Eligible professionals or group practices using registries that serve as EHR data submission vendors may, for 2013, either report a minimum of 3 measures for at least 80 percent of cases, or use the reporting criterion that aligns with the EHR Incentive Program. To meet the criteria for satisfactory reporting using an EHR data submission vendor for the 2014 PQRS incentive, eligible professionals or group practices must use the criteria that align with the EHR Incentive Program. (For more detailed information see the CY 2013 Medicare PFS final rule with comment period (77 FR 69188).

4. Participation in a Qualified Clinical Data Registry

Section 601(b) of the recently enacted American Taxpayer Relief Act of 2012 amended section 1848(m)(3) of the Act to allow eligible professionals to be treated as satisfactorily submitting data on quality measures for covered professional services if the eligible professional satisfactorily participates in a qualified clinical data registry. For 2014 and subsequent years, the Secretary is required to treat an eligible professional as satisfactorily submitting data on quality measures under the PQRS program if, in lieu of reporting PQRS quality measures the eligible professional is satisfactorily participating, as determined by the Secretary, in a qualified clinical data registry for the year.

The Secretary is required to establish requirements for an entity to be considered a qualified clinical data registry, including a requirement that the entity provide information, at such time and in such manner, as the Secretary determines necessary. In establishing these requirements, the Secretary must consider whether an entity: Has mechanisms for transparency of data, risk models, and measures; requires submission of data with respect to multiple payers; provides timely performance reports to participants at the individual level; and supports quality improvement initiatives. The pre-rulemaking process established in sections 1890 and 1890A of the Social Security Act does not apply to measures used by a qualified registry and registries may use NQF-endorsed measures. The Secretary is required to establish a process to determine whether an entity meets the requirements to be a qualified clinical data registry. The process can involve a determination by the Secretary or the Secretary can designate one or more independent organizations to make such determination, or both approaches can be used.

B. The EHR Incentive Program

The Health Information Technology for Economic and Clinical Health Act (the ''HITECH Act'') is included in the American Recovery and Reinvestment Act of 2009 (the ''Recovery Act''). The HITECH Act authorized incentive payments under Medicare and Medicaid for eligible professionals (EPs), eligible hospitals, and critical access hospitals (CAHs) that adopt, implement, upgrade, or demonstrate meaningful use of certified EHR technology (CEHRT), and beginning in 2015, payment adjustments under Medicare for failing to demonstrate meaningful use. Certified EHR technology may include EHR modules that calculate and report clinical quality measures data. These EHR modules can be part of the EP's CEHRT and used by registries and other data submission vendors to report clinical quality measures on behalf of EPs.

The EHR Incentive Program will be implemented in three stages. For CYs 2011, 2012, and 2013, EPs are required to select and report from a list of 44 CQMs subject to the reporting criteria established for those years. (For more information see the July 28, 2010 EHR Incentive Program final rule (75 FR 44409 through 44411) and the September 4, 2012 EHR Incentive Program Stage 2 final rule (77 FR 54057).) Beginning in 2014, EPs must select and report from a list of 64 CQMs that are contained in the 6 domains of quality of care established in the National Quality Strategy. The six

domains are: (1) Patient and Family Engagement; (2) Patient Safety; (3) Care Coordination; (4) Population and Community Health; (5) Efficient Use of Healthcare Resources; and (6) Clinical Processes/Effectiveness. In order to satisfy the CQM component of the EHR Incentive Program beginning in 2014, EPs must report nine CQMs covering at least three domains. (For more information see the September 4, 2012 EHR Incentive Program Stage 2 final rule (77 FR 54058).)

C. Maintenance of Certification

Twenty-four member boards of the American Board of Medical Specialties (ABMS) currently recertify physician specialists through the ABMS Maintenance of Certification (MOC) process.[3] The MOC assesses physicians' commitment to lifelong learning according to the following six core competencies for quality patient care: (1) patient care; (2) medical knowledge; (3) practice-based learning and improvement; (4) interpersonal and communications skills; (5) professionalism; and (6) systems-based practice. Generally speaking, the MOC incorporates these six core competencies through a four-part process:

- Part I: Licensure and Professional Standing
- Part II: Lifelong Learning and Self-Assessment
- Part III: Cognitive Expertise
- Part IV: Practice Performance Assessment [4]

Within this four-part process, particularly in Part IV, certain member boards require the reporting of quality measures data using a registry or other method associated with a member board. More information on the ABMS MOC can be found at *http://www.abms.org/Maintenance_of_Certification/ABMS_MOC.aspx.*

D. Other Quality Reporting Programs

Several quality reporting programs exist within private industry as well. For example the Society of Thoracic Surgeons (STS) established a national database in 1989 as an initiative for quality improvement and patient safety among cardiothoracic surgeons. [5] Similarly, the American College of Cardiology (ACC) has developed and partnered with other organizations to create numerous quality initiatives to assist cardiovascular professionals to bridge the gap between science and practice and to ensure patient access to high-quality, appropriate and cost-effective care.[6]

These programs are a small sampling of quality reporting programs occurring throughout the nation that provide distinct reporting criteria for program participation.

II. Request for Information

We are seeking input from the public on ways in which an eligible professional might use the CQM data reported to medical boards, specialty societies, regional health care quality organizations or other non-federal reporting programs to fulfill requirements of PQRS, and, although we are not seeking to change the requirements we established for the EHR Incentive Program in 2014, the EHR Incentive Program. We are seeking input on how alignment of certain requirements present in both federal and non-federal CQM reporting programs could reduce the burden for eligible professionals and accelerate quality improvement. We are also seeking input on the amendments made by section 601(b) of the American Taxpayer Relief Act of 2012. Therefore, we are soliciting comment on the following questions:

- High level questions:

++ How are the current reporting requirements for the PQRS and and the reporting requirements in 2014 for the EHR Incentive Program similar to the reporting requirements already established for the ABMS boards or to other non-federal quality reporting programs? How are they different? In what ways are these reporting requirements duplicative and can these reporting programs be integrated to reduce reporting burden on eligible professionals?

++ Are there examples of other non-federal programs under which eligible professionals report quality measures data?

++ What would be the benefits and shortcomings involved with allowing third-party entities to report quality data to CMS on behalf of physicians and other eligible professionals?

++ What entities have the capacity to report quality data similar to those reported under the PQRS, Value-based Payment Modifier, and/or EHR Incentive programs? If these entities were to report such data to CMS, what requirements should we include in the reporting system used by such entities, including requirements to ensure high quality data?

++ How should our quality reporting programs change/evolve to reduce reporting burden on eligible professionals, while still receiving robust data on clinical quality?

- Questions regarding reporting requirements for entities that report via a registry under the PQRS for 2014 and subsequent years or the EHR Incentive Program if registry reporting is established as a reporting method for that program in future years:

++ What types of entities should be eligible to submit quality measures data on behalf of eligible professionals for PQRS and the EHR Incentive Program? Examples might include medical board registries, specialty society registries, regional quality collaboratives or other entities. What qualification requirements should be applicable to such entities?

++ What functionalities should entities qualified to submit PQRS quality measures data possess? For example, for CQMs that can be electronically submitted and reported under PQRS and the EHR Incentive Program, should an entity's qualification to submit such measures be based on whether they have technology certified to ONC's certification criteria for CQM calculation and/or electronic submission?

++ What criteria should we require of entities submitting quality measures data to us on behalf of eligible professionals? Examples might include transparency of measures available to EPs, specific frequency of feedback reports, tools to guide improvement efforts for EPs, ability to report aggregate data, agreement to data audits if requested, etc.

++ Should reporting entities be required to publicly post performance data?

++ Should we require an entity to submit a yearly self-nomination statement to participate in PQRS?

++ What should be included in the data validation plan for these reporting entities?

++ If CMS provided a reporting option for PQRS and/or the EHR Incentive Program through such entities, what specification should CMS use to receive the quality data information (for example, Quality Reporting Document Architecture [QRDA] 1 or 3, XML, other)?

++ Should data submission timelines for these reporting entities be modified so that the submission timeframes for these quality reporting programs are aligned? For example, PQRS qualified

[3] *http://www.abms.org/Maintenance_of_Certification/ABMS_MOC.aspx.*

[4] *http://www.abms.org/Maintenance_of_Certification/ABMS_MOC.aspx.*

[5] *http://www.sts.org/national-database.*

[6] *http://www.cardiosource.org/Science-And-Quality/Quality-Programs.aspx.*

registries are required to submit quality measures data once, within 2 months following the reporting period. How much time are reporting entities outside of PQRS afforded to submit quality measures data? What challenges do reporting entities face in reporting data according to current timeframes?

++ What oversight (for example, checks or audits) should be in place to ensure that data is submitted and calculated properly by entities?

• Questions regarding selection of measures related to registry reporting under PQRS for 2014 and subsequent years and for the EHR Incentive Program if registry reporting is established as a reporting method for that program in future years:

++ Should we require that a certain proportion of submitted measures have particular characteristics such as being NQF-endorsed or outcome-based?

++ Should we require that the quality measures data submitted cover a certain number of the six national quality strategy domains?

++ To what extent would third-party entities struggle to meet reporting for measures currently available under PQRS and EHR Incentive Program?

• Questions regarding registry measures reporting criteria:

++ If we propose revised criteria for satisfactory reporting under PQRS and for meeting the CQM component of meaningful use under the EHR Incentive Program, how many measures should an eligible professional be required to report to collect meaningful quality data? For example, for reporting periods occurring in 2014, eligible professionals using CEHRT must report 9 measures covering at least 3 domains to meet the criteria for satisfactory reporting for the 2014 PQRS incentive and meet the CQM component of achieving meaningful use for the EHR Incentive Program. (For more information see the EHR Incentive Program Stage 2 final rule (77 FR 54058) and the CY 2013 Medicare PFS final rule with comment period (77 FR 69192).) If we were to align reporting criteria with reporting requirements for other non-federal reporting programs, in future years, should we propose to require reporting on a different number of measures than what is currently required for the PQRS in 2013 and the EHR Incentive Program under the Stage 2 final rule or should the non-federal reporting programs align with CMS criteria?

++ For PQRS, should eligible professionals still be required to report quality measures data on a certain percentage of their applicable patients, such as 80 percent, for 2014 and subsequent years? Or, should we require that eligible professionals report on a certain minimum number of patients, such as 20, rather than a percentage?

(Catalog of Federal Domestic Assistance Program No. 93.773 Medicare—Hospital Insurance Program; and No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: January 9, 2013.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2013–02703 Filed 2–4–13; 11:15 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0001]

Request for Nominations for Voting Members on Public Advisory Panels or Committees

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting nominations for voting members to serve on the Device Good Manufacturing Practice Advisory Committee, certain device panels of the Medical Devices Advisory Committee, the National Mammography Quality Assurance Advisory Committee, and the Technical Electronic Products Radiation Safety Standards Committee in the Center for Devices and Radiological Health. Nominations will be accepted for current vacancies and those that will or may occur through December 31, 2013.

FDA seeks to include the views of women and men, members of all racial and ethnic groups, and individuals with and without disabilities on its advisory committees, and therefore encourages nominations of appropriately qualified candidates from these groups.

DATES: Because scheduled vacancies occur on various dates throughout each year, no cutoff date is established for the receipt of nominations. However, when possible, nominations should be received at least 6 months before the date of scheduled vacancies for each year, as indicated in this notice.

ADDRESSES: All nominations for membership should be sent electronically to *cv@oc.fda.gov*, or by mail to Advisory Committee Oversight & Management Staff, 10903 New Hampshire Ave., Bldg. 32, rm. 5103, Silver Spring, MD 20993–0002. Information about becoming a member on a FDA advisory committee can also be obtained by visiting FDA's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm.*

FOR FURTHER INFORMATION CONTACT: For specific Committee/Panel questions, contact the following persons listed in table 1 of this document.

TABLE 1

Contact person	Committee/certain device panels of the medical devices advisory committee
LCDR Sara Anderson, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1544, Silver Spring, MD 20993, 301–796–7046, email: *Sara.Anderson@fda.hhs.gov*.	National Mammography Quality Assurance Advisory Committee. Dental Products Panel. Hematology and Pathology Devices Panel. Orthopaedic and Rehabilitation Devices Panel.
Shanika Craig, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1613, Silver Spring, MD 20993, 301–796–6639, email: *Shanika.Craig@fda.hhs.gov*.	Technical Electronic Product Radiation Safety Standards Committee. Anesthesiology and Respiratory Therapy Devices Panel. Gastroenterology and Urology Devices Panel. Microbiology Devices Panel. Obstetrics and Gynecology Devices Panel. Radiological Devices Panel.
Natasha Facey, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1544, Silver Spring, MD 20993, 301–796–5290, email: *Natasha.Facey@fda.hhs.gov*.	Device Good Manufacturing Practice Advisory Committee. General Hospital and Personal Use Devices Panel. Immunology Devices Panel. Ophthalmic Devices Panel. Neurological Devices Panel.

TABLE 1—Continued

Contact person	Committee/certain device panels of the medical devices advisory committee
Pamela D. Scott, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 5406, Silver Spring, MD 20993, 301–796–5433, email: *PamelaD.Scott@fda.hhs.gov*.	Medical Devices Dispute Resolution Panel.
Jamie Waterhouse, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1544, Silver Spring, MD 20993, 301–796–3036, email: *Jamie.Waterhouse@fda.hhs.gov*.	Circulatory System Devices Panel. Ear, Nose and Throat Devices Panel. General and Plastic Surgery Devices Panel. Molecular and Clinical Genetics Devices Panel.

SUPPLEMENTARY INFORMATION:

I. Vacancies

FDA is requesting nominations of voting members for vacancies listed as follows:

TABLE 2

Committee/panel expertise needed	Current and upcoming vacancies	Approximate date needed
Anesthesiology and Respiratory Therapy Devices Panel of the Medical Devices Advisory Committee—Anesthesiologists, pulmonary medicine specialists, or other experts who have specialized interests in ventilator support, pharmacology, physiology, or the effects and complications of anesthesia.	3	December 1, 2013.
Circulatory System Devices Panel of the Medical Devices Advisory Committee—Interventional cardiologists, electrophysiologists, invasive (vascular) radiologists, vascular and cardiothoracic surgeons, and cardiologists with special interest in congestive heart failure.	1	July 1, 2013.
Dental Products Panel of the Medical Devices Advisory Committee—Dentists, engineers and scientists who have expertise in the areas of dental implants, dental materials, periodontology, tissue engineering, and dental anatomy.	3	November 1, 2013.
Ear, Nose and Throat Devices Panel of the Medical Devices Advisory Committee—Otologists, neurotologists, audiologists.	3	November 1, 2013.
Gastroenterology and Urology Devices Panel of the Medical Devices Advisory Committee—Transplant specialists, gastroenterologists, urologists and nephrologists.	3 2	Immediately. January 1, 2014.
General and Plastic Surgery Devices Panel of the Medical Devices Advisory Committee—Surgeons (general, plastic, reconstructive, pediatric, thoracic, abdominal, pelvic and endoscopic); dermatologists; experts in biomaterials, lasers, wound healing, and quality of life; and biostatisticians.	2	September 1, 2013.
General Hospital and Personal Use Devices Panel of the Medical Devices Advisory Committee—Internists, pediatricians, neonatologists, endocrinologists, gerontologists, nurses, biomedical engineers or microbiologists/infection control practitioners or experts.	1 3	Immediately. January 1, 2014.
Hematology and Pathology of the Medical Devices Advisory Committee—Hematologists (benign and/or malignant hematology), hematopathologists (general and special hematology, coagulation and homeostasis, and hematological oncology), gynecologists with special interests in gynecological oncology, cytopathologists, and molecular pathologists with special interests in development of predictive and prognostic biomarkers.	4	March 1, 2013.
Immunology Devices Panel of the Medical Devices Advisory Committee—Persons with experience in medical, surgical, or clinical oncology, internal medicine, clinical immunology, allergy, molecular diagnostics, or clinical laboratory medicine.	1 1	Immediately. March 1, 2013.
Medical Devices Dispute Resolution Panel of the Medical Devices Advisory Committee—Experts with broad, cross-cutting scientific, engineering, clinical, analytical or mediation skills who are familiar with the materials and/or operating mechanisms related to addressing complex or contested scientific issues.	1	October 1, 2013.
Microbiology Devices Panel of the Medical Devices Advisory Committee—Infectious disease clinicians, e.g., pulmonary disease specialists, sexually transmitted disease specialists, pediatric infectious disease specialists, experts in tropical medicine and emerging infectious diseases, biofilm development; mycologists; clinical microbiologists and virologists; clinical virology and microbiology laboratory directors, with expertise in clinical diagnosis and in vitro diagnostic assays, e.g., hepatologists; molecular biologists.	1 3	Immediately. March 1, 2013.
Molecular and Clinical Genetics Devices Panel of the Medical Devices Advisory Committee—Experts in human genetics and in the clinical management of patients with genetic disorders, e.g., pediatricians, obstetricians, neonatologists. Individuals with training in inborn errors of metabolism, biochemical and/or molecular genetics, population genetics, epidemiology and related statistical training, and clinical molecular genetics testing (e.g., genotyping, array CGH, etc.) Individuals with experience in genetics counseling, medical ethics are also desired, and individuals with experience in ancillary fields of study will be considered.	2	June 1, 2013.
Neurological Devices Panel of the Medical Devices Advisory Committee—Neurosurgeons (cerebrovascular and pediatric), neurologists (stroke, pediatric, pain management, and movement disorders), interventional neuroradiologists, psychiatrists, and biostatisticians.	1	December 1, 2013.

TABLE 2—Continued

Committee/panel expertise needed	Current and upcoming vacancies	Approximate date needed
Obstetrics and Gynecology Devices Panel of the Medical Devices Advisory Committee—Experts in perinatology, embryology, reproductive endocrinology, pediatric gynecology, gynecological oncology, operative hysteroscopy, pelviscopy, electrosurgery, laser surgery, assisted reproductive technologies, contraception, postoperative adhesions, and cervical cancer and colposcopy; biostatisticians and engineers with experience in obstetrics/gynecology devices; urogynecologists; experts in breast care; experts in gynecology in the older patient; experts in diagnostic (optical) spectroscopy; experts in midwifery; labor and delivery nursing.	2	February 1, 2013.
Ophthalmic Devices Panel of the Medical Devices Advisory Committee—Ophthalmologists specializing in cataract and refractive surgery and vitreo-retinal surgery, in addition to vision scientists, optometrists, and biostatisticians practiced in ophthalmic clinical trials.	2	November 1, 2013.
Orthopaedic and Rehabilitation Devices Panel of the Medical Devices Advisory Committee—Orthopedic surgeons (joint, spine, trauma, and pediatric); rheumatologists; engineers (biomedical, biomaterials, and biomechanical); experts in rehabilitation medicine, sports medicine, and connective tissue engineering; and biostatisticians.	3	September 1, 2013.
Radiological Devices Panel of the Medical Devices Advisory—Physicians with experience in general radiology, mammography, ultrasound, magnetic resonance, computed tomography, other radiological subspecialties and radiation oncology; scientists with experience in diagnostic devices, radiation physics, statistical analysis, digital imaging and image analysis.	2	February 1, 2013.
Device Good Manufacturing Practice Advisory Committee—Vacancies include a public representative and a government representative.	2	June 1, 2013.
National Mammography Quality Assurance Advisory Committee—Physicians, practitioners, or other health professionals whose clinical practice, research specialization, or professional expertise include a significant focus on mammography.	1	February 1, 2013.
Technical Electronic Product Radiation Safety Standards Advisory Committee—Vacancies include general public representative and a government representative.	2	January 1, 2014.

II. Functions

A. Medical Devices Advisory Committee

The committee reviews and evaluates data on the safety and effectiveness of marketed and investigational devices and makes recommendations for their regulation. The panels engage in a number of activities to fulfill the functions of what the Federal Food, Drug, and Cosmetic Act (the FD&C Act) envisions for device advisory panels. With the exception of the Medical Devices Dispute Resolution Panel, each panel, according to its specialty area performs the following duties: (1) Advises the Commissioner of Food and Drugs (the Commissioner) regarding recommended classification or reclassification of devices into one of three regulatory categories, (2) advises on any possible risks to health associated with the use of devices, (3) advises on formulation of product development protocols, (4) reviews premarket approval applications for medical devices, (5) reviews guidelines and guidance documents, (6) recommends exemption of certain devices from the application of portions of the FD&C Act, (7) advises on the necessity to ban a device, and (8) responds to requests from the Agency to review and make recommendations on specific issues or problems concerning the safety and effectiveness of devices. With the exception of the Medical Devices Dispute Resolution Panel, each panel, according to its specialty area, may also make appropriate recommendations to the Commissioner on issues relating to the design of clinical studies regarding the safety and effectiveness of marketed and investigational devices.

The Dental Products Panel also functions at times as a dental drug panel. The functions of the dental drug panel are to evaluate and recommend whether various prescription drug products should be changed to over-the-counter status and to evaluate data and make recommendations concerning the approval of new dental drug products for human use.

The Medical Devices Dispute Resolution Panel provides advice to the Commissioner on complex or contested scientific issues between FDA and medical device sponsors, applicants, or manufacturers relating to specific products, marketing applications, regulatory decisions and actions by FDA, and Agency guidance and policies. The panel makes recommendations on issues that are lacking resolution, are highly complex in nature, or result from challenges to regular advisory panel proceedings or Agency decisions or actions.

B. National Mammography Quality Assurance Advisory Committee

The functions of the committee are to advise FDA on the following topics: (1) Developing appropriate quality standards and regulations for mammography facilities; (2) developing appropriate standards and regulations for bodies accrediting mammography facilities under this program; (3) developing regulations with respect to sanctions; (4) developing procedures for monitoring compliance with standards; (5) establishing a mechanism to investigate consumer complaints; (6) reporting new developments concerning breast imaging that should be considered in the oversight of mammography facilities; (7) determining whether there exists a shortage of mammography facilities in rural and health professional shortage areas and determining the effects of personnel on access to the services of such facilities in such areas; (8) determining whether there will exist a sufficient number of medical physicists after October 1, 1999; and (9) determining the costs and benefits of compliance with these requirements.

C. Device Good Manufacturing Practice Advisory Committee

The functions of the committee are to review proposed regulations issuance regarding good manufacturing practices governing the methods used in, and the facilities and controls used for, manufacture, packaging, storage, installation, and servicing of devices, and to make recommendations regarding the feasibility and reasonableness of those proposed

regulations. The committee also reviews and makes recommendations on proposed guidelines developed to assist the medical device industry in meeting the good manufacturing practice requirements, and provides advice with regard to any petition submitted by a manufacturer for an exemption or variance from good manufacturing practice regulations.

Section 520 of the FD&C Act, (21 U.S.C. 360j), as amended, provides that the Device Good Manufacturing Practice Advisory Committee shall be composed of nine members as follows: (1) Three of the members shall be appointed from persons who are officers or employees of any Federal, State, or local government; (2) two shall be representatives of the interests of the device manufacturing industry; (3) two shall be representatives of the interests of physicians and other health professionals; and (4) two shall be representatives of the interests of the general public.

D. Technical Electronic Product Radiation Safety Standards Committee

The function of the committee is to provide advice and consultation on the technical feasibility, reasonableness, and practicability of performance standards for electronic products to control the emission of radiation from such products. The committee may recommend electronic product radiation safety standards for consideration.

Section 534(f) of the FD&C Act (21 U.S.C. 360kk(f)), as amended by the Safe Medical Devices Act of 1990, provides that the Technical Electronic Product Radiation Safety Standards Committee include five members from governmental Agencies, including State or Federal Governments; five members from the affected industries; and five members from the general public, of which at least one shall be a representative of organized labor.

III. Qualifications

A. Panels of the Medical Devices Advisory Committee

Persons nominated for membership on the panels should have adequately diversified experience appropriate to the work of the panel in such fields as clinical and administrative medicine, engineering, biological and physical sciences, statistics, and other related professions. The nature of specialized training and experience necessary to qualify the nominee as an expert suitable for appointment may include experience in medical practice, teaching, and/or research relevant to the field of activity of the panel. The particular needs at this time for each panel are listed in section I of this document. The term of office is up to 4 years, depending on the appointment date.

B. National Mammography Quality Assurance Advisory Committee

Persons nominated for membership should be physicians, practitioners, and other health professionals, whose clinical practice, research specialization, or professional expertise include a significant focus on mammography and individuals identified with consumer interests. Prior experience on Federal public advisory committees in the same or similar subject areas will also be considered relevant professional expertise.

The particular needs at this time for this committee are listed in section I of this document. The term of office is up to 4 years, depending on the appointment date.

C. Device Good Manufacturing Practice Advisory Committee

Persons nominated for membership as a health professional or officer or employee of any Federal, State, or local government should have knowledge of or expertise in any one or more of the following areas: Quality assurance concerning the design, manufacture, and use of medical devices. To be eligible for selection as a representative of the general public, nominees should possess appropriate qualifications to understand and contribute to the committee's work. The particular needs at this time for this committee are listed in section I of this document. The term of office is up to 4 years, depending on the appointment date.

D. Technical Electronic Product Radiation Safety Standards Committee

Persons nominated should be technically qualified by training and experience in one or more fields of science or engineering applicable to electronic product radiation safety. The particular needs at this time for this committee are listed in section I of this document. The term of office is up to 4 years, depending on the appointment date.

IV. Nomination Procedures

Any interested person may nominate one or more qualified persons for membership on one or more of the advisory panels or advisory committees. Self-nominations are also accepted. Nominations must include a current, complete resume or curriculum vitae for each nominee, and their current business address and/or home address, telephone number, and email address if available. Nominations must specify the advisory panel(s) or advisory committee(s) for which the nominee is recommended. Nominations must also acknowledge that the nominee is aware of the nomination unless self-nominated. FDA will ask potential candidates to provide detailed information concerning such matters related to financial holdings, employment, and research grants and/or contracts to permit evaluation of possible sources of conflict of interest.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14 relating to advisory committees.

Dated: February 1, 2013.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2013–02793 Filed 2–6–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of 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 open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The 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 Diabetes and Digestive and Kidney Diseases Initial Review Group; Kidney, Urologic and Hematologic Diseases D Subcommittee.

Date: March 5–7, 2013.

Open: March 5, 2013, 4:00 p.m. to 4:30 p.m.

Agenda: To review procedures and discuss policy.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Closed: March 5, 2013, 4:30 p.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Closed: March 6, 2013, 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Closed: March 7, 2013, 8:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Barbara A. Woynarowska, Ph.D., Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 754, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 402–7172, *woynarowskab@niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group; Diabetes, Endocrinology and Metabolic Diseases B Subcommittee.

Date: March 6–8, 2013.

Open: March 6, 2013, 5:30 p.m. to 6:00 p.m.

Agenda: To review procedures and discuss policy.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Closed: March 6, 2013, 6:00 p.m. to 9:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Closed: March 7, 2013, 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Closed: March 8, 2013, 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: John F. Connaughton, Ph.D., Chief, Chartered Committees Section, Review Branch, DEA, NIDDK, National Institutes of Health, Room 753, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, *connaughtonj@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group; Digestive Diseases and Nutrition C Subcommittee.

Date: March 13–15, 2012.

Open: March 13, 2013, 6:00 p.m. to 6:30 p.m.

Agenda: To review procedures and discuss policy.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Closed: March 13, 2013, 6:30 p.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Closed: March 14, 2013, 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Closed: March 15, 2013, 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Robert Wellner, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 706, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, *rw175w@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: February 1, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–02694 Filed 2–6–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Advisory Committee on Research on Women's Health.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Advisory Committee on Research on Women's Health.

Date: March 7, 2013.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: The Committee will provide advice to the Office of Research on Women's Health (ORWH) on appropriate research activities with respect to women's health and related studies to be undertaken by the national research institutes; to provide recommendations regarding ORWH activities; to meet the mandates of the office; and for discussion of scientific issues.

Place: National Institutes of Health, Building 31, Conference Room 6, 31 Center Drive, Bethesda, MD 20892.

Contact Person: Susan E Maier, Ph.D., Deputy Director, Office of Research on Women's Health, 6707 Democracy Plaza, Suite 400, Bethesda, MD 20817, 301–402–1770, *Susan.Maier@nih.gov.*

Information is also available on the Institute's/Center's home page: *www4.od.nih.gov/orwh/*, where an agenda and any additional information for the meeting will be posted when available.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals From Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Dated: January 31, 2013.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–02700 Filed 2–6–13; 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: Risk, Prevention and Health Behavior.
Date: February 18, 2013.
Time: 2:30 p.m. to 4:00 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: Rebecca Henry, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3222, MSC 7808, Bethesda, MD 20892, 301–435–1717, *henryrr@mail.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Autoimmune and Infectious Diseases.
Date: March 1, 2013.
Time: 3:00 p.m. to 6:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Betty Hayden, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4206, MSC 7812, Bethesda, MD 20892, 301–435–1223, *haydenb@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA RM11–006: Transformative R01 Roadmap Review.
Date: March 4, 2013.
Time: 8:00 a.m. to 6:00 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 L. Bowers, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4170, MSC 7806, Bethesda, MD 20892, (301) 435–1725, *bowersj@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Cancer Diagnostics and Treatments (CDT) SBIR/STTR.
Date: March 4–5, 2013.
Time: 8:00 a.m. to 5:00 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: Zhang-Zhi Hu, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6186, MSC 7804, Bethesda, MD 20892, (301) 594–2414, *huzhuang@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA RM11–006: Transformative R01 Roadmap Review.
Date: March 4, 2013.
Time: 8:00 a.m. to 6:00 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 L. Bowers, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4170, MSC 7806, Bethesda, MD 20892, (301) 435–1725, *bowersj@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Biophysical, Physiological, Pharmacological and Bioengineering Neuroscience.
Date: March 4, 2013.
Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.
Contact Person: Joseph G Rudolph, Ph.D., Chief and Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5186, MSC 7844, Bethesda, MD 20892, 301–408–9098, *josephru@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Non-HIV Microbial Vaccine Development.
Date: March 4, 2013.
Time: 8:30 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Residence Inn by Marriott, 7335 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Scott Jakes, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4198, MSC 7812, Bethesda, MD 20892, 301–495–1506, *jakesse@mail.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Biological Chemistry, Biophysics, and Drug Discovery.
Date: March 4, 2013.
Time: 8:30 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Doubletree Hotel Bethesda, (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Sergei Ruvinov, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4158, MSC 7806, Bethesda, MD 20892, 301–435–1180, *ruvinser@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Lymphatics in Health and Disease in the Digestive, Urinary, Cardiovascular and Pulmonary Systems.
Date: March 4–5, 2013.
Time: 10:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).
Contact Person: Peter J Perrin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2180, MSC 7818, Bethesda, MD 20892, (301) 435–0682, *perrinp@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Program Project: BioCars, a Synchrotron Structural Biology Resource.
Date: March 4–6, 2013.
Time: 6:00 p.m. to 1:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Argonne Guest House, 9700 S Cass Avenue, Lemont, IL 60439.
Contact Person: Nuria E Assa-Munt, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4164, MSC 7806, Bethesda, MD 20892, (301) 451–1323, *assamunu@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 1, 2013.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–02697 Filed 2–6–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; 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 USC, as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; The Diversity-promoting Institutions Drug Abuse Research Program (DIDARP).
Date: March 26, 2013.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Nadine Rogers, Ph.D., Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, 6001 Executive Blvd., Room 4229, MSC 9550, Bethesda, MD 20892–9550, 301–402–2105, *rogersn2@nida.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: February 1, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–02695 Filed 2–6–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; P41 BTRC review.

Date: March 11–13, 2013.

Time: 6:00 p.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Houston Plaza/Medical Center, 6633 Travis Street, Houston, TX 77030.

Contact Person: Manana Sukhareva, Ph.D., Scientific Review Officer, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health, 6707 Democracy Boulevard, Suite 959, Bethesda, MD 20892, 301–451–3397, *sukharem@mail.nih.gov.*

Dated: February 1, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–02696 Filed 2–6–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Secretarial Commission on Indian Trust Administration and Reform

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of meeting; correction.

SUMMARY: The Office of the Secretary published a document in the **Federal Register** of January 28, 2013, announcing that the Secretarial Commission on Indian Trust Administration and Reform (the Commission) will hold a public meeting on February 12 and 13, 2013; and will host a youth outreach session on February 11, 2013. This notice corrects and clarifies the location of the meetings.

DATES: The Commission's public meeting will begin at 8 a.m. and end at 2:30 p.m. on February 12, and begin at 8 a.m. and end at 4:30 p.m. on February 13, 2013. Members of the public who wish to attend in person should RSVP by February 8, 2013, to: *trustcommission@ios.doi.gov* to ensure adequate meeting packets will be made available. Members of the public who wish to participate via teleconference and/or webinar should respond by February 8, 2013, to: *trustcommission@ios.doi.gov* and information on how to register will be provided; virtual participation is limited to 100 participants. The Commission's public youth outreach session will be held from 7 p.m. to 9 p.m. on February 11, 2013; additional information will be available at: *http://www.doi.gov/cobell/commission/index.cfm.*

ADDRESSES: The public meeting on February 12 and 13, 2013, will be held at the Hilton Seattle Airport, 17620 International Blvd., Seattle, Washington 98188. The public youth outreach session will be held at the University of Washington, Samuel E. Kelly Ethnic Cultural Center, 3931 Brooklyn Avenue NE., Seattle, Washington 98195. We encourage you to RSVP to *trustcommission@ios.doi.gov* by February 8, 2013.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Official, Lizzie Marsters, Chief of Staff to the Deputy Secretary, Department of the Interior, 1849 C Street NW., Room 6118, Washington, DC 20240; or email to *Lizzie_Marsters@ios.doi.gov.*

SUPPLEMENTARY INFORMATION:

Corrections

In the **Federal Register** of January 28, 2013, in the FR Doc. 5829–5830, on page 5829, in the third column, correct the location listed in the **ADDRESSES** section with the following:

The public meeting on February 12 and 13, 2013, will be held at the Hilton Seattle Airport, 17620 International Blvd., Seattle, Washington 98188. We encourage you to RSVP to *trustcommission@ios.doi.gov* by February 8, 2013. The public youth outreach session on February 11, 2013 will be held at University of Washington, Samuel E. Kelly Ethnic Cultural Center, 3931 Brooklyn Avenue NE., Seattle, Washington 98195.

Dated: February 4, 2013.

David J. Hayes,

Deputy Secretary.

[FR Doc. 2013–02796 Filed 2–6–13; 8:45 am]

BILLING CODE 4310–W7–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R6–ES–2012–N305; FF06E13000–123–FXES11130600000D2]

Endangered and Threatened Wildlife and Plants; Enhancement of Survival Permit Application; Draft Greater Sage-Grouse Umbrella Candidate Conservation Agreement With Assurances for Wyoming Ranch Management, and Environmental Assessment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are announcing the availability of the following documents for review and comment by the public and Federal, Tribal, State, and local governments:

- Draft Greater Sage-grouse Umbrella Candidate Conservation Agreement with Assurances for Wyoming Ranch Management (Umbrella CCAA), and
- Draft Environment Assessment of the Greater Sage-grouse Umbrella Candidate Conservation Agreement with Assurances for Wyoming Ranch Management (EA).

The Service and several State, Federal, and local partners prepared the draft Umbrella CCAA to provide

Wyoming ranchers with the opportunity to voluntarily conserve greater sage-grouse and its habitat while carrying out their ranching activities. Ranchers may apply for an enhancement of survival permit under the Endangered Species Act of 1973, as amended (ESA), by agreeing to implement certain conservation measures in the Umbrella CCAA that apply to their properties. Pursuant to the National Environmental Policy Act, we also prepared a draft environmental assessment (EA) that analyzes the potential impacts to the human environment from the proposed Umbrella CCAA and alternatives to the action.

DATES: Written comments must be submitted by March 11, 2013.

ADDRESSES: Send written comments by U.S. mail to Tyler Abbott, Deputy Field Supervisor, Wyoming Ecological Services Field Office, U.S. Fish and Wildlife Service, 5353 Yellowstone Road, Suite 308A, Cheyenne, WY 82009, or via email to *WYSagegrouseCCAA@fws.gov.* You also may send comments by facsimile to 307–772–2358. The draft CCAA and EA are available on our Mountain-Prairie Region Ecological Services Web site at *www.fws.gov/wyominges/.* You also may review copies of these documents during regular business hours at the Wyoming Ecological Services Field Office (see address above). If you do not have access to the Web site or cannot visit our office, you may request copies by telephone at 307–772–2374 ext. 231 or by letter to the Wyoming Field Office.

FOR FURTHER INFORMATION CONTACT: Tyler Abbott, U.S. Fish and Wildlife Service, 307–772–2374 ext. 231; *tyler_abbott@fws.gov.*

SUPPLEMENTARY INFORMATION: Under a Candidate Conservation Agreement with Assurances (CCAA), participating landowners voluntarily undertake management activities on their property to enhance, restore, or maintain habitat benefiting species that are proposed for listing or candidates for listing under the ESA, or those species that may become candidates. A CCAA, and the subsequent permits that are issued pursuant to section 10(a)(1)(A) of the ESA (16 U.S.C. 1531 et seq.), encourage private and non-Federal property owners to implement conservation efforts for species by assuring property owners that they will not be subjected to increased land use restrictions as a result of efforts to attract or increase the numbers or distribution of a listed species on their property if that species becomes listed under the ESA in the future. CCAA permit application requirements and issuance criteria are found in 50 CFR 17.22(d) and 17.32(d).

On March 23, 2010, the Service determined that listing the greater sage-grouse (*Centrocercus urophasianus*) under the ESA (16 U.S.C. 1538) was warranted, but precluded by the need to address higher priority species first. As result, the U.S. Fish and Wildlife Service, in coordination with the Wyoming Governor's Office, the Bureau of Land Management, the Natural Resources Conservation Service, the Wyoming Department of Agriculture, Wyoming Game and Fish Department, and the Wyoming Association of Conservation Districts, developed a draft statewide umbrella CCAA for ranch management. The intent of the umbrella CCAA is to use voluntary, proactive conservation measures to reduce or remove threats to the greater sage-grouse, thereby potentially reducing the need to list the species. The draft umbrella CCAA covers an area of approximately 17 million acres of privately owned lands within the range of the greater sage-grouse in Wyoming.

The draft umbrella CCAA contains a comprehensive menu of conservation measures designed to reduce or remove each identified potential threat to the greater sage-grouse that may occur on a ranching operation in Wyoming. This approach allows each interested rancher to select conservation measures specific to their operation, rather than require each participant to conform to one prescriptive action. A private landowner who wishes to enroll in the umbrella CCAA would develop a streamlined individual CCAA for the enrolled property. Partner agencies would assist the landowner in selecting the conservation measures from the umbrella CCAA that would address threats occurring on the property to be enrolled. Each landowner would submit their individual CCAA to the Service to apply for a section 10(a)(1)(A) permit for take of the sage-grouse incidental to conservation and ranching activities, should the species become listed.

The Service and other participating agencies have also prepared a draft EA that considers the potential impacts of implementing the umbrella CCAA and issuing assurances and individual permits to private landowners participating in the umbrella CCAA.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: January 23, 2013.

Michael Thabault,

Acting Regional Director, Mountain-Prairie Region, Denver, Colorado.

[FR Doc. 2013–02728 Filed 2–6–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2013–N007; 40120–1112–0000–F2]

Receipt of Applications for Endangered Species Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (ESA) prohibits activities with listed species unless a Federal permit is issued that allows such activities. The ESA requires that we invite public comment before issuing these permits.

DATES: We must receive written data or comments on the applications at the address given below, by March 11, 2013.

ADDRESSES: Documents and other information submitted with the applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice: U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, GA 30345 (Attn: Cameron Shaw, Permit Coordinator).

FOR FURTHER INFORMATION CONTACT: Cameron Shaw, telephone 904/731–3191; facsimile 904/731–3045.

SUPPLEMENTARY INFORMATION: The public is invited to comment on the following applications for permits to conduct certain activities with endangered and threatened species pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) and our regulations in the Code of Federal Regulations (CFR) at 50 CFR part 17. This notice is provided under section 10(c) of the Act.

If you wish to comment, you may submit comments by any one of the following methods. You may mail comments to the Fish and Wildlife Service's Regional Office (see **ADDRESSES** section) or via electronic mail (email) to: *permitsR4ES@fws.gov.* Please include your name and return address in your email message. If you do not receive a confirmation from the Fish and Wildlife Service that we have received your email message, contact us directly at the telephone number listed above (see **FOR FURTHER INFORMATION CONTACT** section). Finally, you may hand deliver comments to the Fish and Wildlife Service office listed above (see **ADDRESSES** section).

Before including your address, telephone number, email address, or other personal identifying information in your comments, 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 comments to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Permit Application Number: TE–91331A

Applicant: Timothy Day, Pensacola, Florida.

Applicant requests authorization to take (capture, mark, translocate and release) Perdido Key beach mouse (*Peromyscus polionotus tryssillepsis*), Choctawhatchee beach mouse (*Peromyscus polionotus allophrys*) and Alabama beach mouse (*Peromyscus polionotus ammobates*) for the purpose of conducting presence/absence surveys and assisting in species recovery efforts. These activities will be conducted in Escambia and Walton Counties, Florida and Baldwin County, Alabama.

Permit Application Number: TE–91366A

Applicant: Dr. Paul Stewart, Troy, Alabama.

Applicant requests authorization to take (capture, translocate, collect voucher specimens, and release) 68 freshwater mussels species and 17 freshwater fish species in the State of Alabama.

Permit Application Number: TE–91373A

Applicant: Jonathan Miller, Troy, Alabama.

Applicant requests authorization to take (capture, translocate, collect voucher specimens, and release) 68 freshwater mussels species and 17 freshwater fish species in the State of Alabama.

Permit Application Number: TE–84054

Applicant: URS Corporation, Franklin, Tennessee.

Applicant requests amended authorization to take (capture, handle, and release) the Etowah darter (*Etheostoma etowahae*) and the Conasauga logperch (*Percina jenkinsi*) for the purpose of conducting presence/absence surveys in Georgia.

Permit Application Number: TE–94714A

Applicant: Natural Natives Inc., Seneca, South Carolina.

Applicant requests authorization to engage in interstate commerce (sell) 19 listed plant species.

Permit Application Number: TE–206872

Applicant: Joy O'Keefe, Terre Haute, Indiana.

Applicant requests amended authorization to take (capture, mark, collect tissues, salvage, attach scientific devices and release) Virginia big-eared bats (*Corynorhinus townsendii virginianus*) for the purpose of scientific research. These activities will be conducted within the states of Kentucky, North Carolina, Virginia and West Virginia.

Permit Application Number: TE–54973

Applicant: North Carolina State University, Raleigh, North Carolina.

Applicant requests renewed authorization to take (capture, hold, propagate in captivity and release) St. Francis Satyr butterflies for the purpose of scientific research and species recovery. These activities will occur in North Carolina.

Permit Application Number: TE–94728A

Applicant: Environmental Consulting Operations, Benton, Arkansas.

Applicant request authorization to conduct presence/absence surveys on the American burying beetle (*Nicrophorus americanus*) in the State of Arkansas.

Permit Application Number: TE–95405A

Applicant: Virginia Polytechnic Institute and State University, Blacksburg, Virginia.

Applicant requests authorization to take (capture, mark, collect tissues, salvage, attach scientific devices and release) Indiana bats (*Myotis sodalis*) for the purpose of scientific research. These activities will be conducted at Fort Knox, Kentucky, and in Montgomery, Giles, Pulaski, Bland and Tazewell Counties, Virginia.

Permit Application Number: TE–95412A

Applicant: Kentucky Department of Environmental Protection, Frankfort, Kentucky.

Applicant requests authorization to take (capture, translocate, collect voucher specimens, and release) 29 freshwater mussels species and 6 freshwater fish species while conducting surveys and scientific research in the State of Kentucky.

Permit Application Number: TE–86220A

Applicant: Florida Museum of Natural History, University of Florida, Gainesville, Florida.

Applicant requests authorization to take (capture, translocate, temporarily house, propagate in captivity, and release) Schaus Swallowtail butterflies (*Heraclides aristodemus ponceanus*) in the State of Florida.

Dated: January 31, 2013.

Jacquelyn B. Parrish,

Acting Regional Director.

[FR Doc. 2013–02739 Filed 2–6–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LL LLWO220000 L63100000.PH0000 13X]

Renewal of Approved Information Collection

AGENCY: Bureau of Land Management, Interior.

ACTION: 30-day notice and request for comments.

SUMMARY: The Bureau of Land Management (BLM) has submitted an information collection request to the Office of Management and Budget (OMB) to continue the collection of information that enables the BLM to monitor compliance with timber export restrictions. The Office of Management and Budget (OMB) previously approved this information collection activity, and assigned it control number 1004–0058.

DATES: The OMB is required to respond to this information collection request within 60 days but may respond after 30 days. For maximum consideration, written comments should be received on or before March 11, 2013.

ADDRESSES: Please submit comments directly to the Desk Officer for the Department of the Interior (OMB #1004–0058), Office of Management and

Budget, Office of Information and Regulatory Affairs, fax 202–395–5806, or by electronic mail at *OIRA_submission@omb.eop.gov.* Please provide a copy of your comments to the BLM. You may do so via mail, fax, or electronic mail.

Mail: U.S. Department of the Interior, Bureau of Land Management, 1849 C Street NW., Room 2134LM, Attention: Jean Sonneman, Washington, DC 20240.

Fax: to Jean Sonneman at 202–245–0050.

Electronic mail: Jean_Sonneman@blm.gov.

Please indicate ''Attn: 1004–0058'' regardless of the form of your comments.

FOR FURTHER INFORMATION CONTACT: Mike Bechdolt, at 202–912–7234. Persons who use a telecommunication device for the deaf may call the Federal Information Relay Service at 1–800–877–8339, to leave a message for Mr. Bechdolt . You may also review the information collection request online at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act (44 U.S.C. 3501–3521) and OMB regulations at 5 CFR part 1320 provide that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond. In order to obtain and renew an OMB control number, Federal agencies are required to seek public comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d) and 1320.12(a)).

As required at 5 CFR 1320.8(d), the BLM published a 60-day notice in the **Federal Register** on October 18, 2012 (77 FR 64123). The comment period ended December 17, 2012. The BLM received no comments. The BLM now requests comments on the following subjects:

1. Whether the collection of information is necessary for the proper functioning of the BLM, including whether the information will have practical utility;
2. The accuracy of the BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;
3. The quality, utility and clarity of the information to be collected; and
4. How to minimize the information collection burden on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other forms of information technology.

Please send comments as directed under **ADDRESSES** and **DATES**. Please refer to OMB control number 1004–0058 in your correspondence. 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.

The following information is provided for the information collection:

Title: Timber Export Reporting and Substitution Determination (43 CFR Part 5420).

OMB Control Number: 1004–0058.

Abstract: This collection of information collection pertains to compliance of Federal timber purchases with timber export restrictions.

Forms:

- Form 5450–17, Export Determination; and
- Form 5460–17, Substitution Determination.

Frequency of Collection: On occasion.

Description of Respondents: Purchasers of Federal timber.

Estimated Annual Responses: 2.

Estimated Annual Burden Hours: 2.

The following table details the individual components and estimated hour burdens of this information collection request:

A. Type of response	B. Number of responses	C. Hours per response	D. Total hours (column B x column C)
Form 5450–17 Export Determination	1	1	1
Form 5460–17 Substitution Determination	1	1	1
Totals	2		2

Jean Sonneman,

Bureau of Land Management, Information Collection Clearance Officer.

[FR Doc. 2013–02734 Filed 2–6–13; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Institute of Electrical and Electronics Engineers

Notice is hereby given that, on January 11, 2013, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), the Institute of Electrical and Electronics Engineers (''IEEE'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, 64 new standards have been initiated and 16 existing standards are being revised. More detail regarding these changes can be found at *http://standards.ieee.org/about/sba/jun2012.html; http://standards.ieee.org/about/sba/aug2012.html; http://standards.ieee.org/about/sba/oct2012.html;* and *http://standards.ieee.org/about/sba/dec2012.html.*

On September 17, 2004, IEEE filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 3, 2004 (69 FR 64105).

The last notification was filed with the Department on June 26, 2012. A notice was published in the **Federal**

Register pursuant to Section 6(b) of the Act on July 25, 2012 (77 FR 43615).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2013–02702 Filed 2–6–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (OJJDP) Docket No. 1614]

Meeting (Webinar) of the Federal Advisory Committee on Juvenile Justice

AGENCY: Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice.

ACTION: Notice of Webinar meeting.

SUMMARY: The Office of Juvenile Justice and Delinquency Prevention (OJJDP) announces a meeting of the Federal Advisory Committee on Juvenile Justice (FACJJ).

DATES AND LOCATIONS: The meeting will take place online, as a webinar, on Monday, March 4, 2013, from 3 to 5 p.m. ET.

FOR FURTHER INFORMATION CONTACT: Robin Delany-Shabazz, Designated Federal Official, OJJDP, *Robin.Delany-Shabazz@usdoj.gov,* or 202–307–9963. [This is not a toll-free number.]

SUPPLEMENTARY INFORMATION: The Federal Advisory Committee on Juvenile Justice (FACJJ), established pursuant to Section 3(2)A of the Federal Advisory Committee Act (5 U.S.C. App.2), will meet to carry out its advisory functions under Section 223(f)(2)(C–E) of the Juvenile Justice and Delinquency Prevention Act of 2002. The FACJJ is composed of representatives from the states and territories. FACJJ member duties include: reviewing Federal policies regarding juvenile justice and delinquency prevention; advising the OJJDP Administrator with respect to particular functions and aspects of OJJDP; and advising the President and Congress with regard to State perspectives on the operation of OJJDP and Federal legislation pertaining to juvenile justice and delinquency prevention. More information may be found at *www.facjj.org.*

Meeting Agenda: The agenda will include: (a) Welcome and introductions; (b) remarks from the Administrator; (c) subcommittee reports and discussions; (d) other business; and (e) adjournment.

To participate in or view the webinar meeting, members of the FACJJ and of the public must pre-register online. Members and interested persons must link to the webinar registration portal through *www.facjj.org* no later than Wednesday, February 27, 2013. Upon registration, information will be sent to you at the email you provide to enable you to connect to the webinar. Should problems arise with webinar registration, call Michelle Duhart-Tonge at 703–789–4712. [This is not a toll-free telephone number.] **Note:** Members of the public will be able to listen to and view the webinar as observers but will not be able to actively participate.

Written Comments: Interested parties may submit written comments in advance to Robin Delany-Shabazz, Designated Federal Official, by email to *Robin.Delany-Shabazz@usdoj.gov* no later than Monday, February 25, 2013. Alternatively, fax your comments to 202–307–2819 and call Joyce Mosso Stokes at 202–305–4445 to ensure that they are received. [These are not toll-free numbers.]

Marilyn McCoy Roberts,

Deputy Administrator, Office of Juvenile Justice and Delinquency Prevention.

[FR Doc. 2013–02681 Filed 2–6–13; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (BJA) Docket No. 1613]

Meeting of the Department of Justice's (DOJ's) National Motor Vehicle Title Information System (NMVTIS) Federal Advisory Committee

AGENCY: Office of Justice Programs (OJP), Justice.

ACTION: Notice of meeting.

SUMMARY: This is an announcement of a meeting of DOJ's National Motor Vehicle Title Information System (NMVTIS) Federal Advisory Committee to discuss various issues relating to the operation and implementation of NMVTIS.

DATES: The meeting will take place on Wednesday, March 6, 2013, from 8:30 a.m. to 4:30 p.m. ET.

ADDRESSES: The meeting will take place at the Office of Justice Programs (OJP), 810 7th Street NW., Washington, DC 20531.

FOR FURTHER INFORMATION CONTACT: Todd Brighton, Designated Federal Employee (DFE), Bureau of Justice Assistance, Office of Justice Programs, 810 7th Street NW., Washington, DC 20531; Phone: (202) 616–3879 [note: this is not a toll-free number]; Email: *Todd.Brighton@usdoj.gov.*

SUPPLEMENTARY INFORMATION: This meeting is open to the public. Members of the public who wish to attend this meeting must register with Mr. Brighton at the above address at least seven (7) days in advance of the meeting. Registrations will be accepted on a space available basis. Access to the meeting will not be allowed without registration. Please bring photo identification and allow extra time prior to the meeting. Interested persons whose registrations have been accepted may be permitted to participate in the discussions at the discretion of the meeting chairman and with approval of the DFE.

Anyone requiring special accommodations should notify Mr. Brighton at least seven (7) days in advance of the meeting.

Purpose

The NMVTIS Federal Advisory Committee will provide input and recommendations to the Office of Justice Programs (OJP) regarding the operations and administration of NMVTIS. The primary duties of the NMVTIS Federal Advisory Committee will be to advise the Bureau of Justice Assistance (BJA) Director on NMVTIS-related issues, including but not limited to: Implementation of a system that is self-sustainable with user fees; options for alternative revenue-generating opportunities; determining ways to enhance the technological capabilities of the system to increase its flexibility; and options for reducing the economic burden on current and future reporting entities and users of the system.

Todd Brighton,

NMVTIS Enforcement Coordinator, Bureau of Justice Assistance, Office of Justice Programs.

[FR Doc. 2013–02795 Filed 2–6–13; 8:45 am]

BILLING CODE 4410–18–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency proposes to request use of the Identification Card Request, NA Form 6006, which will be used by

NARA employees, on-site contractors, volunteers, Foundation members, Interns, and others in order to obtain a NARA Identification Card. The public is invited to comment on the proposed information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments must be received on or before April 8, 2013 to be assured of consideration.

ADDRESSES: Comments should be sent to: Paperwork Reduction Act Comments (ISSD), Room 4400, National Archives and Records Administration, 8601 Adelphi Rd, College Park, MD 20740–6001; or faxed to 301–713–7409; or electronically mailed to *tamee.fechhelm@nara.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information collection and supporting statement should be directed to Tamee Fechhelm at telephone number 301–837–1694, or fax number 301–713–7409.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), NARA invites the general public and other Federal agencies to comment on proposed information collections. The comments and suggestions should address one or more of the following points: (a) Whether the proposed information collection is necessary for the proper performance of the functions of NARA; (b) the accuracy of NARA's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways, including the use of information technology, to minimize the burden of the collection of information on respondents; and (e) whether small businesses are affected by this collection. The comments that are submitted will be summarized and included in the NARA request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this notice, NARA is soliciting comments concerning the following information collection:

Title: Identification Card Request.

OMB number: 3095–0057.

Agency form number: NA Form 6006.

Type of review: Regular.

Affected public: Individuals or households, Business or other for-profit, Federal government.

Estimated number of respondents: 1,500.

Estimated time per response: 3 minutes.

Frequency of response: On occasion.

Estimated total annual burden hours: 75 hours.

Abstract: The collection of information is necessary as to comply with HSPD–12 requirements. Use of the form is authorized by 44 U.S.C. 2104. At the NARA College Park facility, individuals receive a proximity card with the identification badge that is electronically coded to permit access to secure zones ranging from a general nominal level to stricter access levels for classified records zones. The proximity card system is part of the security management system that meets the accreditation standards of the Government intelligence agencies for storage of classified information and serves to comply with E.O. 12958.

Dated: January 30, 2013.

Michael L. Wash,

Executive for Information Services/CIO.

[FR Doc. 2013–02788 Filed 2–6–13; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES

Public Availability of the National Endowment for the Humanities FY 2012 Service Contract Inventory

AGENCY: National Endowment for the Humanities.

ACTION: Notice of Public Availability of FY 2012 Service Contract Inventories.

SUMMARY: In accordance with Section 743 of Division C of the Consolidated Appropriations Act of 2010 (Pub. L. 111–117), the National Endowment for the Humanities (NEH) is publishing this notice to advise the public of the availability of the FY 2012 Service Contract Inventory. This inventory provides information on service contract actions over $25,000 that were made in FY 2012. The information is organized by function to show how contracted resources are distributed throughout the agency. The inventory has been developed in accordance with guidance issued on November 5, 2010 and December 19, 2011 by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP). OFPP's guidance is available at *www.whitehouse.gov/omb/procurement-service-contract-inventories.* NEH has posted its FY 2012 inventory on its Web site at the following link: *www.neh.gov/about/legal/reports.*

FOR FURTHER INFORMATION CONTACT: Questions regarding the service contract inventory should be directed to Barry Maynes in the Administrative Services Office at (202) 606–8233 or *bmaynes@neh.gov.*

Dated: February 4, 2013.

Michael P. McDonald,

General Counsel and Federal Register Liaison Officer.

[FR Doc. 2013–02785 Filed 2–6–13; 8:45 am]

BILLING CODE 7536–01–P

NATIONAL LABOR RELATIONS BOARD

Sunshine Act Meetings: February 2013

Time and Dates

All meetings are held at 2:00 p.m.

Wednesday, February 6;
Thursday, February 7;
Wednesday, February 13;
Thursday, February 14;
Wednesday, February 20;
Thursday, February 21;
Wednesday, February 27;
Thursday, February 28.

PLACE: Board Agenda Room, No. 11820, 1099 14th St. NW., Washington DC 20570.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Pursuant to § 102.139(a) of the Board's Rules and Regulations, the Board or a panel thereof will consider ''the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition * * * of particular representation or unfair labor practice proceedings under section 8, 9, or 10 of the [National Labor Relations] Act, or any court proceedings collateral or ancillary thereto.'' See also 5 U.S.C. 552b(c)(10).

CONTACT PERSON FOR MORE INFORMATION: *Gary Shinners,* Acting Executive Secretary, (202) 273–3737.

Dated: February 5, 2013.

Gary Shinners,

Acting Executive Secretary.

[FR Doc. 2013–02882 Filed 2–5–13; 4:15 pm]

BILLING CODE 7545–01–P

NATIONAL SCIENCE FOUNDATION

Comment Request: National Science Foundation Proposal/Award Information—Grant Proposal Guide

AGENCY: National Science Foundation.

ACTION: Notice.

SUMMARY: The National Science Foundation (NSF) is announcing plans to request renewed clearance of this collection. In accordance with the requirement of Section 3506(c)(2)(A) of

the Paperwork Reduction Act of 1995, we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting OMB clearance of this collection for no longer than 3 years.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; 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: Written comments should be received by April 8, 2013 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Written comments regarding the information collection and requests for copies of the proposed information collection request should be addressed to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Blvd., Rm. 295, Arlington, VA 22230, or by email to *splimpto@nsf.gov.*

FOR FURTHER INFORMATION CONTACT: Suzanne Plimpton on (703) 292–7556 or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Title of Collection: ''National Sciences Foundation Proposal/Award Information—Grant Proposal Guide''.

OMB Approval Number: 3145–0058.

Expiration Date of Approval: July 31, 2015.

Type of Request: Intent to seek approval to extend with revision an information collection for three years.

Proposed Project: The National Science Foundation Act of 1950 (Pub. L. 81–507) set forth NSF's mission and purpose:

''To promote the progress of science; to advance the national health, prosperity, and welfare; to secure the national defense. * * *''

The Act authorized and directed NSF to initiate and support:

- Basic scientific research and research fundamental to the engineering process;
- Programs to strengthen scientific and engineering research potential;
- Science and engineering education programs at all levels and in all the various fields of science and engineering;
- Programs that provide a source of information for policy formulation; and
- Other activities to promote these ends.

Over the years, NSF's statutory authority has been modified in a number of significant ways. In 1968, authority to support applied research was added to the Organic Act. In 1980, The Science and Engineering Equal Opportunities Act gave NSF standing authority to support activities to improve the participation of women and minorities in science and engineering.

Another major change occurred in 1986, when engineering was accorded equal status with science in the Organic Act. NSF has always dedicated itself to providing the leadership and vision needed to keep the words and ideas embedded in its mission statement fresh and up-to-date. Even in today's rapidly changing environment, NSF's core purpose resonates clearly in everything it does: Promoting achievement and progress in science and engineering and enhancing the potential for research and education to contribute to the Nation. While NSF's vision of the future and the mechanisms it uses to carry out its charges have evolved significantly over the last four decades, its ultimate mission remains the same.

Use of the Information: The regular submission of proposals to the Foundation is part of the collection of information and is used to help NSF fulfill this responsibility by initiating and supporting merit-selected research and education projects in all the scientific and engineering disciplines. NSF receives more than 40,000 proposals annually for new projects, and makes approximately 10,500 new awards. Support is made primarily through grants, contracts, and other agreements awarded to more than 2,000 colleges, universities, academic consortia, nonprofit institutions, and small businesses. The awards are based mainly on evaluations of proposal merit submitted to the Foundation (proposal review is cleared under OMB Control No. 3145–0060).

The Foundation has a continuing commitment to monitor the operations of its information collection to identify and address excessive reporting burdens as well as to identify any real or apparent inequities based on gender, race, ethnicity, or disability of the proposed principal investigator(s)/project director(s) or the co-principal investigator(s)/co-project director(s).

Burden on the Public: The Foundation estimates that an average of 120 hours is expended for each proposal submitted. An estimated 40,000 proposals are expected during the course of one year for a total of 4,800,000 public burden hours annually.

Dated: February 4, 2013.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2013–02768 Filed 2–6–13; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978 (Pub. L. 95–541)

AGENCY: National Science Foundation.

ACTION: Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish a notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act at Title 45 Part 670 of the Code of Federal Regulations. This is the required notice of permit applications received.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by March 11, 2013. This application may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Room 755, Office of Polar Programs, National Science Foundation, 4201 Wilson Boulevard, Arlington, Virginia 22230.

FOR FURTHER INFORMATION CONTACT: Polly A. Penhale at the above address or (703) 292–7420.

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas a requiring

special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

The applications received are as follows:

Permit Application: 2013–028

1. *Applicant*: John H. Postlethwait, Institute of Neuroscience, 1254 University of Oregon, Eugene, OR 97403.

Activity for Which Permit Is Requested

Enter Antarctic Specially Protected Areas. The applicant intends to enter ASPA 152-Western Bransfield Strait, and ASPA 153-Eastern Dallmann Bay to capture Antarctic fish by trawling and trapping. The project will study the evolution of secondary pelagicism in Antarctic fishes by reduction of bone mineral density. Fish will be caught and taken to the Palmer Station laboratory for further study, then released live back into the Southern Ocean. Trawling and trapping are complementary fishing techniques. Trawling is time-efficient means to collect the icefish *Chaenocephaus aceratus* and the rockcod *Notothenia coriiceps,* but is limited to smooth bottoms. Trapping, on the other hand, can be performed irrespective of bottom type, which enhances the ability to capture the odorant-sensing *N. coriiceps.*

Location

Antarctic Peninsula including ASPA 152-Western Bransfield Strait, and ASPA 153-Eastern Dallmann Bay.

Dates

March 10, 2013 to June 27, 2013.

Nadene G. Kennedy,

Permit Officer, Office of Polar Programs.

[FR Doc. 2013–02690 Filed 2–6–13; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Business and Operations Advisory Committee; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Business and Operations Advisory Committee (9556) .

Date/Time: Monday, February 25, 2013; 1:00 p.m. to 4:00 p.m. (EST).

Place: National Science Foundation, 4201 Wilson Boulevard, Stafford II, Room 515.

To help facilitate your entry into the building, contact the individual listed below. Your request should be received by email (*pbalanga@nsf.gov*) on or prior to Thursday, February 21, 2012.

Type of Meeting: Open.

Contact Person: Patty Balanga, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230 (703) 292–8100, *pbalanga@nsf.gov.*

Purpose of Meeting: To provide advice concerning issues related to the oversight, integrity, development and enhancement of NSF's business operations.

Agenda: Welcome/Introductions, BFA Strategic Priorities, Follow-Up on NSF Employee Viewpoint Survey, Discuss the Pros and Cons of the Meeting's Virtual Aspects.

Dated: February 1, 2013.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2013–02687 Filed 2–6–13; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

National Science Board; Sunshine Act Meetings; Notice

The National Science Board's Committee on Education and Human Resources, pursuant to NSF regulations (45 CFR part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n-5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of a teleconference for the transaction of National Science Board business and other matters specified, as follows:

DATE & TIME: Monday, February 11, 2013, 10:00–11:00 a.m. EST.

SUBJECT MATTER: (1) Chairman's opening remarks; and (2) Guidelines for discussion at the Board's February 20th meeting.

STATUS: Open.

LOCATION: This meeting will be held by teleconference at the National Science Board Office, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230. A public listening room will be available for this teleconference meeting. All visitors must contact the Board Office [call 703–292–7000 or send an email message to *nationalsciencebrd@nsf.gov*] at least 24 hours prior to the teleconference for the public room number and to arrange for a visitor's badge. All visitors must report to the NSF visitor desk located in the lobby at the 9th and N. Stuart Streets entrance on the day of the teleconference to receive a visitor's badge.

UPDATES & POINT OF CONTACT: Please refer to the National Science Board Web site *www.nsf.gov/nsb* for additional information. Meeting information and updates (time, place, subject matter or status of meeting) may be found at *http://www.nsf.gov/nsb/notices/.* Point of contact for this meeting is: Jacqueline Meszaros, National Science Board Office, 4201Wilson Blvd., Arlington, VA 22230. Telephone: (703) 292–7000.

Ann Bushmiller,

Senior Counsel to the National Science Board.

[FR Doc. 2013–02844 Filed 2–5–13; 11:15 am]

BILLING CODE 7555–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68813; File No. SR–EDGA–2013–06]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend EDGA Rule 11.13 To Extend the Operation of a Pilot Pursuant to Rule 11.13 Until September 30, 2013

February 1, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 31, 2013, EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule 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 EDGA Rule 11.13 to extend the operation of a pilot pursuant to Rule 11.13 (the ''Pilot'') until September 30, 2013. The Exchange also proposes to adopt new paragraph (i) to Rule 11.13 in connection with the upcoming operation of the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or the ''Plan'').[3] All of the changes described herein are applicable to EDGA Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *www.directedge.com,* at the Exchange's

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012).

principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions and to adopt new paragraph (i) to Rule 11.13 in connection with upcoming operation of the Limit Up-Limit Down Plan.

Background

Portions of Rule 11.13, explained in further detail below, are currently operating as the Pilot and are set to expire on February 4, 2013.[4] The Exchange proposes to extend the Pilot to September 30, 2013.

On September 10, 2010, the Commission approved, on a pilot basis, changes to EDGA Rule 11.13 to provide for uniform treatment: (1) Of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (2) in the event transactions occur that result in the issuance of an individual stock trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on the Exchange.[5] The Exchange also adopted additional changes to Rule 11.13 that reduced the ability of the Exchange to deviate from the objective standards set forth in Rule 11.13.[6] The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a pilot basis through September 30, 2013, which is the date that the Exchange anticipates that the phased implementation of the Limit Up-Limit Down Plan will be complete. As explained in further detail below, although the Limit Up-Limit Down Plan is intended to prevent executions that would need to be nullified as clearly erroneous, the Exchange believes that certain protections should be maintained while the industry gains initial experience operating with the Limit Up-Limit Down Plan, including the provisions of Rule 11.13 that currently operate as a pilot.

Proposed Limit Up-Limit Down Provision to Rule 11.13

The Exchange proposes to adopt new paragraph (i) to Rule 11.13, to provide that the existing provisions of Rule 11.13 will continue to apply to all Exchange transactions, including transactions in securities subject to the Plan, other than as set forth in proposed paragraph (i). Accordingly, other than as proposed below, the Exchange proposes to maintain and continue to apply the Clearly Erroneous Execution standards in the same way that it does today. Notably, this means that the Exchange might nullify transactions that occur within the price bands disseminated pursuant to the Limit Up-Limit Down Plan to the extent such transactions qualify as clearly erroneous under existing criteria. As an example, assume that a Tier 1 security pursuant to the Plan has a reference price pursuant to both the Plan and Rule 11.13 of $100.00. The lower pricing band under the Plan would be $95.00 and the upper pricing band under the Plan would be $105.00. An execution could occur on the Exchange in this security at $96.00, as this is within the Plan's pricing bands. However, if subjected to review as potentially clearly erroneous, the Exchange would nullify an execution at $96.00 as clearly erroneous because it exceeds the 3% threshold that is in place pursuant to Rule 11.13(c)(1) for securities priced above $50.00 (*i.e.,* with a reference price of $100.00, any transactions at or below $97.00 or above $103.00 could be nullified as clearly erroneous). Accordingly, this proposal maintains the status quo with respect to reviews of Clearly Erroneous Executions and the application of objective numerical guidelines by the Exchange. The proposal does not increase the discretion afforded to the Exchange in connection with reviews of Clearly Erroneous Executions.

The Limit Up-Limit Down Plan is designed to prevent executions from occurring outside of dynamic price bands disseminated to the public by the single plan processor as defined in the Limit Up-Limit Down Plan.[7] The possibility remains that the Exchange could experience a technology or systems problem with respect to the implementation of the price bands disseminated pursuant to the Plan. To address such possibilities, the Exchange proposes to adopt language to make clear that if an Exchange technology or systems issue results in any transaction occurring outside of the price bands disseminated pursuant to the Plan, an Officer of the Exchange or senior level employee designee, acting on his or her own motion or at the request of a third party, shall review and declare any such trades null and void. Absent extraordinary circumstances, any such action of the Officer of the Exchange or other senior level employee designee shall be taken in a timely fashion, generally within thirty (30) minutes of the detection of the erroneous transaction. When extraordinary circumstances exist, any such action of the Officer of the Exchange or other senior level employee designee must be taken by no later than the start of Regular Trading Hours[8] on the trading day following the date on which the execution(s) under review occurred. Although the Exchange will act as promptly as possible and the proposed objective standard (*i.e.,* whether an execution occurred outside the band) should make it feasible to quickly make a determination, there may be circumstances in which additional time may be needed for verification of facts or coordination with outside parties, including the single plan processor responsible for disseminating the price bands and other market centers. Accordingly, the Exchange believes it necessary to maintain some flexibility to make a determination outside of the thirty (30) minute guideline. In addition, the Exchange proposes that a transaction that is nullified pursuant to new paragraph (i) would be appealable in accordance with the provisions of Rule 11.13(e)(2). In addition, the Exchange proposes to make clear that in the event that a single plan processor experiences a technology or systems problem that prevents the dissemination of price bands, the Exchange would make the determination of whether to nullify transactions based on Rule 11.13(a)–(h).

The Exchange believes that cancelling trades that occur outside of the price bands disseminated pursuant to the Plan is consistent with the purpose and

[4] *See* Securities Exchange Act Release No. 67500 (July 25, 2012), 77 FR 45398 (July 31, 2012) (SR–EDGA–2012–30).

[5] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–EDGA–2010–03).

[6] *Id.*

[7] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012).

[8] Regular Trading Hours commence at 9:30 a.m. Eastern Time. *See* Exchange Rule 1.5(y).

intent of the Plan, as such transactions are not intended to occur in the first place. If transactions do occur outside of the price bands and no exception applies—which necessarily would be caused by a technology or systems issue—then the Exchange believes the appropriate result is to nullify such transactions.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act,[9] which requires the rules of an exchange to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule meets these requirements in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. More specifically, the Exchange believes that the extension of the Pilot would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Although the Limit Up-Limit Down Plan will be operational during the same time period as the proposed extended Pilot, the Exchange believes that maintaining the Pilot for at least through the phased implementation of the Plan is operational will help to protect against unanticipated consequences. To that end, the extension will allow the Exchange to determine whether Rule 11.13 is necessary once the Plan is operational and, if so, whether improvements can be made. Further, the Exchange believes it consistent with the protection of investors and the public interest to adopt objective criteria to nullify transactions that occur outside of the Plan's price bands when such transactions should not have been executed but were due to a systems or technology issue.

[9] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Financial Industry Regulatory Authority (''FINRA'') and other national securities exchanges are also filing similar proposals. Thus the Exchange believes that the proposal will help to ensure consistent rules across market centers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6)(iii) thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6) [12] normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii) [13] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program. For this reason, the Commission designates the proposed rule change to be operative upon filing.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6)(iii). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–EDGA–2013–06 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–EDGA–2013–06. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE.,

[14] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGA–2013–06 and should be submitted on or before February 28, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02745 Filed 2–6–13; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68800; File No. SR–CBOE–2013–012]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend CBSX Rule 52.4 Relating to the Clearly Erroneous Policy

February 1, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 29, 2013, Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend a pilot program related to CBOE Stock Exchange (''CBSX'') Rule 52.4, entitled ''Clearly Erroneous Policy.'' The Exchange also proposes to adopt new paragraph (i) to CBSX Rule 52.4 in connection with the upcoming operation of the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Securities and Exchange Act of 1934 (the ''Limit Up-Limit Down Plan'' or ''Plan'').[3]

(additions are *in italics;* deletions are [bracketed])

* * * * *

Chicago Board Options Exchange, Incorporated

Rules

* * * * *

Rule 52.4 Clearly Erroneous Policy

The provisions of paragraphs (c), (e)(2), (f), and (g) of this Rule, as amended on September 10, 2010, *and the provisions of paragraph (i)*, shall be in effect during a pilot period set to end on [February 4]*September 30*, 2013. If the pilot is not either extended*, replaced* or approved permanent *by September 30, 2013,* the prior versions of paragraphs (c), (e)(2), (f), and (g) shall be in effect*, and the provisions of paragraph (i) shall be null and void.*

* * * * *

(i) Securities Subject to Limit Up-Limit Down Plan. For purposes of this paragraph, the phrase ''Limit Up-Limit Down Plan'' or ''Plan'' shall mean the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act. The provisions of paragraphs (a) through (h) above shall govern all CBSX transactions, including transactions in securities subject to the Plan, other than as set forth in this paragraph (i). If as a result of CBSX technology or systems issue any transaction occurs outside of the applicable price bands disseminated pursuant to the Plan, an Official or senior level employee designee, acting on his or her own motion or at the request of a third party, shall review and declare any such trades null and void. Absent extraordinary circumstances, any such action of the Official or other senior level employee designee shall be taken in a timely fashion, generally within thirty (30) minutes of the detection of the erroneous transaction. When extraordinary circumstances exist, any such action of the Official or other senior level employee designee must be taken by no later than the start of CBSX Regular Trading Hours on the trading day following the date on which the execution(s) under review occurred. Each CBSX Trader involved in the transaction shall be notified as soon as practicable by CBSX, and the party aggrieved by the action may appeal such action in accordance with the provisions of paragraph (e)(2) above. In the event that a single plan processor experiences a technology or systems issue that prevents the dissemination of price bands, CBSX will make the determination of whether to nullify transactions based on paragraphs (a) through (h) above.

* * * * *

The text of the proposed rule change is also available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to extend the effectiveness of CBSX's current rule ''Clearly Erroneous Policy'' and to adopt new paragraph (i) to CBSX Rule 52.4 in connection with upcoming operation of the Limit Up-Limit Down Plan.

Proposal To Extend Pilot

Portions of Rule 52.4, explained in further detail below, are currently operating as a pilot program set to expire on February 4, 2013.[4] The Exchange proposes to extend the pilot program to September 30, 2013.

On September 10, 2010, the Commission approved, on a pilot basis, changes to CBSX Rule 52.4 to provide for uniform treatment: (1) Of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (2) in the event transactions occur that result in the issuance of an individual stock trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on CBSX.[5] The Exchange also adopted additional changes to CBSX Rule 52.4 that reduced the ability of CBSX to deviate from the objective standards set forth in Rule 52.4.[6] The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a pilot basis through

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[4] Securities Exchange Act Release No. 67575 (August 2, 2012), 77 FR 47478 (August 8, 2012) (SR–CBOE–2012–070).

[5] Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–CBOE–2010–056).

[6] *Id.*

September 30, 2013, which is the date that the Exchange anticipates that the phased implementation of the Limit Up-Limit Down Plan will be complete. As explained in further detail below, although the Limit Up-Limit Down Plan is intended to prevent executions that would need to be nullified as clearly erroneous, the Exchange believes that certain protections should be maintained while the industry gains initial experience operating with the Limit Up-Limit Down Plan, including the provisions of Rule 52.4 that currently operate as a pilot.

Proposed Limit Up-Limit Down Provision to Rule 52.4

The Exchange proposes to adopt new paragraph (i) to Rule 52.4, to provide that the existing provisions of CBSX Rule 52.4 will continue to apply to all CBSX transactions, including transactions in securities subject to the Plan, other than as set forth in proposed paragraph (i). Accordingly, other than as proposed below, the Exchange proposes to maintain and continue to apply the Clearly Erroneous Policy standards in the same way that it does today. Notably, this means that CBSX might nullify transactions that occur within the price bands disseminated pursuant to the Limit Up-Limit Down Plan to the extent such transactions qualify as clearly erroneous under existing criteria. As an example, assume that a Tier 1 security pursuant to the Plan has a reference price pursuant to both the Plan and Rule 52.4 of $100.00. The lower pricing band under the Plan would be $95.00 and the upper pricing band under the Plan would be $105.00. An execution could occur on CBSX in this security at $96.00, as this is within the Plan's pricing bands. However, if subjected to review as potentially clearly erroneous, CBSX would nullify an execution at $96.00 as clearly erroneous because it exceeds the 3% threshold that is in place pursuant to Rule 52.4(c)(1) for securities priced above $50.00 (*i.e.,* with a reference price of $100.00, any transactions at or below $97.00 or above $103.00 could be nullified as clearly erroneous). Accordingly, this proposal maintains the status quo with respect to reviews of clearly erroneous executions and the application of objective numerical guidelines by CBSX. The proposal does not increase the discretion afforded to CBSX in connection with reviews of clearly erroneous executions.

The Limit Up-Limit Down Plan is designed to prevent executions from occurring outside of dynamic price bands disseminated to the public by the single plan processor as defined in the Limit Up-Limit Down Plan.[7] The possibility remains that CBSX could experience a technology or systems problem with respect to the implementation of the price bands disseminated pursuant to the Plan. To address such possibilities, CBSX proposes to adopt language to make clear that if a CBSX technology or systems issue results in any transaction occurring outside of the price bands disseminated pursuant to the Plan, an Official or senior level employee designee, acting on his or her own motion or at the request of a third party, shall review and declare any such trades null and void. Absent extraordinary circumstances, any such action of the Official or other senior level employee designee shall be taken in a timely fashion, generally within thirty (30) minutes of the detection of the erroneous transaction. When extraordinary circumstances exist, any such action of the Official or other senior level employee designee must be taken by no later than the start of CBSX Regular Trading Hours[8] on the trading day following the date on which the execution(s) under review occurred. Although CBSX will act as promptly as possible and the proposed objective standard (*i.e.,* whether an execution occurred outside the band) should make it feasible to quickly make a determination, there may be circumstances in which additional time may be needed for verification of facts or coordination with outside parties, including the single plan processor responsible for disseminating the price bands and other market centers. Accordingly, CBSX believes it necessary to maintain some flexibility to make a determination outside of the thirty (30) minute guideline. In addition, CBSX proposes that a transaction that is nullified pursuant to new paragraph (i) would be appealable in accordance with the provisions of Rule 52.4(e)(2). In addition, CBSX proposes to make clear that in the event that a single plan processor experiences a technology or systems problem that prevents the dissemination of price bands, CBSX would make the determination of whether to nullify transactions based on Rule 52.4(a)–(h).

The Exchange believes that cancelling trades that occur outside of the price bands disseminated pursuant to the Plan is consistent with the purpose and intent of the Plan, as such transactions are not intended to occur in the first place. If transactions do occur outside of the price bands and no exception applies—which necessarily would be caused by a technology or systems issue—then the Exchange believes the appropriate result is to nullify such transactions.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[9] In particular, the proposal is consistent with Section 6(b)(5) of the Act,[10] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system. The Exchange believes that the pilot program promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. More specifically, the Exchange believes that the extension of the pilot would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Although the Limit Up-Limit Down Plan will be operational during the same time period as the proposed extended pilot, the Exchange believes that maintaining the pilot for at least through the phased implementation of the Plan is operational will help to protect against unanticipated consequences. To that end, the extension will allow the Exchange to determine whether Rule 52.4 is necessary once the Plan is operational and, if so, whether improvements can be made. Further, the Exchange believes it consistent with the protection of investors and the public interest to adopt objective criteria to nullify transactions that occur outside of the Plan's price bands when such transactions should not have been executed but were due to a systems or technology issue.

[7] *See* Limit Up-Limit Down Release, *supra* note 3.

[8] Regular Trading Hours commence at 9:30 a.m. Eastern Time. *See* CBSX Rule 51.2(a).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that the Financial Industry Regulatory Authority (''FINRA'') and other national securities exchanges are also filing similar proposals, and thus, that the proposal will help to ensure consistent rules across market centers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and Rule 19b–4(f)(6)(iii) thereunder.[12]

A proposed rule change filed under Rule 19b–4(f)(6) [13] normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii) [14] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program. For this reason, the Commission designates the proposed rule change to be operative upon filing.[15]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2013–012 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2013–012. 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2013–012 and should be submitted on or before February 28, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02705 Filed 2–6–13; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6)(iii). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6)(iii).

[15] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68803; File No. SR–NSX–2013–06]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 11.19 To Extend a Pilot Program Regarding Clearly Erroneous Executions

February 1, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 30, 2013, National Stock Exchange, Inc. (''NSX®'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change, as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comment 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 extend a pilot program related to Rule 11.19, entitled ''Clearly Erroneous Executions.'' The Exchange also proposes to adopt new paragraph (j) to Rule 11.19 in connection with the upcoming operation of the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

under the Act (the ''Limit Up-Limit Down Plan'' or ''Plan'').[3] The Exchange has designated this proposal as non-controversial and provided the Commission with the notice required by Rule 19b–4(f)(6)(iii) under the Act.[4]

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nsx.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions and to adopt new paragraph (j) to Rule 11.19 in connection with the upcoming operation of the Limit Up-Limit Down Plan.

Proposal To Extend Pilot

Portions of Rule 11.19, explained in further detail below, are currently operating as a pilot program set to expire on February 4, 2013.[5] The Exchange proposes to extend the pilot program to September 30, 2013.

On September 10, 2010, the Commission approved, on a pilot basis, changes to NSX Rule 11.19 to provide for uniform treatment: (1) Of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (2) in the event transactions occur that result in the issuance of an individual stock trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on the Exchange.[6] The Exchange also adopted additional changes to Rule 11.19 that reduced the ability of the Exchange to deviate from the objective standards set forth in Rule 11.19.7 The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a pilot basis through September 30, 2013, which is the date that the Exchange anticipates that the phased implementation of the Limit Up-Limit Down Plan will be complete. As explained in further detail below, although the Limit Up-Limit Down Plan is intended to prevent executions that would need to be nullified as clearly erroneous, the Exchange believes that certain protections should be maintained while the industry gains initial experience operating with the Limit Up-Limit Down Plan, including the provisions of Rule 11.19 that currently operate as a pilot.

Proposed Limit Up-Limit Down Provision to Rule 11.19

The Exchange proposes to adopt new paragraph (j) to Rule 11.19, to provide that the existing provisions of Rule 11.19 will continue to apply to all Exchange transactions, including transactions in securities subject to the Plan, other than as set forth in proposed paragraph (j). Accordingly, other than as proposed below, the Exchange proposes to maintain and continue to apply the Clearly Erroneous Execution standards in the same way that it does today. Notably, this means that the Exchange might nullify transactions that occur within the price bands disseminated pursuant to the Limit Up-Limit Down Plan to the extent such transactions qualify as clearly erroneous under existing criteria. As an example, assume that a Tier 1 security pursuant to the Plan has a reference price pursuant to both the Plan and Rule 11.19 of $100.00. The lower pricing band under the Plan would be $95.00 and the upper pricing band under the Plan would be $105.00. An execution could occur on the Exchange in this security at $96.00, as this is within the Plan's pricing bands. However, if subjected to review as potentially clearly erroneous, the Exchange would nullify an execution at $96.00 as clearly erroneous because it exceeds the 3% threshold that is in place pursuant to Rule 11.19(c)(1) for securities priced above $50.00 (*i.e.,* with a reference price of $100.00, any transactions at or below $97.00 or above $103.00 could be nullified as clearly erroneous). Accordingly, this proposal maintains the status quo with respect to reviews of Clearly Erroneous Executions and the application of objective numerical guidelines by the Exchange. The proposal does not increase the discretion afforded to the Exchange in connection with reviews of Clearly Erroneous Executions.

The Limit Up-Limit Down Plan is designed to prevent executions from occurring outside of dynamic price bands disseminated to the public by the single plan processor as defined in the Limit Up-Limit Down Plan.[8] The possibility remains that the Exchange could experience a technology or systems problem with respect to the implementation of the price bands disseminated pursuant to the Plan. To address such possibilities, the Exchange proposes to adopt language to make clear that if an Exchange technology or systems issue results in any transaction occurring outside of the price bands disseminated pursuant to the Plan, an Officer of the Exchange or senior level employee designee, acting on his or her own motion or at the request of a third party, shall review and declare any such trades null and void. Absent extraordinary circumstances, any such action of the Officer of the Exchange or other senior level employee designee shall be taken in a timely fashion, generally within thirty (30) minutes of the detection of the erroneous transaction. When extraordinary circumstances exist, any such action of the Officer of the Exchange or other senior level employee designee must be taken by no later than the start of Regular Trading Hours[9] on the trading day following the date on which the execution(s) under review occurred. Although the Exchange will act as promptly as possible and the proposed objective standard (*i.e.,* whether an execution occurred outside the band) should make it feasible to quickly make a determination, there may be circumstances in which additional time may be needed for verification of facts or coordination with outside parties, including the single plan processor responsible for disseminating the price bands and other market centers. Accordingly, the Exchange believes it necessary to maintain some flexibility to make a determination outside of the thirty (30) minute guideline. In addition, the Exchange proposes that a transaction that is nullified pursuant to new paragraph (j) would be appealable in accordance with the provisions of

[3] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[4] 17 CFR 240.19b–4(f)(6)(iii).

[5] Securities Exchange Act Release No. 67576 (August 2, 2012), 77 FR 47452 (August 8, 2012) (SR–NSX–2012–11).

[6] Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–NSX–2010–07).

[8] *See* Limit Up-Limit Down Release, *supra* note 3.

[9] Regular Trading Hours commence at 9:30 a.m. Eastern Time. *See* NSX Rule 1.5(R).

Rule 11.19(e)(2). In addition, the Exchange proposes to make clear that in the event that a single plan processor experiences a technology or systems problem that prevents the dissemination of price bands, the Exchange would make the determination of whether to nullify transactions based on Rule 11.19(a)–(i).

The Exchange believes that cancelling trades that occur outside of the price bands disseminated pursuant to the Plan is consistent with the purpose and intent of the Plan, as such transactions are not intended to occur in the first place. If transactions do occur outside of the price bands and no exception applies—which necessarily would be caused by a technology or systems issue—then the Exchange believes the appropriate result is to nullify such transactions.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[10] In particular, the proposal is consistent with Section 6(b)(5) of the Act,[11] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system. The Exchange believes that the pilot program promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. More specifically, the Exchange believes that the extension of the pilot would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Although the Limit Up-Limit Down Plan will be operational during the same time period as the proposed extended pilot, the Exchange believes that maintaining the pilot for at least through the phased implementation of the Plan is operational will help to protect against unanticipated consequences. To that end, the extension will allow the Exchange to determine whether Rule 11.19 is necessary once the Plan is operational and, if so, whether improvements can be made. Further, the Exchange believes it consistent with the protection of investors and the public interest to adopt objective criteria to nullify transactions that occur outside of the Plan's price bands when such transactions should not have been executed but were due to a systems or technology issue.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change implicates any competitive issues. To the contrary, the Exchange believes that the Financial Industry Regulatory Authority, Inc. (''FINRA'') and other national securities exchanges are also filing similar proposals, and thus, that the proposal will help to ensure consistent rules across market centers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[12] and Rule 19b–4(f)(6)(iii) thereunder.[13]

A proposed rule change filed under Rule 19b–4(f)(6)[14] normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii)[15] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program. For this reason, the Commission designates the proposed rule change to be operative upon filing.[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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NSX–2013–06 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NSX–2013–06. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6)(iii). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6)(iii).

[16] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSX–2013–06 and should be submitted on or before February 28, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02707 Filed 2–6–13; 8:45 am]

BILLING CODE 8011–01–P

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68809; File No. SR–NYSEArca-2013–12]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Arca Equities Rule 7.10, Which Governs Clearly Erroneous Executions, Extending the Effective Date of the Pilot Until September 30, 2013 and Adopting New Paragraph (i) to NYSE Arca Equities Rule 7.10 In Connection With the Upcoming Operation of the Plan To Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS Under the Act

February 1, 2013.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on January 30, 2013, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to to [sic] amend NYSE Arca Equities Rule 7.10, which governs clearly erroneous executions, to extend the effective date of the pilot by which portions of such Rule operate until September 30, 2013. The pilot is currently scheduled to expire on February 4, 2013. The Exchange also proposes to adopt new paragraph (i) to NYSE Arca Equities Rule 7.10 in connection with the upcoming operation of the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or ''Plan'').[4] The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Arca Equities Rule 7.10, which governs clearly erroneous executions, to extend the effective date of the pilot by which portions of such Rule operate, until September 30, 2013. The pilot is currently scheduled to expire on February 4, 2013.[5] The Exchange also proposes to add new paragraph (i) to NYSE Arca Equities Rule 7.10 in connection with the upcoming implementation of the Limit Up-Limit Down Plan.

On September 10, 2010, the Commission approved, on a pilot basis, market-wide amendments to exchanges' rules for clearly erroneous executions to set forth clearer standards and curtail discretion with respect to breaking erroneous trades. In connection with this pilot initiative, the Exchange amended NYSE Arca Equities Rule 7.10(c), (e)(2), (f), and (g). The amendments provide for uniform treatment of clearly erroneous execution reviews (1) in Multi-Stock Events[6] involving twenty or more securities, and (2) in the event transactions occur that result in the issuance of an individual security trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on the Exchange.[7] The amendments also eliminated appeals of certain rulings made in conjunction with other exchanges with respect to clearly erroneous transactions and limited the Exchange's discretion to deviate from Numerical Guidelines set forth in the Rule in the event of system disruptions or malfunctions.

If the pilot were not extended, the prior versions of paragraphs (c), (e)(2), (f), and (g) of NYSE Arca Equities Rule 7.10 would be in effect, and NYSE Arca would have different rules than other exchanges and greater discretion in connection with breaking clearly erroneous transactions. The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a pilot basis through September 30, 2013, which is the date that the Exchange anticipates that the phased implementation of the Limit Up-Limit Down Plan will be complete. As

[4] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[5] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–NYSEArca–2010–58). *See also* Securities Exchange Act Release Nos. 63482 (December 9, 2010), 75 FR 78331 (December 15, 2010) (SR–NYSEArca–2010–113); 64234 (April 7, 2011), 76 FR 20399 (April 12, 2011) (SR–NYSEArca–2011–15); 65065 (August 9, 2011), 76 FR 50502 (August 15, 2011) (SR–NYSEArca–2011–56); 66135 (January 11, 2012), 77 FR 2590 (January 18, 2012) (SR–NYSEArca–2011–100); and 67566 (August 1, 2012), 77 FR 47142 (August 7, 2012) (SR–NYSEArca–2012–79).

[6] Terms not defined herein are defined in NYSE Arca Equities Rule 7.10.

[7] Separately, the Exchange has proposed to extend the effective date of the trading pause pilot under NYSE Arca Equities Rule 7.11, which requires to the Exchange to pause trading in an individual security listed on the Exchange if the price moves by a specified percentage as compared to prices of that security in the preceding five-minute period during a trading day. *See* Securities Exchange Act Release No. 68748 (January 28, 2013) (SR–NYSEArca–2012–02) [sic].

explained in further detail below, although the Limit Up-Limit Down Plan is intended to prevent executions that would need to be nullified as clearly erroneous, the Exchange believes that certain protections should be maintained while the industry gains initial experience operating with the Limit Up-Limit Down Plan, including the provisions of NYSE Arca Equities Rule 7.10 that currently operate as a pilot.

Proposed Limit Up-Limit Down Provision to NYSE Arca Equities Rule 7.10

The Exchange proposes to adopt new paragraph (i) to NYSE Arca Equities Rule 7.10, to provide that the existing provisions of NYSE Arca Equities Rule 7.10 will continue to apply to all Exchange transactions, including transactions in securities subject to the Plan, other than as set forth in proposed paragraph (i). Accordingly, other than as proposed below, the Exchange proposes to maintain and continue to apply the Clearly Erroneous Execution standards in the same way that it does today. Notably, this means that the Exchange might nullify transactions that occur within the price bands disseminated pursuant to the Limit Up-Limit Down Plan to the extent such transactions qualify as clearly erroneous under existing criteria. As an example, assume that a Tier 1 security pursuant to the Plan has a reference price pursuant to both the Plan and Rule 7.10 of $100.00. The lower pricing band under the Plan would be $95.00 and the upper pricing band under the Plan would be $105.00. An execution could occur on the Exchange in this security at $96.00, as this is within the Plan's pricing bands. However, if subjected to review as potentially clearly erroneous, the Exchange would nullify an execution at $96.00 as clearly erroneous because it exceeds the 3% threshold that is in place pursuant to Rule 7.10(c)(1) for securities priced above $50.00 (*i.e.,* with a reference price of $100.00, any transactions at or below $97.00 or above $103.00 could be nullified as clearly erroneous). Accordingly, this proposal maintains the status quo with respect to reviews of Clearly Erroneous Executions and the application of objective numerical guidelines by the Exchange. The proposal does not increase the discretion afforded to the Exchange in connection with reviews of Clearly Erroneous Executions.

The Limit Up-Limit Down Plan is designed to prevent executions from occurring outside of dynamic price bands disseminated to the public by the single plan processor as defined in the Limit Up-Limit Down Plan.[8] The possibility remains the Exchange could experience a technology or systems problem with respect to the implementation of the price bands disseminated pursuant to the Plan. To address such possibilities, the Exchange proposes to adopt language to make clear that if an Exchange technology or systems issue results in any transaction occurring outside of the price bands disseminated pursuant to the Plan, an Officer of the Exchange or senior level employee designee, acting on his or her own motion or at the request of a third party, shall review and declare any such trades null and void. Absent extraordinary circumstances, any such action of the Officer of the Exchange or other senior level employee designee shall be taken in a timely fashion, generally within thirty (30) minutes of the detection of the erroneous transaction. When extraordinary circumstances exist, any such action of the Officer of the Exchange or other senior level employee designee must be taken by no later than the start of the Core Trading Hours[9] on the trading day following the date on which the execution(s) under review occurred. Although the Exchange will act as promptly as possible and the proposed objective standard (*i.e.,* whether an execution occurred outside the band) should make it feasible to quickly make a determination, there may be circumstances in which additional time may be needed for verification of facts or coordination with outside parties, including the single plan processor responsible for disseminating the price bands and other market centers. Accordingly, the Exchange believes it necessary to maintain some flexibility to make a determination outside of the thirty (30) minute guideline. In addition, the Exchange proposes that a transaction that is nullified pursuant to new paragraph (i) would be appealable in accordance with the provisions of Rule 7.10(e)(2). In addition, the Exchange proposes to make clear that in the event that a single plan processor experiences a technology or systems problem that prevents the dissemination of price bands, the Exchange would make the determination of whether to nullify transactions based on Rule 7.10(a)–(h).

The Exchange believes that cancelling trades that occur outside of the price bands disseminated pursuant to the Plan is consistent with the purpose and intent of the Plan, as such transactions are not intended to occur in the first place. If transactions do occur outside of the price bands and no exception applies—which necessarily would be caused by a technology or systems issue—then the Exchange believes the appropriate result is to nullify such transactions.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[10] of the Act, in general, and furthers the objectives of Section 6(b)(5)[11] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the pilot program promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. More specifically, the Exchange believes that the extension of the pilot would promote just and equitable principles of trade because it would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria. Additionally, resolution of the incident will occur promptly through a transparent process, which the Exchange believes would protect investors and the public interest. The proposed rule change would also foster cooperation and coordination with persons engaged in facilitating transactions in securities and to remove impediments to, and perfect the mechanism of, a free and open market and a national market system because it would help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest.

Although the Limit Up-Limit Down Plan will be operational during the same time period as the proposed extended pilot, the Exchange believes that maintaining the pilot for at least through the phased implementation of the Plan is operational will help to protect against unanticipated consequences. To that end, the extension will allow the Exchange to determine whether NYSE

[8] *See* Limit Up-Limit Down Release, *supra* note 4.

[9] Core Trading Hours commence at 9:30 a.m. Eastern Time, 6:30 a.m. Pacific Time. *See* NYSE Arca Equities Rule 1.1(j).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

Arca Equities Rule 7.10 is necessary once the Plan is operational and, if so, whether improvements can be made. Further, the Exchange believes it consistent with the protection of investors and the public interest to adopt objective criteria to nullify transactions that occur outside of the Plan's price bands when such transactions should not have been executed but were due to a systems or technology issue.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that the Financial Industry Regulatory Authority and other national securities exchanges are also filing similar proposals, and thus, that the proposal will help to ensure consistent rules across market centers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and Rule 19b–4(f)(6)(iii) thereunder.[13]

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program. For this reason, the Commission designates the proposed rule change to be operative upon filing.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2013–12 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2013–12. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2013–12, and should be submitted on or before February 28, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02710 Filed 2–6–13; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6)(iii). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[14] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68808; File No. SR–FINRA–2013–012]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Clearly Erroneous Pilot Period and To Adopt a New Provision in Connection With the Limit Up-Limit Down Plan

February 1, 2013.

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 January 30, 2013, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

FINRA is proposing to amend FINRA Rule 11892 (Clearly Erroneous Transactions in Exchange-Listed Securities) to extend the effective date of the clearly erroneous pilot, which is currently scheduled to expire on February 4, 2013. FINRA also proposes to adopt new supplementary material in connection with the upcoming operation of the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of SEC Regulation NMS (the ''Limit Up-Limit Down Plan'' or ''Plan'').[4]

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA 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, FINRA 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. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

FINRA proposes to amend FINRA Rule 11892 (Clearly Erroneous Transactions in Exchange-Listed Securities) (the ''Rule'') to extend the effective date of the amendments set forth in File No. SR–FINRA–2010–032 (the ''clearly erroneous pilot''), which are currently scheduled to expire on February 4, 2013,[5] until September 30, 2013, and to adopt new Supplementary Material .03 in connection with the upcoming operation of the Limit Up-Limit Down Plan.

Proposal To Extend Pilot

On September 10, 2010, the Commission approved, on a pilot basis, changes to the self-regulatory organizations' (''SROs'') clearly erroneous rules, including FINRA Rule 11892, to provide for uniform treatment: (1) Of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (2) in the event transactions occur that result in the issuance of an individual stock trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect for transactions otherwise than on an exchange.[6] FINRA also adopted additional changes to the Rule as part of the clearly erroneous pilot that reduced the ability of FINRA to deviate from the objective standards set forth in the Rule. FINRA believes the benefits to market participants derived from this more-objective clearly erroneous rule should continue on a pilot basis through September 30, 2013, which is the date that FINRA anticipates that the phased implementation of the Limit Up-Limit Down Plan will be complete.

As explained in further detail below, although the Limit Up-Limit Down Plan is intended to prevent executions that would need to be deemed erroneous, FINRA believes that certain protections should be maintained while the industry gains initial experience operating with the Limit Up-Limit Down Plan, including the provisions of Rule 11892 that currently operate as a pilot.

Proposed Limit Up-Limit Down Provision for Rule 11892

FINRA proposes to adopt new Supplementary Material .03 to provide that the existing provisions of Rule 11892 will continue to apply to all over-the-counter transactions involving an exchange-listed security reported through a FINRA system, including transactions in securities subject to the Plan, other than as set forth in proposed Supplementary Material .03. Accordingly, other than as proposed below, FINRA proposes to maintain and continue to apply the clearly erroneous standards as it does today. Notably, this means that FINRA might deem as clearly erroneous transactions that occur within the price bands disseminated pursuant to the Limit Up-Limit Down Plan to the extent such transactions qualify as clearly erroneous under existing criteria.

As an example, assume that a Tier 1 security pursuant to the Plan has a reference price of $100.00 pursuant to both the Plan and Rule 11892. The lower price band under the Plan would be $95.00 and the upper price band under the Plan would be $105.00. An execution could occur otherwise than on an exchange in this security at $96.00, as this is within the Plan's price bands. However, if subjected to review as potentially clearly erroneous, FINRA would deem an execution at $96.00 as clearly erroneous because it exceeds the 3% threshold that is in place pursuant to Rule 11892(b)(1) for securities priced above $50.00 (*i.e.,* with a reference price of $100.00, any transactions at or below $97.00 or above $103.00 could be deemed clearly erroneous). Accordingly, this proposal maintains the status quo with respect to reviews of clearly erroneous transactions and the application of objective numerical guidelines by FINRA. The proposal does not increase the discretion afforded to FINRA in connection with reviews of clearly erroneous transactions.

The Limit Up-Limit Down Plan is designed to prevent executions from occurring outside of dynamic price bands disseminated to the public by the single plan processor as defined in the Limit Up-Limit Down Plan.[7] The possibility remains that a member may experience a technology or systems problem that results in the occurrence of an over-the-counter transaction in an exchange-listed security outside of the applicable price bands. To address this possibility, FINRA proposes to adopt language to make clear that if a member's technology or systems issue results in any transaction being reported to a FINRA system outside of the price bands disseminated pursuant to the Plan, a FINRA officer, acting on his or her own motion or at the request of a member, shall review and deem any such trades as clearly erroneous, so long as the member certifies that the subject transaction(s) occurring outside of the applicable price bands disseminated pursuant to the Plan is the result of the member's *bona fide* technological or systems issue.[8]

Absent extraordinary circumstances, any action by a FINRA officer shall be taken in a timely fashion, generally within thirty (30) minutes of the detection of the erroneous transaction. When extraordinary circumstances exist, any such action of the FINRA officer must be taken by no later than

[4] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[5] *See* Securities Exchange Act Release No. 67579 (August 2, 2012), 77 FR 47467 (August 8, 2012) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2012–038).

[6] *See* Securities Exchange Act Release No. 62885 (September 10, 2010), 75 FR 56641 (September 16, 2010) (Order Approving File No. SR–FINRA–2010–032).

[7] *See* Limit Up-Limit Down Release, *supra* note 4.

[8] During for cause reviews of clearly erroneous trades or examinations of member firms, FINRA will review whether there is sufficient documentation of technology or system issues to reasonably substantiate the certifications. FINRA also will review members' procedures for complying with the Limit Up-Limit Down Plan.

the start of normal market hours on the trading day following the date on which the execution(s) under review occurred.

Although FINRA will act as promptly as possible and the proposed objective standard (*i.e.,* whether an execution occurred outside the band) should make it feasible to quickly make a determination, FINRA may require additional time to obtain the required certification from a member that the transaction(s) outside of the price bands occurred as a result of the member's *bona fide* technological or systems issue. In addition, there may be circumstances in which additional time may be needed for verification of facts or coordination with outside parties, including the single plan processor responsible for disseminating the price bands and other SROs. Accordingly, FINRA believes it necessary to maintain some flexibility to make a determination outside of the thirty (30) minute guideline. In addition, FINRA proposes that a transaction that is deemed clearly erroneous pursuant to new Supplementary Material .03 would be appealable in accordance with the provisions of Rule 11894. In addition, FINRA proposes to make clear that, in the event that a single plan processor experiences a technology or systems problem that prevents the dissemination of price bands, FINRA would make the determination of whether to deem transactions clearly erroneous based on Rule 11892 paragraphs (a) and (b) and Supplementary Material .01.

FINRA believes that it is consistent with the purpose and intent of the Plan to deem as clearly erroneous transactions that occur otherwise than on an exchange and are reported to a FINRA system that occur outside of the price bands disseminated pursuant to the Plan as a result of a members technology or systems issue.

FINRA has filed the proposed rule change for immediate effectiveness. The effective date of the proposed rule change will be the date of filing.

2. Statutory Basis

FINRA believes that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities association and, in particular, with the requirements of Section 15A of the Act.[9] In particular, the proposal is consistent with Section 15A(b)(6)[10] because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest.

FINRA believes that the pilot program promotes just and equitable principles of trade in that it promotes transparency and uniformity across SROs concerning reviews of transactions as clearly erroneous. More specifically, FINRA believes that the extension of the clearly erroneous pilot would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change also would help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Although the Limit Up-Limit Down Plan will be operational during the same time period as the proposed extended clearly erroneous pilot, FINRA believes that maintaining the clearly erroneous pilot for at least through the phased implementation of the Plan will help to protect against unanticipated consequences. To that end, the extension will allow FINRA to determine whether Rule 11892 is necessary once the Plan is operational and, if so, whether improvements can be made.

Further, FINRA believes it is consistent with the protection of investors and the public interest to adopt objective criteria to deem transactions reported to a FINRA system outside of the price bands as clearly erroneous when a member has certified that such transaction was due to the member's *bona fide* systems or technology issue.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change implicates any competitive issues. To the contrary, FINRA believes that the other SROs also are filing similar proposals and, thus, the proposal will help to ensure consistent rules across the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

FINRA has not solicited, and does not intend to solicit, comments on this proposed rule change. FINRA has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6)(iii) thereunder.[12]

FINRA has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program. For this reason, the Commission designates the proposed rule change to be operative upon filing.[13]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

[9] 15 U.S.C. 78*o*–3.

[10] 15 U.S.C. 78*o*–3(b)(6).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6)(iii). As required under Rule 19b–4(f)(6)(iii), FINRA provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[13] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2013–012 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2013–012. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2013–012, and should be submitted on or before February 28, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02709 Filed 2–6–13; 8:45 am]

BILLING CODE 8011–01–P

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68814; File No. SR–EDGX–2013–06]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend EDGX Rule 11.13 To Extend the Operation of a Pilot Pursuant to Rule 11.13 Until September 30, 2013

February 1, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 31, 2013, EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule 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 EDGX Rule 11.13 to extend the operation of a pilot pursuant to Rule 11.13 (the ''Pilot'') until September 30, 2013. The Exchange also proposes to adopt new paragraph (i) to Rule 11.13 in connection with the upcoming operation of the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or the ''Plan'').[3] All of the changes described herein are applicable to EDGX Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions and to adopt new paragraph (i) to Rule 11.13 in connection with upcoming operation of the Limit Up-Limit Down Plan.

Background

Portions of Rule 11.13, explained in further detail below, are currently operating as the Pilot and are set to expire on February 4, 2013.[4] The Exchange proposes to extend the Pilot to September 30, 2013.

On September 10, 2010, the Commission approved, on a pilot basis, changes to EDGX Rule 11.13 to provide for uniform treatment: (1) Of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (2) in the event transactions occur that result in the issuance of an individual stock trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on the Exchange.[5] The Exchange also adopted additional changes to Rule 11.13 that reduced the ability of the Exchange to deviate from the objective standards set forth in Rule 11.13.[6] The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a pilot basis through September 30, 2013, which is the date that the Exchange anticipates that the phased implementation of the Limit Up-Limit Down Plan will be complete. As explained in further detail below, although the Limit Up-Limit Down Plan is intended to prevent executions that would need to be nullified as clearly erroneous, the Exchange believes that certain protections should be maintained while the industry gains initial experience operating with the Limit Up-Limit Down Plan, including the provisions of Rule 11.13 that currently operate as a pilot.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012).

[4] *See* Securities Exchange Act Release No. 67499 (July 25, 2012), 77 FR 45399 (July 31, 2012) (SR–EDGX–2012–27).

[5] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–EDGX–2010–03).

[6] *Id.*

Proposed Limit Up-Limit Down Provision to Rule 11.13

The Exchange proposes to adopt new paragraph (i) to Rule 11.13, to provide that the existing provisions of Rule 11.13 will continue to apply to all Exchange transactions, including transactions in securities subject to the Plan, other than as set forth in proposed paragraph (i). Accordingly, other than as proposed below, the Exchange proposes to maintain and continue to apply the Clearly Erroneous Execution standards in the same way that it does today. Notably, this means that the Exchange might nullify transactions that occur within the price bands disseminated pursuant to the Limit Up-Limit Down Plan to the extent such transactions qualify as clearly erroneous under existing criteria. As an example, assume that a Tier 1 security pursuant to the Plan has a reference price pursuant to both the Plan and Rule 11.13 of $100.00. The lower pricing band under the Plan would be $95.00 and the upper pricing band under the Plan would be $105.00. An execution could occur on the Exchange in this security at $96.00, as this is within the Plan's pricing bands. However, if subjected to review as potentially clearly erroneous, the Exchange would nullify an execution at $96.00 as clearly erroneous because it exceeds the 3% threshold that is in place pursuant to Rule 11.13(c)(1) for securities priced above $50.00 (*i.e.,* with a reference price of $100.00, any transactions at or below $97.00 or above $103.00 could be nullified as clearly erroneous). Accordingly, this proposal maintains the status quo with respect to reviews of Clearly Erroneous Executions and the application of objective numerical guidelines by the Exchange. The proposal does not increase the discretion afforded to the Exchange in connection with reviews of Clearly Erroneous Executions.

The Limit Up-Limit Down Plan is designed to prevent executions from occurring outside of dynamic price bands disseminated to the public by the single plan processor as defined in the Limit Up-Limit Down Plan.[7] The possibility remains that the Exchange could experience a technology or systems problem with respect to the implementation of the price bands disseminated pursuant to the Plan. To address such possibilities, the Exchange proposes to adopt language to make clear that if an Exchange technology or systems issue results in any transaction occurring outside of the price bands disseminated pursuant to the Plan, an Officer of the Exchange or senior level employee designee, acting on his or her own motion or at the request of a third party, shall review and declare any such trades null and void. Absent extraordinary circumstances, any such action of the Officer of the Exchange or other senior level employee designee shall be taken in a timely fashion, generally within thirty (30) minutes of the detection of the erroneous transaction. When extraordinary circumstances exist, any such action of the Officer of the Exchange or other senior level employee designee must be taken by no later than the start of Regular Trading Hours[8] on the trading day following the date on which the execution(s) under review occurred. Although the Exchange will act as promptly as possible and the proposed objective standard (*i.e.,* whether an execution occurred outside the band) should make it feasible to quickly make a determination, there may be circumstances in which additional time may be needed for verification of facts or coordination with outside parties, including the single plan processor responsible for disseminating the price bands and other market centers. Accordingly, the Exchange believes it necessary to maintain some flexibility to make a determination outside of the thirty (30) minute guideline. In addition, the Exchange proposes that a transaction that is nullified pursuant to new paragraph (i) would be appealable in accordance with the provisions of Rule 11.13(e)(2). In addition, the Exchange proposes to make clear that in the event that a single plan processor experiences a technology or systems problem that prevents the dissemination of price bands, the Exchange would make the determination of whether to nullify transactions based on Rule 11.13(a)–(h).

The Exchange believes that cancelling trades that occur outside of the price bands disseminated pursuant to the Plan is consistent with the purpose and intent of the Plan, as such transactions are not intended to occur in the first place. If transactions do occur outside of the price bands and no exception applies—which necessarily would be caused by a technology or systems issue—then the Exchange believes the appropriate result is to nullify such transactions.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act,[9] which requires the rules of an exchange to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule meets these requirements in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. More specifically, the Exchange believes that the extension of the Pilot would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Although the Limit Up-Limit Down Plan will be operational during the same time period as the proposed extended Pilot, the Exchange believes that maintaining the Pilot for at least through the phased implementation of the Plan is operational will help to protect against unanticipated consequences. To that end, the extension will allow the Exchange to determine whether Rule 11.13 is necessary once the Plan is operational and, if so, whether improvements can be made. Further, the Exchange believes it consistent with the protection of investors and the public interest to adopt objective criteria to nullify transactions that occur outside of the Plan's price bands when such transactions should not have been executed but were due to a systems or technology issue.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Financial Industry Regulatory Authority (''FINRA'') and other national securities exchanges are also filing similar proposals. Thus the Exchange believes that the proposal will help to ensure consistent rules across market centers.

[7] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012).

[8] Regular Trading Hours commence at 9:30 a.m. Eastern Time. *See* Exchange Rule 1.5(y).

[9] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6)(iii) thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6) [12] normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii) [13] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program. For this reason, the Commission designates the proposed rule change to be operative upon filing.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–EDGX–2013–06 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–EDGX–2013–06. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGX–2013–06 and should be submitted on or before February 28, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02746 Filed 2–6–13; 8:45 am]

BILLING CODE 8011–01–P

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6)(iii). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68812; File No. SR–ICEEU–2012–09]

Self-Regulatory Organizations; ICE Clear Europe Limited; Order Approving Proposed Rule Change To Provide for a Customer Clearing Model for CDS Products and To Amend, Clarify, and Consolidate Certain Rules and Procedures

February 1, 2013.

I. Introduction

On October 22, 2012, ICE Clear Europe Limited (''ICE Clear Europe'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change SR–ICEEU–2012–09 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on November 9, 2012.[3] The Commission received one comment letter to the proposed rule change.[4] This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The principal purpose of the proposed rule change is to provide for a Customer CDS Clearing Model whereby customers of ICE Clear Europe Clearing Members have the ability to clear CDS products through ICE Clear Europe. In addition, ICE Clear Europe is amending its Rules and CDS Procedures in order to implement certain rule changes that are unrelated to Customer CDS Clearing Model.

Currently, ICE Clear Europe Clearing Members may clear CDS products at ICE Clear Europe through their proprietary accounts only and not on behalf of their customers. The Customer CDS Clearing Model extends ICE Clear Europe's

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 68152 (November 5, 2012), 77 FR 67427 (November 9, 2012).

[4] Letter from Kermit Kubitz (November 30, 2012).

customer clearing models that are currently available for other products to CDS products, with certain modifications appropriate for the nature of the product.

The Customer CDS Clearing Model builds on the customer clearing framework available for other products at ICE Clear Europe. US customers must clear through a registered futures commission merchant and/or broker-dealer (depending on whether the product is an index CDS or single-name CDS), consistent with the requirements of the Commodity Exchange Act and the Act, as applicable. Non-US customers may clear through a non-US clearing member in accordance with applicable local laws or through a registered futures commission merchant and/or broker-dealer.

The terms of the Customer CDS Clearing Model, as well as various related enhancements to the clearing model, were proposed as amendments to the ICE Clear Europe Rules and CDS Procedures. Changes to Part 1 of the Rules clarify and conform existing definitions to the Customer CDS Clearing Model, create new CDS-specific definitions used in new operative provisions, clarify customer and proprietary account class definitions that are relevant to CDS, and clarify general standards of Clearing Member responsibility and liability. Other changes reflect the incorporation into the Rules of provisions that had been in a separate master agreement entered into between the Clearing Member and ICE Clear Europe. Changes to Part 2 of the Rules provide updates related to anti-money laundering legislation applicable to customers, clarify membership standards for Clearing Members, clarify the obligations of Clearing Members with respect to customer accounts and proprietary accounts and clarify and/or restate certain provisions relating to Clearing Member default and termination of clearing membership. Changes to Part 3 of the Rules clarify certain payment mechanics for Clearing Members with respect to amounts owed by their customers and include a waiver of set-off by Clearing Members. Changes to Part 4 of the Rules reflect amendments to the contract rights and obligations of ICE Clear Europe and Clearing Members, particularly in the context of the clearing of CDS on behalf of customers. Changes to Part 5 of the Rules address the delivery of margin from customers to Clearing Members and add provisions dealing with transfer of margin by security interest rather than title transfer. Changes to Part 6 of the Rules clarify the procedures for providing notice of position limits and clarify further how position limits apply in instances where contracts arise due to firm trades, voiding, or error policies. Changes to Parts 7 and 8 of the Rules clarify that references in those parts of the Rules (covering Settlement and Delivery of Futures (Part 7) and Options (Part 8)), which relate solely to Energy contracts, do not apply to CDS Customer Accounts or customers in the context of CDS clearing. Changes to Part 9 of the Rules consolidate and clarify the respective rights and obligations of ICE Clear Europe and Clearing Members in the case of a Clearing Member or ICE Clear Europe default and the procedures to be followed in determining a net sum payable to or receivable from a defaulting Clearing Member. Changes to Part 10 of the Rules provide more detail regarding how a disciplinary or appeals panel could impose a sanction on a customer and determine liability or responsibility in any instance where there is joint misfeasance. Changes to Part 11 relate to the operation of the ICE Clear Europe guaranty funds, including changes relating to the introduction of customer clearing. ICE Clear Europe will continue to operate separate guaranty funds for CDS products and for energy products. Changes to Part 12 of the Rules conform to the new terms and definitions that are part of the Customer CDS Customer Model. Changes to Part 15 of the Rules provide provisions dealing with CDS contracts cleared in the customer account (including the representation of customer transactions in relevant books and records and treatment of customer transactions in the case of credit events) and the elimination of the separate master agreement previously entered into between CDS Clearing Members and ICE Clear Europe. Changes to Part 16 of the Rules address the addition of CDS clearing to the ICE Clear Europe FCM customer clearing model and certain other clarifications and enhancements requested by CDS Clearing Members.

ICE Clear Europe is also establishing in Exhibit 1 of the Rules certain standard terms (the Customer-CM CDS Transactions Standard Terms) that will be applicable to Customer-CM CDS Transactions, which are CDS transactions between a Non-FCM/BD Clearing Member and a non-U.S. customer. Under the changes to Rule 1516, all Non-FCM/BD Clearing Members must agree to the applicability of these terms as between them and each of their customers. The Standard Terms provisions, among other things, ensure that the terms of Customer-CM CDS Transactions mirror the terms of the cleared transaction, enable a clearing member to pass on clearing-house performance (or non-performance) to their customers, facilitate the provision of margin to ICE Clear Europe, and amend provisions in underlying agreements relating to events of default and close-out in order to ensure that the porting of contracts and margin under the default rules will be effective. In addition, various consents must be supplied for ICE Clear Europe to update customer records in DTCC and receive other information as required relating to customers.[5]

ICE Clear Europe is also modifying its CDS Procedures. Changes to Part 1 of the CDS Procedures clarify and conform existing definitions to the Customer CDS Clearing Model, as well as add new definitions used in new operative provisions. Changes to Part 2 of the CDS Procedures clarify and conform membership requirements to standards implemented as a result of the Dodd-Frank Act. Changes to Part 3 of the CDS Procedures delete a reference to CDS Operational Procedures, which document has become obsolete in light of the changes related to customer clearing. Changes to Part 4 of the CDS Procedures update information that must be provided with respect to CDS contracts and procedures for submission of CDS contracts for clearing. Changes to Part 5 of the CDS Procedures address customer clearing in the context of the CDS Default Committee procedures. Part 6 of the CDS Procedures was removed because it is no longer necessary in light of ICE Clear Europe's use of determinations made by the ISDA Determinations Committees with respect to credit and succession events. Changes to Part 7 address restructuring as a credit event with respect to CDS contracts cleared in the customer account, including the processing for triggering settlement of such contracts. Changes to Part 8 of the CDS Procedures clarify the procedures for listing new CDS Contracts, in particular to enable ICE Clear Europe to respond in timely fashion to any prohibition on trading in CDS imposed under the EU Short Selling Regulation (Regulation 236/2012 dated 14 March 2012). Changes to Part 9 of the CDS Procedures include various provisions previously included in the separate master agreement between CDS Clearing Members and ICE Clear Europe as well as certain tax provisions relevant to customer clearing. These updated provisions apply to both customer

[5] As noted above, US customers must clear through an FCM/BD Clearing Member. The Customer-CM CDS Transactions Standard Terms will not apply to that relationship.

positions and proprietary positions of CDS Clearing Members. Changes to Part 10 of the CDS Procedures update the cross-references and definitions relevant to customer clearing as they relate to Index CDS Contracts. Changes to Part 11 of the CDS Procedures update the cross-references and definitions relevant to customer clearing as they relate to Single Name CDS Contracts. Changes to Part 12 of the CDS Procedures update the cross-references and the definitions relevant to customer clearing with respect to Sovereign Contracts. Changes to Part 13 of the CDS Procedures add certain general procedures relating to customer clearing of CDS contracts.

III. Comment

The Commission received one comment to the proposed rule change. The comment concerned ICE Clear Europe's requirements under the Exchange Act, including but not limited to recordkeeping and reporting requirements that are outside of the scope of this proposal. The Commission notes, however, that ICE Clear Europe, as a clearing agency registered with the Commission, is fully subject to the Exchange Act and all applicable rules and regulations promulgated thereto.

IV. Discussion

Section 17A(b)(3)(F) of the Act [6] requires that, among other things, a clearing agency be organized and its rules designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions and to protect investors and the public interest. After careful consideration, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder. The implementation of the Customer CDS Clearing Model may promote the prompt and accurate clearance of securities transactions, derivatives agreements, contracts, and transactions by extending clearing to a broader segment of the CDS market.

V. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act [7] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[8] that the proposed rule change (File No. SR–ICEEU–2012–09) be, and hereby is, approved.[9]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02711 Filed 2–6–13; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78q–1(b)(3)(F).

[7] 15 U.S.C. 78q–1.

[8] 15 U.S.C. 78s(b)(2).

[9] In approving this proposed rule change the Commission has considered the proposed rule's impact of efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68799; File No. SR–NASDAQ–2013–015]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to NASDAQ Rule 4120

February 1, 2013.

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 January 24, 2013, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The NASDAQ Stock Market LLC proposes to correct an erroneous deletion from NASDAQ Rule 4120(c)(7)(B) related to the randomization period conducted prior to the IPO Cross under NASDAQ Rule 4753. The Exchange has designated the proposed changes herein as immediately effective.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

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. 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 Statutory Basis for, the Proposed Rule Change

1. *Purpose*

The Exchange hereby amends NASDAQ Rule 4120(c)(7)(B) which governs the orderly launch of trading in initial public offerings (''IPOs'') of NASDAQ-listed securities. Specifically, NASDAQ is amending Rule 4120(c)(7)(B) to insert language that describes the randomization period of zero to fifteen seconds that automatically occurs prior to the IPO Cross set forth in NASDAQ Rule 4753. The randomization period is designed to prevent gaming of the IPO Cross by delaying for a variable amount of time the precise moment of execution of each IPO Cross. Although NASDAQ's execution system currently includes and for years has included a randomization period for each IPO Cross, the language describing the randomization period was erroneously removed from Rule 4120(c)(7)(B).

On August 20, 2007, NASDAQ filed SR–NASDAQ–2007–073 (''Original Halt Cross Filing'') which, among other things, removed from Rule 4120(b)(7)(A) the rule language accurately describing the randomization period prior to the launch of the NASDAQ Halt Cross. The purpose section of the Original Halt Cross Filing stated as a rationale that:

> The randomization period was designed to deter market participants from timing their participation in a way that harmed other participants. This provision, however, results in other markets trading after the issue has re-opened but prior to NASDAQ restarting trading using the Halt Cross. NASDAQ believe[s] that it is confusing and disruptive to market participants for NASDAQ, the listing market, to continue a halt after other market centers have resumed trading and, therefore, proposes to eliminate the random period prior to the execution of the Halt Cross.

This explanation focuses on Halt Crosses that NASDAQ initiates following halts of stocks that have

previously traded in the secondary market; the reasoning does not apply in the context of an IPO launch, as there is no trading on other markets until the IPO Cross is completed.

Nevertheless, Amendment 1 to SR–NASDAQ–2007–073 (''Amended Halt Cross Filing''), which superseded the Original Halt Cross Filing, erroneously removed the language accurately describing the randomization period for each IPO Cross.[3] The Amended Halt Cross filing, among other things, removed the language describing the randomization period from both the provisions governing the Halt Cross (Rule 4120(c)(7)(A)) and the IPO Cross (Rule 4120(c)(7)(B)). The Amended Halt Cross Filing offered no rationale for removing the randomization period prior to the IPO Cross. In actuality, NASDAQ did not intend to remove the randomization period and, in fact, the NASDAQ system has continued through the present to include a randomization period prior to each IPO Cross. Accordingly, NASDAQ is proposing to re-instate in Rule 4120(c)(7)(B) language that accurately describes the randomization period that is identical to the language it erroneously removed via the Amended Halt Cross Filing.

2. *Statutory Basis*

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and with Section 6(b)(5) of the Act,[5] in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transaction 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 proposed rule change promotes this goal by accurately describing an element of NASDAQ's trading system that already protects investors and the public interest by ensuring an orderly opening of trading in IPOs of NASDAQ-listed securities. The specific functionality, the randomization period, is designed to and does in fact prevent improper timing by an Exchange member of its participation in the IPO Cross in a manner that could harm other participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The Exchange's proposed rule change is unrelated to competition, because it does not change the Exchange's current process and therefore will neither alter the Exchange's competitiveness nor inhibit the ability of any person to compete in the securities markets. Rather, the change is focused solely upon ensuring that NASDAQ's rules accurately describe the process in place to promote the orderly launch of trading following an IPO on NASDAQ.

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

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) Impose any significant burden on competition; and

(iii) Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)[6] of the Act and Rule 19b–4(f)(6)[7] thereunder.

A proposed rule change filed pursuant to Rule 19b–4(f)(6)[8] under the Act normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii)[9] under the Act, the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the Exchange can, pursuant to its rules, use the randomization period to prevent improper timing by Exchange members participating in an IPO Cross in a manner that could harm other market participants. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest as the randomization period was previously in NASDAQ's rules and is designed to prevent gaming of an IPO Cross by delaying for a variable amount of time the precise moment of execution of each IPO Cross.[10] In addition, the Exchange represented that the NASDAQ system already provides for the randomization period, therefore, waiving the 30-day operative delay will enable NASDAQ to bring its rules and system in alignment quickly, thus reducing the potential for investor confusion. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative upon filing with the Commission.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[11] of the Act to determine whether the proposed rule change 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 Number SR–NASDAQ–2013–015 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission,

[3] *See* Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify the Halt Cross Process, Securities Exchange Act Release No. 56348 (Aug. 31, 2007); 72 FR 51693 (Sept. 6, 2007).

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of the filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[8] 17 CFR 240.19b–4(f)(6).

[9] 17 CFR 240.19b–4(f)(6)(iii).

[10] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78s(b)(2)(B).

100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2013–015. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2013–015, and should be submitted on or before February 28, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02704 Filed 2–6–13; 8:45 am]

BILLING CODE 8011–01–P

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68802; File No. SR–CHX–2013–04]

Self Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending CHX Article 20, Rule 10 To Extend the Effective Date of Certain Clearly Erroneous Transactions Provisions Operating Under a Pilot Until September 30, 2013 and To Establish Guidelines for the Handling of Clearly Erroneous Transactions in Connection With the Plan To Address Extraordinary Market Volatility

February 1, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1], and Rule 19b–4 [2] thereunder, notice is hereby given that on January 28, 2013, the Chicago Stock Exchange, Inc. (''CHX'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the CHX. CHX has filed this proposal pursuant to Rule 19b–4(f)(6) of the Act [3] which is effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CHX proposes to amend CHX Article 20, Rule 10, entitled ''Handling of Clearly Erroneous Transactions,'' to extend the effective date of certain provisions operating under a pilot until September 30, 2013. The Exchange also proposes to adopt new paragraph (i) to Article 20, Rule 10 in connection with the upcoming operation of the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or ''Plan'').[4] The text of this proposed rule change is available on the Exchange's Web site at (www.chx.com) and in the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CHX included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CHX has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Transactions and to adopt a new paragraph (i) to Article 20, Rule 10 in connection with upcoming operation of the Limit Up-Limit Down Plan.

Proposal To Extend Pilot

Portions of Article 20, Rule 10, explained in further detail below, are currently operating as a pilot program set to expire on February 4, 2013.[5] The Exchange proposes to amend paragraph .01 of the Interpretations and Policies of Article 20, Rule 10 to extend the pilot program to September 30, 2013.

On September 10, 2010, the Commission approved, on a pilot basis, changes to CHX Article 20, Rule 10 to provide for uniform treatment: (1) of clearly erroneous transaction reviews in multi-stock events involving twenty or more securities; and (2) in the event transactions occur that result in the issuance of an individual stock trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on the Exchange.[6] The Exchange also adopted additional changes to CHX Article 20, Rule 10 that reduced the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (File No. 4–631) (Order Approving, on a Pilot Basis, the National Market System Plan to Address Extraordinary Market Volatility by BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The Nasdaq Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc).

[5] *See* Securities Exchange Act Release No. 67572 (August 2, 2012), 77 FR 47481 (August 8, 2012) (SR–CHX–2012–11); *see also* paragraph .01 of the Interpretations and Policies of CHX Article 20, Rule 10.

[6] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–CHX–2010–13).

ability of the Exchange to deviate from the objective standards set forth in Article 20, Rule 10.[7] The Exchange believes the benefits to market participants from the more objective Clearly Erroneous Transactions rule should continue on a pilot basis through September 30, 2013, which is the date that the Exchange anticipates that the phased implementation of the Limit Up-Limit Down Plan will be complete. As explained in further detail below, although the Limit Up-Limit Down Plan is intended to prevent transactions that would need to be nullified as clearly erroneous, the Exchange believes that certain protections should be maintained while the industry gains initial experience operating with the Limit Up-Limit Down Plan, including the provisions of Article 20, Rule 10 that currently operate as a pilot.

Proposed Limit Up-Limit Down Provision to Article 20, Rule 10

The Exchange proposes to adopt new paragraph (i) to Article 20, Rule 10, to provide that the existing provisions of Article 20, Rule 10 will continue to apply to all Exchange transactions, including transactions in securities subject to the Plan, other than as set forth in proposed paragraph (i). Accordingly, other than as proposed below, the Exchange proposes to maintain and continue to apply the Clearly Erroneous Transaction standards in the same way that it does today. Notably, this means that the Exchange might nullify transactions that occur within the price bands disseminated pursuant to the Limit Up-Limit Down Plan to the extent such transactions qualify as clearly erroneous under existing criteria. As an example, assume that a Tier 1 security pursuant to the Plan has a reference price pursuant to both the Plan and Article 20, Rule 10 of $100.00. The lower pricing band under the Plan would be $95.00 and the upper pricing band under the Plan would be $105.00. A transaction could occur on the Exchange in this security at $96.00, as this is within the Plan's pricing bands. However, if subjected to review as potentially clearly erroneous, the Exchange would nullify a transaction at $96.00 as clearly erroneous because it exceeds the 3% threshold that is in place pursuant to Article 20, Rule 10(c)(1) for securities priced above $50.00 (*i.e.,* with a reference price of $100.00, any transactions at or below $97.00 or above $103.00 could be nullified as clearly erroneous). Accordingly, this proposal maintains the status quo with respect to review of Clearly Erroneous Transactions and the application of objective numerical guidelines by the Exchange. The proposal does not increase the discretion afforded to the Exchange in connection with review of Clearly Erroneous Transactions.

The Limit Up-Limit Down Plan is designed to prevent transactions from occurring outside of dynamic price bands disseminated to the public by the single plan processor as defined in the Limit Up-Limit Down Plan.[8] The possibility remains that the Exchange could experience a technology or systems problem with respect to the implementation of the price bands disseminated pursuant to the Plan. To address such possibilities, the Exchange proposes to adopt language to make clear that if an Exchange technology or systems issue results in any transactions occurring outside of the price bands disseminated pursuant to the Plan, an Officer of the Exchange or senior level employee designee, acting on his or her own motion or at the request of a third party, shall review and declare any trades null and void. Absent extraordinary circumstances, any such action of the Officer of the Exchange or other senior level employee designee shall be taken in a timely fashion, generally within thirty (30) minutes of the detection of the erroneous transaction. When extraordinary circumstances exist, any such action of the Officer of the Exchange or other senior level employee designee must be taken by no later than the start of the Regular Trading Session[9] on the trading day following the date on which the transaction(s) under review occurred. Although the Exchange will act as promptly as possible and the proposed objective standard (*i.e.,* whether a transaction occurred outside the band) should make it feasible to quickly make a determination, there may be circumstances in which additional time may be needed for verification of facts or coordination with outside parties, including the single plan processor responsible for disseminating the price bands and other market centers. Accordingly, the Exchange believes it necessary to maintain some flexibility to make a determination outside of the thirty (30) minute guideline. In addition, the Exchange proposes that a transaction that is nullified pursuant to new paragraph (i) would be appealable in accordance with the provisions of Article 20, Rule 10(e)(2). In addition, the Exchange proposes to make clear that in the event that a single plan processor experiences a technology or systems problem that prevents the dissemination of price bands, the Exchange would make the determination of whether to nullify transactions based on Article 20, Rule 10(a)–(h).

The Exchange believes that cancelling trades that occur outside of the price bands disseminated pursuant to the Plan is consistent with the purpose and intent of the Plan, as such transactions are not intended to occur in the first place. If transactions do occur outside of the price bands and no exception applies—which necessarily would be caused by a technology or systems issue—then the Exchange believes the appropriate result is to nullify such transactions.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[10] In particular, the proposal is consistent with Section 6(b)(5) of the Act,[11] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system. The Exchange believes that the pilot program promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. More specifically, the Exchange believes that the extension of the pilot would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Although the Limit Up-Limit

[7] *Id.*

[8] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (File No. 4–631) (Order Approving, on a Pilot Basis, the National Market System Plan To Address Extraordinary Market Volatility by BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The Nasdaq Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc).

[9] The Regular Trading Session commences at 9:30 a.m. Eastern Time. *See* CHX Article 20, Rule 1(b).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

Down Plan will be operational during the same time period as the proposed extended pilot, the Exchange believes that maintaining the pilot for at least through the phased implementation of the Plan is operational will help to protect against unanticipated consequences. To that end, the extension will allow the Exchange to determine whether Article 20, Rule 10 is necessary once the Plan is operational and, if so, whether improvements can be made. Further, the Exchange believes it consistent with the protection of investors and the public interest to adopt objective criteria to nullify transactions that occur outside of the Plan's price bands when such transactions should not have been made but were due to a systems or technology issue.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change implicates any competitive issues. To the contrary, the Exchange believes that FINRA and other national securities exchanges are also filing similar proposals, and thus, that the proposal will help to ensure consistent rules across market centers.

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

Because the proposed rule change does not (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and Rule 19b–4(f)(6)(iii) thereunder.[13]

A proposed rule change filed under Rule 19b–4(f)(6) [14] normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii) [15] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program. For this reason, the Commission designates the proposed rule change to be operative upon filing.[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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CHX–2013–04 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CHX–2013–04. 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CHX–2013–04 and should be submitted on or before February 28, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02706 Filed 2–6–13; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6)(iii). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6)(iii).

[16] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68807; File No. SR–NSX–2013–02]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Adopt a New Order Type Called the ''Auto-Ex Only'' Order

February 1, 2013.

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 January 23, 2013, National Stock Exchange, Inc. (''NSX'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to: (1) add new definitions to clarify its Automatic Execution Mode of order interaction (''Auto-Ex''); and (2) implement a new order type called ''Auto-Ex Only,'' which would only interact with orders entered though Auto-Ex mode.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nsx.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to: (1) add new definitions to clarify Auto-Ex mode; and (2) implement a new order type called the ''Auto-Ex Only'' order under NSX Rule 11.11(c)(13), which would allow a User [3] to submit an order that will only interact with orders entered through NSX's Auto-Ex mode.

Auto-Ex Only Order Type

On August 31, 2006, the Securities and Exchange Commission (the ''SEC'' or ''Commission'') approved amendments to NSX trading rules to provide for a price-time priority market with two modes of order interaction: (1) Auto-Ex and (2) Order Delivery.[4] Every User of the Exchange's trading system, NSX BLADE® (''Blade''), is eligible to use the Auto-Ex mode, under which Blade matches and executes like-priced orders (including against orders entered via Order Delivery mode) that are resting on the NSX Book [5] in accordance with the process described in Exchange Rule 11.13(b)(1). Unlike Auto-Ex, a User must meet certain eligibility standards prior to submitting displayed and undisplayed orders using Order Delivery Mode (''Order Delivery Participant'').[6]

An incoming marketable order would be executed immediately against contra-side orders entered via Auto-Ex mode resting in the NSX Book. However, that same incoming marketable order may experience a delay if matched against an order resting on the NSX Book that was entered by an Order Delivery Participant via Order Delivery mode. The potential delays are due to [sic] Exchange sending an Order Delivery Notification [7] to the Order Delivery Participant that posted the order requiring them to execute a potential match. The Order Delivery Participant must respond within defined time frames set by the Exchange with a complete fill, a partial fill, or instruction to cancel in full.[8]

To avoid such delays, the Exchange proposes to implement the Auto-Ex Only order, a new order type that would allow Users to submit an immediate-or-cancel (''IOC'') limit or market order with ''Auto-Ex Only'' handling instructions. Auto-Ex Only orders would be executed solely against orders with price-time priority entered via Auto-Ex mode and posted to the NSX Book. An Auto-Ex Only order would not interact with any orders resting on the NSX Book entered via Order Delivery Mode nor would it be routed away to another trading center. Like an IOC order,[9] an unexecuted portion of an Auto-Ex Only order would be cancelled if not fully matched for execution against Auto-Ex orders with price/time priority on the NSX Book.

The Exchange notes that its price/time priority and order execution rules [10] would limit an Auto-Ex Only Order's ability to interact with certain undisplayed orders. In addition, orders entered via Order Delivery mode with price time priority may also inhibit an Auto-Ex Only order's ability to interact with undisplayed liquidity. Specifically, an Auto-Ex Only order would first execute against displayed orders on the NSX Book. An Auto-Ex Only order could be precluded from interacting with an undisplayed order (*i.e.,* a Zero Display Reserve Order [11]) entered via Auto-Ex mode if the undisplayed order shares a price point with an order entered via Order Delivery mode.[12] Similarly, an order entered via Order Delivery mode could also prevent an incoming Auto-Ex Only order from interacting with the undisplayed portion of a Reserve Order [13] under circumstances in which the order entered via Order Delivery mode has price/time priority. Like displayed orders, the displayed portion of a Reserve Order will interact against incoming Auto-Ex Only orders only to the extent that there are no orders entered via Order Delivery mode in the NSX Book with price/time priority.

Lastly, the Exchange notes that Users may not rely on the Auto-Ex Only order for compliance with Rule 611 of Regulation NMS because the Auto-Ex Only order will not interact with orders entered via Order Delivery mode that may be deemed ''protected quotations'' on the Exchange.[14]

The following examples describe the functionality of the proposed Auto-Ex Only order. Each example lists orders

[3] A ''User'' is any ETP Holder or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.9. *See* Exchange Rule 1.5(U).

[4] *See* Securities Exchange Act Release No. 54391 (August 31, 2006), 71 FR 52836 (September 7, 2006) (SR–NSX–2006–08). The Exchange's two modes of order interaction are described in NSX Rule 11.13(b).

[5] Exchange Rule 1.5 defines ''NSX Book'' as ''the System's electronic fie [sic] of orders.''

[6] *See* NSX Rule 11.13(b)(2) and the Interpretations and Policies thereto. Order Delivery Participants typically submit their orders as ''Post Only'' in order to preclude acting as a liquidity taker (in Auto-Ex) and to prevent the Exchange from routing the order away.

[7] An Order Delivery Notification refers to a message sent by the Exchange to the Order Delivery Participant communicating the details of the full or partial quantity of an inbound contra-side order that potentially may be matched within the System for execution against an order entered via Order Delivery mode.

[8] *See* NSX Rule 11.13(b)(2) and the Interpretations and Policies thereto.

[9] Under NSX Rule 11.11(b)(1), an IOC order is a limit order that is to be executed in whole or in part as soon as such order is received, and the portion not so executed is to be treated as cancelled. An order designated as IOC is not eligible to be routed away pursuant to NSX Rule 11.15.

[10] *See* NSX Rule 11.14(a) and, with respect to Reserve Orders (including Zero Display Reserve Orders), NSX Rule 11.14(a)(4).

[11] *See* NSX Rule 11.11(c)(2)(A). A User may enter a Reserve Order with zero display quantity, in which case the Reserve Order will be known as a ''Zero Display Reserve Order.''

[12] An Auto-Ex Only order would interact with an undisplayed order where an order entered via Order Delivery mode is also undisplayed and has priority behind a displayed order not entered via Order Delivery mode. *See* Example 4 *infra.*

[13] Under Exchange Rule 11.11(c)(2), a Reserve Order is defined as a ''limit order with a portion of the quantity displayed (''displayed quantity'') and with a reserve portion of the quantity (''reserve quantity'') that is not displayed.''

[14] Rule 611 of Regulation NMS, among other things, requires a trading center to establish, maintain, and enforce written policies and procedures reasonably designed to prevent ''trade-throughs''—the execution of trades at prices inferior to protected quotations displayed by other trading centers. To be protected, a quotation must be immediately and automatically accessible. 17 CFR 242.611. An Auto-Ex-Only order cannot be used as an Inter-market Sweep Order.

resting in the NSX Book in price/time priority.

Example One:

National Best Bid and Offer (''NBBO''): 134.50–134.51

Bids on the NSX Book:

134.50 × 400 (Order Delivery)
134.50 × 200 (Auto-Ex)

Incoming Order:

Limit Order to sell 400 at 134.50

Result: Currently, the Exchange would match the incoming limit order to sell 400 shares at 134.50 against the order entered via Order Delivery mode and send an Order Delivery Notification to the Order Delivery Participant that posted the order. A potential delay may occur while awaiting the Order Delivery Participant's response with a complete fill, a partial fill, or instruction to cancel in full.

If submitted as a proposed Auto-Ex Only order, the entire order will be cancelled (like an IOC order) because the order is not eligible to execute against the order entered via Order Delivery mode with price/time priority ahead of the Auto-Ex order resting on the NSX Book. A User sending an Auto-Ex Only order would receive an immediate cancellation and avoid the delay inherent in otherwise interacting with an order entered via Order Delivery.

Example Two:

NBBO: 134.50–134.51

Bids on the Exchange Book:

134.50 × 400 (Auto-Ex mode)
134.50 × 200 (Order Delivery mode)

Incoming Order:

Limit Order to sell 400 at 134.50

Result: Currently, an incoming limit order to sell 400 shares at 134.50 will be fully executed at 134.50 against the displayed Auto-Ex order of 400 shares that is resting at the top of the NSX Book. The system would operate the same under these circumstances, regardless of which order type was selected, because the only resting order that could interact with the incoming order was entered via Auto-Ex mode.

Example Three:

NBBO: 134.50–134.51

Bids on the Exchange Book:

134.50 × 400 (Auto-Ex mode)
134.50 × 200 (Order Delivery mode)

Incoming Order:

Limit Order to sell 600 at 134.50

Result: Currently, an incoming limit order to sell 600 shares will execute at 134.50 against the 400 share Auto-Ex order resting at the top of the NSX Book. The Exchange would then match the remaining 200 shares against the order entered via Order Delivery mode and send an Order Delivery Notification to the Order Delivery Participant that posted the order. A potential delay may occur while awaiting the Order Delivery Participant's response with a complete fill, a partial fill, or instruction to cancel in full.

If submitted as a proposed Auto-Ex Only order, the incoming limit order to sell 600 shares will receive a partial fill of 400 shares at 134.50 against the order entered via Auto-Ex mode at the top of the NSX Book, and the remaining balance will be cancelled because, as per its instructions, it could not interact with the resting order entered via Order Delivery mode with second-in-time priority.

Example Four:

NBBO: 134.50–134.51

Bids on the Exchange Book:

Midpoint Peg × 500 (Auto-Ex mode/Dark)
134.50 × 400 (Order Delivery mode)
134.50 × 200 (Auto-Ex mode)

Incoming Order:

Limit Order to sell 1000 at 134.50

Result: Currently, an incoming limit order to sell 1000 shares priced at 134.50 would execute against the Midpoint Peg Dark Auto-Ex order of 500 shares at 134.505.

The Exchange would then match the 400 shares at a price of 134.50 against the order entered via Order Delivery mode and send an Order Delivery Notification to the Order Delivery Participant that posted the order. A potential delay may occur while awaiting the Order Delivery Participant's response with a complete fill, a partial fill, or instruction to cancel in full. The 100 shares at a price of 134.50 would then execute against the 200 share order ender [sic] via Auto-Ex mode with third-in-time priority.

If submitted as an Auto-Ex Only order, the incoming limit order to sell 1000 shares will receive a partial fill of 500 shares at 134.505 against the Midpoint Peg Dark Auto-Ex order with first price priority on the NSX Book and the remaining balance of 500 shares will be canceled because, as per its instructions, it cannot interact with the order entered via Order Delivery mode that has next price/time priority. The Midpoint Peg Dark Auto-Ex order executes first because, even though it is a Dark order, it is an Auto-Ex order with first (price) priority.

Example Five:

NBBO: 134.51–134.52

Bids on the Exchange Book:

134.50 × 400 (Auto-Ex mode)
134.50 × 200 (Order Delivery mode)

Incoming Order:

Limit Order to sell 1000 at 134.50

Result: Currently, an incoming limit order to sell 1000 shares at 134.50 would be routed to the away market to be matched against the protected NBBO. If submitted as an Auto-Ex Only order, an incoming limit order to sell any amount, will be cancelled because it would otherwise trade through the NBBO in violation of Rule 611 of Regulation NMS [15] and Auto-Ex Only orders, as per their instructions, are not to be routed away to another market center.

Example Six:

NBBO: 134.50–134.51

Bids on the Exchange Book:

134.50 × 400 (Auto-Ex mode)
134.50 × 800 (Auto-Ex mode)
134.50 × 600 (Auto-Ex mode)
134.50 × 200 (Order Delivery mode)
134.50 × 400 (Auto-Ex mode)

Incoming Order:

Limit Order to sell 5000 shares at 134.50

Result: Currently, an incoming limit order to sell 5000 shares at 134.50 would execute 2200 shares in the NSX Book at 134.50. The Exchange would then match 200 shares at a price of 134.50 against the order entered via Order Delivery mode and send an Order Delivery Notification to the Order Delivery Participant that posted the order. A potential delay may occur while awaiting the Order Delivery Participant's response with a complete fill, a partial fill, or instruction to cancel in full. The remaining 2600 shares would route to an away market to be matched against the protected NBBO in compliance with Rule 611 of Regulation NMS.[16]

If submitted as an Auto-Ex Only order, an incoming limit order to sell 5000 shares at 134.50 will receive a partial fill for 1800 shares at 134.50 by being matched against the top three orders on NSX Book, each of which was entered via Auto-Ex mode. The remaining shares will be canceled because the order, as per its instructions, is not eligible for execution against the order entered via Order Delivery that is next in priority.

Example Seven:

NBBO: 134.50–134.52

Bids on the NSX Book:

134.50 × 400 (Auto-Ex mode)
134.50 × 200 (Order Delivery mode)

Incoming Order:

Market Order to sell 600 shares at 134.50

Result: Currently, an incoming market order to sell 600 shares at 134.50 would execute 400 shares against the order

[15] 17 CFR 242.611.

[16] 17 CFR 242.611.

entered via Auto-Ex mode resting in the NSX Book at 134.50. The Exchange would then match the remaining 200 shares at a price of 134.50 against the order entered via Order Delivery mode and send an Order Delivery Notification to the Order Delivery Participant that posted the order. A potential delay may occur while awaiting the Order Delivery Participant's response with a complete fill, a partial fill, or instruction to cancel in full.

If submitted as an Auto-Ex Only order, an incoming market order to sell 600 shares will execute only against the Auto-Ex order for 400 shares at 134.50. The remaining unexecuted shares will cancelled because the order, as per its instructions, is not eligible for execution against the order entered via Order Delivery mode that is next in priority.

Example Eight:

NBBO: 134.50–134.51

Bids on the Exchange Book:

134.50 × 100/500 (Auto-Ex mode/ Reserve Order showing 100 displayed and 500 undisplayed)

134.50 × 200 (Auto-Ex mode)

134.50 × 400 (Order Delivery mode)

Incoming Order:

Limit Order to sell 1000 at 134.50

Result: Currently, an incoming limit order to sell 1000 shares priced at 134.50 would execute 100 shares at 134.50 against the Reserve Order's displayed quantity; would execute 200 at 134.50 against the second-priority Auto-Ex order. The Exchange would then match 400 shares at a price of 134.50 against the order entered via Order Delivery mode and send an Order Delivery Notification to the Order Delivery Participant that posted the order. A potential delay may occur while awaiting the Order Delivery Participant's response with a complete fill, a partial fill, or instruction to cancel in full. On the next three passes through the NSX Book (and assuming a fill of 400 shares against the order entered via Order Delivery mode), the balance of the incoming order of 300 shares would be filled (in 100 lot increments on each pass/refresh) at 134.50 against the refreshed, displayed portion of the Reserve Order.

If submitted as An Auto-Ex Only order, an incoming limit order to sell 1000 shares will receive a fill of 100 shares at 134.50 against the displayed portion of the Auto-Ex Reserve Order; a fill of 200 shares at 134.50 against the next Auto-Ex order with second-in-time priority; and the remaining balance of 700 shares will cancelled because, as per its instructions, it cannot interact with the order entered via Order Delivery mode that has next price/time priority. The displayed portion only of the Auto-Ex Reserve Order executes first because it has first time priority, but the balance of the Reserve Order is not matched for execution because the remaining portions of the Reserve Order would refresh and become displayed with a time priority after the resting order entered via Order Delivery mode, the presence of which cancels the unfilled balance of the Auto-Ex Only order before it can be matched against the refreshed portions of the Reserve Order.

Rationale for Auto-Ex Only Order

The proposed Auto-Ex Only order will benefit Users by allowing them to interact only with orders entered via Auto-Ex mode, thereby avoiding the delays associated with interacting with orders entered via Order Delivery mode. Currently, when an incoming Auto-Ex order is matched against an order entered via Order Delivery mode, the Exchange sends an Order Delivery Notification to the Order Delivery Participant that posted the order. The incoming Auto-Ex order may experience a potential delay while awaiting the Order Delivery Participant's response with a complete fill, a partial fill, or instruction to cancel in full. Conversely, an Auto-Ex Only order would provide Users with a quicker response by avoiding the processing time associated with potential interaction with [sic] resting order entered via Order Delivery mode.

Proposed Definitions

Lastly, the Exchange proposes to amend NSX Rule 1.5 and 11.11 to include definitions for Auto-Ex Mode and Auto-Ex Orders. First, the Exchange proposes to define ''Automatic Execution Mode'' under Exchange Rule 1.5 as ''[t]he mode of order interaction on the Exchange as described in Rule 11.13(b)(1).'' Second, the Exchange proposes to define ''Auto-Ex Order'' under Exchange Rule 11.11(c)(11) as ''[a] limit or market order that is automatically executed by the System against any marketable contra side order as in the manner described in Rule 11.13(b)(1).'' As discussed earlier, the Commission approved in 2006 amendments to NSX trading rules to provide for a price-time priority market with two modes of order interaction: (1) Auto-Ex and (2) Order Delivery.[17] These definitions are meant to add clarity to Exchange Rules and improve the ability to reference Auto-Ex mode elsewhere in future amendments to Exchange rules.

2. Statutory Basis

The Exchange believes the proposed Auto-Ex Only order is consistent with Section 6 of the Act,[18] and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[19] Specifically, the Exchange believes the proposed Auto-Ex Only order furthers the objective of Section 6(b)(5) of the Act[20] because it promotes just and equitable principles of trade, removes impediments to, and perfects the mechanism of a free and open market and a national market system. The proposed Auto-Ex Only order allows Users to choose to only interact with orders entered via Auto-Ex mode, thereby avoiding the delays associated with interacting with orders entered via Order Delivery mode. Currently, when an incoming Auto-Ex order is matched against an order entered via Order Delivery mode, the Exchange sends an Order Delivery Notification to the Order Delivery Participant who posted the order alerting them of a potential match. The incoming Auto-Ex order may experience a potential delay while awaiting the Order Delivery Participant's response with a complete fill, a partial fill, or instruction to cancel in full. On the contrary, an Auto-Ex Only order would provide Users with a quicker response by interacting only with orders entered via Auto-Ex mode, thereby avoiding the processing delays associated with [sic] potential interaction with [sic] resting order entered via Order Delivery mode. Therefore, the Exchange believes the quicker response times resulting from the use of the Auto-Ex Only order promotes just and equitable principles of trade, removes impediments to, and perfects the mechanism of a free and open market and a national market system.

Lastly, the Exchange believes the proposed definitions under Exchange Rules 1.5 and 11.11 are consistent with Section 6(b)[21] of the Act, in general, and furthers the objectives of Section 6(b)(5)[22] in that they are designed to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and a national market system. The Exchange believes that adding these definitions will add clarity to the Exchange's Rules and, therefore,

[17] *See* Exchange Act Release No. 54391, *supra* note 4.

[18] 15 U.S.C. 78f.

[19] 15 U.S.C. 78f(b).

[20] 15 U.S.C. 78f(b)(5).

[21] 15 U.S.C. 78f(b).

[22] 15 U.S.C. 78f(b)(5).

promotes just and equitable principles of trade, removes impediments to, and perfects the mechanism of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed Auto-Ex Only order will benefit Users by allowing them to interact only with orders entered via Auto-Ex mode, thereby avoiding the delays associated with interacting with orders entered via Order Delivery mode. The proposed definitions under Exchange Rules 1.5 and 11.11 are meant to simply add clarity to Exchange rules. Therefore, the Exchange believes the proposed Auto-Ex Only Order and definitions under Exchange Rules 1.5 and 11.11 do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NSX–2013–02 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NSX–2013–02. 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number *SR–NSX–2013–02* and should be submitted on or before February 28, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02708 Filed 2–6–13; 8:45 am]

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[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68817; File No. SR–MIAX–2013–03]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the MIAX Options Fee Schedule

February 1, 2013.

Pursuant to the provisions of 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 January 29, 2013, Miami International Securities Exchange LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a 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 is filing a proposal to amend the MIAX Options Fee Schedule (''Fee Schedule'') to establish fees for the MIAX Clearing Trade Drop Port, a connection to a messaging interface that will provide real-time trade clearing information to the participants to a trade on MIAX and to the participants' respective clearing firms.

While changes to the Fee Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on February 1, 2013.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.miaxoptions.com/filter/wotitle/rule_filing,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to establish a single monthly port fee of $0.0030 per executed contract for the MIAX Clearing Trade Drop (''CTD''), a messaging interface that will provide real-time trade clearing information to the participants to a trade on MIAX and to the participants' respective clearing firms. The Exchange proposes to assess a single per-contract monthly fee to entitled users of the ports, regardless of the number of ports used by a Member or member organization, their clearing firms, and other third-party entities as requested by the Member.

The Exchange originally filed SR–MIAX–2013–03 on January 17, 2013. The instant proposal replaces that filing in its entirety.

MIAX currently assesses fees for Exchange access and services used by Members, Service Bureaus [3] and Extranet Providers.[4] Such Exchange access is gained through ''Ports.'' MIAX currently assesses monthly Port Fees for the Financial Information Exchange (''FIX'') [5] on Electronic Exchange Members (''EEMs''),[6] based upon the number of FIX Ports used by the EEM submitting orders to MIAX. MIAX also currently assesses monthly Port Fees for the MIAX Express Interface (''MEI'') [7] on Market Makers, based upon the number of MIAX matching engines [8] used by the Market Maker, which allows Market Makers to submit electronic quotes to the Exchange.

MIAX proposes to establish a new Port Fee for the MIAX CTD. CTD provides Exchange Members, their clearing firms, and other third-party entities as requested by the Member with real-time clearing trade updates. The updates contain the Member's clearing trade messages on a low latency, real-time basis. The trade messages are routed to a CTD connection containing certain information. The information includes, among other things, the following: (i) Trade date and time; (ii) symbol information; (iii) trade price/size information; (iv) member type (for example, and without limitation, Market Maker, Electronic Exchange Member, Broker-Dealer); and (v) Exchange Member Participant Identifier (''MPID'') for each side of the transaction, including clearing member MPID.

MIAX will assess a CTD fee of $0.0030 per executed contract side for real-time clearing information that is transmitted to one or more CTD ports to which users of such CTD ports are entitled. The executing Member or member organization, their clearing firms, and other third-party entities as requested by the Member are entitled to the use of the CTD port(s) by way of using the executing or clearing member's MPID, OCC Numbers, and/or CMTA Number.

Unlike FIX and MEI Port Fees, the CTD Port Fee will not be based on the number of Ports or connections a Member or member organization has; instead, the CTD Port Fee will be assessed monthly, based upon the number of contracts executed and cleared in the affected month that are sent through the CTD port(s) used by the entitled executing or clearing Member or member organization, their clearing firms, and other third-party entities as requested by the Member, regardless of the number of ports or connections used by the Member or member organization. The Exchange intends to assess the fee for the data and information used in trading options contracts and ongoing entitlement management and configuration, and not for the amount of connectivity to which the Member or member organization subscribes.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [9] in general, and furthers the objectives of Section 6(b)(4) of the Act [10] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members.

The Exchange believes that this amendment is equitable and not unfairly discriminatory because the Exchange is uniformly assessing the CTD fees on all members and member organizations that wish to subscribe to it.

The Exchange believes that the proposed CTD Port Fee is reasonable because it is within the range of similar fees charged by other exchanges, as cited below, and because the CTD data is offered as an optional service for members and member organizations who wish to obtain the data on a real-time basis.

B. Self-Regulatory Organization's Statement on Burden on Competition

MIAX does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Unilateral action by MIAX in establishing fees for services provided to its Members and others using its facilities will not have an impact on competition. As a new entrant in the already highly competitive environment for equity options trading, MIAX does not have the market power necessary to set prices for services that are unreasonable or unfairly discriminatory in violation of the Act. MIAX's proposed CTD Port Fee, as described herein, is comparable to fees charged by other options exchanges for the same or similar services.[11]

Additionally, the CTD Port is offered as an additional service for members and member organizations at a price that is equal to or within the range of prices for similar ports offered by other exchanges, and therefore the Exchange believes that the price of the port fee does not impose a burden on competition.

[3] A Service Bureau is a technology provider that offers and supplies technology and technology services to a trading firm that does not have its own proprietary system. The technology and technology services supplied by Service Bureaus includes both software applications and connectivity, thus Service Bureaus are subject to both API testing and certification and Network testing and certification.

[4] An Extranet Provider is a technology provider that connects with MIAX systems and in turn provides such connectivity to MIAX participants that do not connect directly with MIAX. Extranet Providers do not provide software interfaces with MIAX software applications, thus Extranet Providers are not subject to API testing and certification.

[5] A FIX Port allows EEMs Members to electronically send orders in all products traded on the Exchange.

[6] The term ''Electronic Exchange Member'' means the holder of a Trading Permit who is not a Market Maker. Electronic Exchange Members are deemed ''members'' under the Act. *See* Exchange Rule 100.

[7] MEI is a connection to MIAX systems that enables Market Makers to submit electronic quotes to MIAX.

[8] A ''matching engine'' is a part of the MIAX electronic system that processes options quotes and trades on a symbol-by-symbol basis. Some matching engines will process option classes with multiple root symbols, and other matching engines will be dedicated to one single option root symbol (for example, options on SPY will be processed by one single matching engine that is dedicated only to SPY options). A particular root symbol may only be assigned to a single designated matching engine. A particular root symbol may not be assigned to multiple matching engines.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

[11] For example, NASDAQ OMX PHLX LLC (''PHLX'') charges a Real-time Risk Management Fee of $.0030 per contract for members and member organizations receiving information on a real-time basis up to a maximum of two ports. *See* PHLX Pricing Schedule, Section VII(B). The MIAX proposal is also to assess a $0.0030 per contract fee for real-time information to CTD users, regardless of, and with no limitation on, the number of CTD Ports used.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Written comments were neither 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.[12] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. 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 Number SR–MIAX–2013–03 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2013–03. 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 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MIAX–2013–03, and should be submitted on or before February 28, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02747 Filed 2–6–13; 8:45 am]

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[12] 15 U.S.C. 78s(b)(3)(A)(ii).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68818; File No. SR–BX–2013–010]

Self-Regulatory Organizations; NASDAQ OMX BX Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend a Pilot Program Related to Rule 11890, entitled "Clearly Erroneous Transactions"

February 1, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1], and Rule 19b–4[2] thereunder, notice is hereby given that on January 31, 2013, NASDAQ OMX BX, Inc. ("Exchange" or "BX") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

BX is filing with the Commission a proposal to extend a pilot program related to Rule 11890, entitled "Clearly Erroneous Transactions." The Exchange also proposes to adopt new paragraph (g) to Rule 11890 in connection with the upcoming operation of the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the "Limit Up-Limit Down Plan" or "Plan").[3]

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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Transactions and to adopt new paragraph (g) to Rule 11890 in connection with upcoming operation of the Limit Up-Limit Down Plan.

Proposal To Extend Pilot

Portions of Rule 11890, explained in further detail below, are currently operating as a pilot program set to expire on February 4, 2013.[4] The Exchange proposes to extend the pilot program to September 30, 2013.

On September 10, 2010, the Commission approved, on a pilot basis, changes to Exchange Rule 11890 to provide for uniform treatment: (1) Of clearly erroneous transaction reviews in multi-stock events involving twenty or more securities; and (2) in the event transactions occur that result in the issuance of an individual stock trading pause by the primary market and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the "Limit Up-Limit Down Release").

[4] *See* Securities Exchange Act Release No. 67570 (August 2, 2012), 77 FR 47486 (August 8, 2012) (SR–BX–2012–056).

subsequent transactions that occur before the trading pause is in effect on the Exchange.[5] The Exchange also adopted additional changes to Rule 11890 that reduced the ability of the Exchange to deviate from the objective standards set forth in Rule 11890.[6] The Exchange believes the benefits to market participants from the more objective clearly erroneous transactions rule should continue on a pilot basis through September 30, 2013, which is the date that the Exchange anticipates that the phased implementation of the Limit Up-Limit Down Plan will be complete. As explained in further detail below, although the Limit Up-Limit Down Plan is intended to prevent transactions that would need to be nullified as clearly erroneous, the Exchange believes that certain protections should be maintained while the industry gains initial experience operating with the Limit Up-Limit Down Plan, including the provisions of Rule 11890 that currently operate as a pilot.

Proposed Limit Up-Limit Down Provision to Rule 11890

The Exchange proposes to adopt new paragraph (g) to Rule 11890, to provide that the existing provisions of Rule 11890 will continue to apply to all Exchange transactions, including transactions in securities subject to the Plan, other than as set forth in proposed paragraph (g). Accordingly, other than as proposed below, the Exchange proposes to maintain and continue to apply the Clearly Erroneous Transaction standards in the same way that it does today. Notably, this means that the Exchange might nullify transactions that occur within the price bands disseminated pursuant to the Limit Up-Limit Down Plan to the extent such transactions qualify as clearly erroneous under existing criteria. As an example, assume that a Tier 1 security pursuant to the Plan has a reference price pursuant to both the Plan and Rule 11890 of $100.00. The lower pricing band under the Plan would be $95.00 and the upper pricing band under the Plan would be $105.00. An execution could occur on the Exchange in this security at $96.00, as this is within the Plan's pricing bands. However, if subjected to review as potentially clearly erroneous, the Exchange would nullify an execution at $96.00 as clearly erroneous because it exceeds the 3% threshold that is in place pursuant to Rule 11890(a)(2)(C)(1) for securities priced above $50.00 (*i.e.,* with a reference price of $100.00, any transactions at or below $97.00 or above $103.00 could be nullified as clearly erroneous). Accordingly, this proposal maintains the status quo with respect to reviews of Clearly Erroneous Transactions and the application of objective numerical guidelines by the Exchange. The proposal does not increase the discretion afforded to the Exchange in connection with reviews of Clearly Erroneous Transactions.

The Limit Up-Limit Down Plan is designed to prevent executions from occurring outside of dynamic price bands disseminated to the public by the single plan processor as defined in the Limit Up-Limit Down Plan.[7] The possibility remains that the Exchange could experience a technology or systems problem with respect to the implementation of the price bands disseminated pursuant to the Plan. To address such possibilities, the Exchange proposes to adopt language to make clear that if an Exchange technology or systems issue results in any transaction occurring outside of the price bands disseminated pursuant to the Plan, a Senior Official of the Exchange, acting on his or her own motion or at the request of a third party, shall review and declare any such trades null and void. Absent extraordinary circumstances, any such action of the Senior Official of the Exchange shall be taken in a timely fashion, generally within thirty (30) minutes of the detection of the erroneous transaction. When extraordinary circumstances exist, any such action of the Senior Official of the Exchange must be taken by no later than the start of Regular Trading Hours[8] on the trading day following the date on which the execution(s) under review occurred. Although the Exchange will act as promptly as possible and the proposed objective standard (*i.e.,* whether an execution occurred outside the band) should make it feasible to quickly make a determination, there may be circumstances in which additional time may be needed for verification of facts or coordination with outside parties, including the single plan processor responsible for disseminating the price bands and other market centers. Accordingly, the Exchange believes it necessary to maintain some flexibility to make a determination outside of the thirty (30) minute guideline. In addition, the Exchange proposes that a transaction that is nullified pursuant to new paragraph (g) would be appealable in accordance with the provisions of Rule 11890(c). In addition, the Exchange proposes to make clear that in the event that a single plan processor experiences a technology or systems problem that prevents the dissemination of price bands, the Exchange would make the determination of whether to nullify transactions based on Rule 11890(a)–(f).

The Exchange believes that cancelling trades that occur outside of the price bands disseminated pursuant to the Plan is consistent with the purpose and intent of the Plan, as such transactions are not intended to occur in the first place. If transactions do occur outside of the price bands and no exception applies—which necessarily would be caused by a technology or systems issue—then the Exchange believes the appropriate result is to nullify such transactions.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[9] In particular, the proposal is consistent with Section 6(b)(5) of the Act,[10] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system. The Exchange believes that the pilot program promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. More specifically, the Exchange believes that the extension of the pilot would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Although the Limit Up-Limit Down Plan will be operational during the same time period as the proposed extended pilot, the Exchange believes that maintaining the pilot for at least through the phased implementation of the Plan is operational will help to protect against unanticipated

[5] *See* Securities Exchange Act Release No. 63490 (December 9, 2010), 75 FR 78299 (December 15, 2010) (SR–BX–2010–086).

[6] *Id.*

[7] *See* Limit Up-Limit Down Release, *supra* note 3.

[8] Regular Trading Hours commence at 9:30 a.m. Eastern Time. *See* Exchange Rule 11890(a)(2)(B).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

consequences. To that end, the extension will allow the Exchange to determine whether Rule 11890 is necessary once the Plan is operational and, if so, whether improvements can be made. Further, the Exchange believes it consistent with the protection of investors and the public interest to adopt objective criteria to nullify transactions that occur outside of the Plan's price bands when such transactions should not have been executed but were due to a systems or technology issue.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change implicates any competitive issues. To the contrary, the Exchange believes that FINRA and other national securities exchanges are also filing similar proposals, and thus, that the proposal will help to ensure consistent rules across market centers.

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

Because the proposed rule change does not (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and Rule 19b–4(f)(6)(iii) thereunder.[12]

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program. For this reason, the Commission designates the proposed rule change to be operative upon filing.[13]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2013–010 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2013–010. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2013–010, and should be submitted on or before February 28, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02712 Filed 2–6–13; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6)(iii). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[13] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions and one extension to OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB)

Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov.*

(SSA)

Social Security Administration, DCRDP, Attn: Reports Clearance Director, 107 Altmeyer Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov.*

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than April 8, 2013. Individuals can obtain copies of the collection instruments by writing to the above email address.

1. *Certificate of Responsibility for Welfare and Care of Child Not in Applicant's Custody—20 CFR 404.330, 404.339–341 and 404.348–404.349—0960–0019.* Under the provisions of the Social Security Act (Act), non-custodial parents who are filing for spouse, mother, or father Social Security benefits based on having the child of a number holder or worker in their care must meet the in-care requirements the Act discusses. The in-care provision requires claimants have an entitled child under age 16 or disabled in their care. SSA uses Form SSA–781, Certificate of Responsibility for Welfare and Care of Child in Applicant's Custody, to determine if claimants meet the requirement. The respondents are applicants for spouse, mother's, or father's Social Security benefits.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–761	14,000	1	10	2,333

2. *Request for Change in Time/Place of Disability Hearing—20 CFR 404.914(c)(2) and 416.1414(c)(2)—0960–0348.* At the request of claimants or their representatives, SSA schedules evidentiary hearings at the reconsideration level for claimants of title II benefits or title XVI payments when we deny their claims for disability. When claimants or their representatives find they are unable to attend the scheduled hearing, they complete Form SSA–769 to request a change in time or place of the hearing. SSA uses the information as a basis for granting or denying requests for changes and for rescheduling disability hearings. Respondents are claimants or their representatives who wish to request a change in the time or place of their hearing.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–769	7,483	1	8	998

3. *Earnings Record Information—20 CFR 404.801–404.803 and 404.821–404.822—0960–0505.* SSA discovered as many as 70 percent of the wage reports we receive for children under age seven are actually the earnings of someone other than the child. To ensure we credit the correct person with the reported earnings, SSA verifies wage reports for children under age seven with the children's employers before posting to the earnings record. SSA uses Form SSA–L3231–C1, Request for Employer Information, for this purpose. The respondents are employers who report earnings for children under age seven.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–L3231–C1	20,000	1	10	3,333

4. *Wage Reports and Pension Information—20 CFR 422.122(b)—0960–0547.* Pension plan administrators annually file plan information with the Internal Revenue Service, which then forwards the information to SSA. SSA maintains and organizes this information by plan number, plan participant's name, and Social Security number. Under section *1131(a)* of the Act, pension plan participants are entitled to request this information from SSA. The Wage Reports and Pension Information regulation, *20 CFR 422.122(b)* of the *Code of Federal Regulations,* stipulates that before SSA disseminates this information, the requestor must first submit a written request with identifying information to SSA. The respondents are requestors of pension plan information.

Type of Request: Extension of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Requests for pension plan information	400	1	30	200

5. *Beneficiary Interview and Auditor's Observations Form—0960–0630* — SSA's Office of the Inspector General collects information through Form SSA–322, the Beneficiary Interview and Auditor's Observation form, to interview beneficiaries or their representative payees to determine if the payees are complying with their duties and responsibilities. SSA randomly selects Supplemental Security Income (SSI) recipients and Social Security beneficiaries who have representative payees as respondents for this collection.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–322	1,000	1	15	250

II. SSA submitted the information collections below to OMB for clearance. Your comments regarding the information collections would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than March 11, 2013. Individuals can obtain copies of the OMB clearance packages by writing to *OR.Reports.Clearance@ssa.gov.*

1. *Application for Widow's or Widower's Insurance Benefits—20 CFR 404.335–404.338, & 404.603—0960–0004.* Since SSA needs information to make a formal determination for entitlement to widow(er)'s benefits, we use the Form SSA–10–BK to determine whether an applicant meets the statutory and regulatory conditions for entitlement to widow(er)'s title II benefits. SSA employees interview individuals applying for benefits either face-to-face or via telephone and enter the information on the paper form or into the Modernized Claims System (MCS). The respondents are applicants for widow(er)'s benefits.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–10–BK Paper version	5,000	1	15	1,250
SSA–10–BK MCS version	449,000	1	14	104,767
Totals	454,000			106,017

2. *Statement for Determining Continuing Eligibility Supplemental Security Income Payment—20 CFR 416.204—0960–0145.* SSA uses Form SSA–8202–BK to conduct low and middle error profile telephone or face-to-face redetermination interviews with SSI recipients and representative payees. The information SSA collects during the interview is necessary to determine whether SSI recipients met and continue to meet all statutory and regulatory requirements for SSI eligibility and whether they received, and are still receiving, the correct payment amount.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–8202–BK	6,633	1	21	2,322
Modernized SSI Claims System	71,444	1	20	23,815
Totals	78,077			26,137

3. *Notice Regarding Substitution of Party Upon Death of Claimant—Reconsideration of Disability Cessation—20 CFR 404.917–404.921 and 416.1407–416.1421—0960–0351.* When a claimant dies before we make a determination on that person's request for reconsideration of a disability cessation, SSA seeks a qualified substitute party to pursue the appeal. If SSA locates a qualified substitute party, the agency uses Form SSA–770 to collect information about whether to pursue or withdraw the reconsideration request. We use this information as the basis for the decision to continue or discontinue with the appeals process. Respondents are substitute applicants who are pursuing a reconsideration request for a deceased claimant.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–770	1,200	1	5	100

Dated: February 4, 2013.

Faye Lipsky,

Reports Clearance Director, Social Security Administration.

[FR Doc. 2013–02727 Filed 2–6–13; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 8180]

Advisory Committee on Historical Diplomatic Documentation; Notice of Meeting

SUMMARY: The information regarding the meeting of the Advisory Committee on Historical Diplomatic Documentation on February 25–26 has changed from that provided in the previous **Federal Register** Notice at 78 FR 1298, January 8, 2013.

The Committee's sessions in the morning and afternoon of Monday, February 25, 2013 will be closed in accordance with Section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463). The agenda calls for discussions of agency declassification decisions concerning the *Foreign Relations* series and other declassification issues. These are matters properly classified and not subject to public disclosure under 5 U.S.C. 552b(c)(1) and the public interest requires that such activities be withheld from disclosure.

The Committee will meet in open session from 10:15 a.m.–11:00 a.m. on Tuesday, February 26, 2013, in the Department of State, 2201 ''C'' Street NW., Washington, DC, in Conference Room 1205, to discuss declassification and transfer of Department of State records to the National Archives and Records Administration and the status of the *Foreign Relations* series.

Prior notification and a valid government-issued photo ID (such as driver's license, passport, U.S. government or military ID) are required for entrance into the building. Members of the public planning to attend the meeting on February 26, 2013, RSVP to Colby Prevost, Office of the Historian (202–663–1147) no later than February 18, 2013. When responding, please provide date of birth, valid government-issued photo identification number and type (such as driver's license number/state, passport number/country, or U.S. government ID number/agency or military ID number/branch), and relevant telephone numbers. If you cannot provide one of the specified forms of ID, please consult with Colby Prevost for acceptable alternative forms of picture identification.

In addition, any requests for reasonable accommodation should be made no later than February 18 for the February 26th meeting. Requests for reasonable accommodation received after those dates will be considered, but might be impossible to fulfill.

Personal data is requested pursuant to Public Law 99–399 (Omnibus Diplomatic Security and Antiterrorism Act of 1986), as amended; Public Law 107–56 (USA PATRIOT Act); and Executive Order 13356. The purpose of the collection is to validate the identity of individuals who enter Department facilities. The data will be entered into the Visitor Access Control System (VACS–D) database. Please see the Security Records System of Records Notice (State-36) at *http://www.state.gov/documents/organization/103419.pdf,* for additional information.

Questions concerning the meeting should be directed to Stephen P. Randolph, Executive Secretary, Advisory Committee on Historical Diplomatic Documentation, Department of State, Office of the Historian, Washington, DC, 20520, telephone (202) 663–1123, (email *history@state.gov*).

Dated: January 30, 2013.

Stephen P. Randolph,

Executive Secretary, Advisory Committee on Historical, Diplomatic Documentation, Department of State.

[FR Doc. 2013–02780 Filed 2–6–13; 8:45 am]

BILLING CODE 4710–11–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Request To Release Airport Property at the Dallas/Fort Worth International Airport, DFW Airport, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Request of Release for Permanent Easement of Airport Property.

SUMMARY: The FAA proposes to rule and invite public comment on the request for permanent easement at the Dallas/Fort Worth International Airport under the provisions of Section 125 of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR 21).

DATES: Comments must be received on or before March 11, 2013.

ADDRESSES: Comments on this application may be mailed or delivered to the FAA at the following address: Mr. Mike Nicely, Manager, Federal Aviation Administration, Southwest Region, Airports Division, Texas Airports Development Office, ASW–650, Fort Worth, Texas 76137–0650.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Jeff Fegan, Chief Executive Office, at the following address: Dallas/Fort Worth International Airport, Executive Office, P.O. Box 619428, DFW Airport, Texas 75261.

FOR FURTHER INFORMATION CONTACT: Mr. Rodney Clark, Senior Program Manager, Federal Aviation Administration, Texas Airports Development Office, ASW–651, 2601 Meacham Boulevard, Fort Worth, Texas 76137–0650, Telephone: (817) 222–5659, email: *Rodney.Clark@faa.gov*, fax: (817) 222–5989.

The request to release property may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA invites public comment on the request to release property at the Dallas/Fort Worth International Airport under the provisions of the AIR 21. On October 1, 2012, the FAA determined that the request for permanent easement at Dallas/Fort Worth International Airport, submitted by the Airport, met the procedural requirements of the Federal Aviation Regulations, Part 155. The FAA may approve the request, in whole or in part, no later than March 31, 2013.

The following is a brief overview of the request:

The Dallas/Fort Worth International Airport requests the release for permanent easement of 20.9048 acres of non-aeronautical airport property. The land was acquired by the Cities of Dallas and Fort Worth for use as an airport. The funds generated by the release will be used to improve public access to the Airport.

Any person may inspect the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT.**

In addition, any person may, upon request, inspect the application, notice and other documents relevant to the application in person at the Dallas/Fort Worth International Airport, telephone number (972) 973–5200.

Issued in Fort Worth, Texas on January 31, 2013.

Kelvin L. Solco,

Manager, Airports Division.

[FR Doc. 2013–02737 Filed 2–6–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2012–0099]

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System

In accordance with Part 235 of Title 49 Code of Federal Regulations and 49 U.S.C. 20502(a), this document provides the public notice that by a document dated November 30, 2012, the Norfolk Southern Corporation (NS) has petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of a signal system. FRA assigned the petition Docket Number FRA–2012–0099.

Applicant: Norfolk Southern Corporation, Mr. Brian Sykes, Chief Engineer C&S Engineering, 1200 Peachtree Street NE., Atlanta, GA 30309.

NS seeks approval of the proposed discontinuance and removal of the existing control points and crossover switches at Spring Lane, Milepost (MP) N 607.5, and Vera, MP N 603.9, on the Kenova District in Portsmouth, OH. A new traffic control system control point with two crossovers will be created near MP N 608.0. The remaining single switch from each retired control point will remain as a hand-throw switch. NS seeks to make these proposed changes to modernize its signal equipment and install Positive Train Control.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Ave. SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by March 25, 2013 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). See *http://www.regulations.gov/#!privacyNotice* for the privacy notice of regulations.gov or interested parties may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477).

Issued in Washington, DC, on February 4, 2013.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2013–02766 Filed 2–6–13; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2000–8267]

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that by a document dated October 15, 2012, the Oil Creek and Titusville Lines (OCTL) has petitioned the Federal Railroad Administration (FRA) for an extension of Waiver Docket Number FRA–2000–8267.

Specifically, OCTL seeks to extend a waiver for its ALCO Model S–2 locomotive, Number OCTL 85, from 49 CFR 223.11—*Requirements for existing locomotives,* which requires safety glazing for existing locomotives.

FRA issued the initial waiver that granted OCTL relief on June 18, 2002, and FRA extended the waiver on October 12, 2007. OCTL 85 has been out of service since March 2012. The type of service in which the subject locomotive will be used has not changed since the original waiver. Additionally, OCTL states that OCTL 85's operations will continue to remain limited to Titusville, PA.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov/.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by March 25, 2013 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). See *http://www.regulations.gov/#!privacyNotice* for the privacy notice of regulations.gov or interested parties may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477).

Issued in Washington, DC, on February 4, 2013.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2013–02770 Filed 2–6–13; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2012–0081]

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that by a document dated September 25, 2012, the Kiski Junction Railroad (KJR) has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 223 (Safety Glazing Standards—Locomotives, Passenger Cars and Cabooses). FRA assigned the petition Docket Number FRA–2012–0081.

KJR has petitioned FRA for a waiver to operate passenger excursion equipment on the entire length of its existing railroad without compliant FRA safety glazing, as required by 49 CFR part 223. KJR was previously granted a waiver by FRA to operate this equipment on its Bagdad Line between Schenley and Leechburg, PA, in Docket Number RSGM–96–11. KJR recently expanded its operations and added 7 additional miles of track between Schenley, PA, and Ford City, with the assistance of State and Federal funding. KJR has designated this rail segment as the Allegheny Line. The Allegheny Line's maximum authorized speed is 25 mph, and it complies with FRA Class 2 track standards. The Bagdad Line's maximum authorized speed remains at 10 mph.

KJR requests a permanent waiver of compliance from the glazing requirements set forth in 49 CFR part 223 for one locomotive, one passenger car, and three cabooses—all of which are currently equipped with shatterproof safety glass. Locomotive KJR 7135, an ALCO S–1 diesel electric 660 HP, was built in 1943 as U.S. Navy 7135. Passenger Coach KJR 1154 was built in the 1920s for the Central Railroad of New Jersey. Caboose KJR 200 was built in the 1960s for the New York Central Railroad. Caboose KJR 5, which is a widow caboose, was built for the Pittsburgh and Lake Erie Railroad. Caboose KJR 4, a cupola caboose, was built in 1958 for the Norfolk and Western Railroad. KJR is requesting this relief due to the prohibitive cost involved in retrofitting this equipment with FRA-certified glazing.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov/.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by March 25, 2013 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). See *http://www.regulations.gov/#!privacyNotice* for the privacy notice of regulations.gov or interested parties may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477).

Issued in Washington, DC, on February 4, 2013.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2013–02771 Filed 2–6–13; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2006–24812]

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that by a document dated July13, 2012, the BNSF Railway (BNSF) has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 232—Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment, End-of-Train Devices. FRA assigned the petition Docket Number FRA–2006–24812.

BNSF seeks a waiver of compliance from certain requirements of 49 CFR part 232. Specifically, BNSF requests to expand the scope of the existing waiver that granted relief from the maximum mileage and inspection requirements specified by 49 CFR 232.213—*Extended haul trains,* for certain trains identified in Exhibit A to its July 13, 2012, petition. These trains originate at various Powder River Basin coal mines and terminate at the following locations: Isugen, NE; Becker, MN; Breckenridge, MN; Dilworth, MN; Harrington, TX; and Holcomb, KS.

Given the increased demand for coal by the utility industry, BNSF believes that granting this relief will relieve congestion while maintaining high-quality inspections. The railroad also believes that the waiver's expanded scope will not compromise railroad safety.

In support of the expanded scope of the existing waiver, BNSF's petition further states that the additional extended haul trains modestly exceed the 1,500-mile extended haul threshold. As the trains covered by this request are the very same type of equipment as the trains that are presently subject to this waiver, BNSF believes that there is no anticipated deviation from the current high level of safety.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at

the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov/.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by March 25, 2013 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). See *http://www.regulations.gov/#!privacyNotice* for the privacy notice of regulations.gov or interested parties may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477).

Issued in Washington, DC, on February 4, 2013.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2013–02769 Filed 2–6–13; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 1103X]

Rusk County Rural Rail District—Abandonment Exemption—in Rusk County, TX

On January 18, 2013, the Rusk County Rural Rail District (RCRRD) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the prior approval requirements of 49 U.S.C. 10903 to abandon a 0.9-mile portion of its Henderson-Overton Branch Spur, between milepost 15.2 and milepost 16.1, in Rusk County, TX (the Line). The Line traverses U.S. Postal Service Zip Code 75652. There are no stations on the Line.

RCRRD states that, based on information in its possession, the Line contains no federally granted rights-of-way. Any documentation in RCRRD's possession will be made available to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued no later than May 8, 2013.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than May 18, 2013, or 10 days after service of a decision granting the petition for exemption, whichever occurs sooner. Each OFA must be accompanied by a $1,600 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following the abandonment of rail service and salvage of the Line, the Line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than February 27, 2013. Each trail use request must be accompanied by a $250 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to Docket No. AB 1103X and must be sent to: (1) Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001; and (2) C. Brian Cassidy and Lori Fixley Winland, Locke Lord LLP, 100 Congress Avenue, Suite 300, Austin, TX 78701. Replies to the petition are due on or before February 27, 2013.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Governmental Affairs and Compliance at (202) 245–0238 or refer to the full abandonment or discontinuance regulations at 49 CFR 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis (OEA) at (202) 245–0305. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by OEA will be served upon all parties of record and upon any agencies or other persons who comment during its preparation. Other interested persons may contact OEA to obtain a copy of the EA (or EIS). It is anticipated that the EA (or EIS) in this proceeding will be made available on or about February 12, 2013, and that comments will be due on or about March 4, 2013.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: February 4, 2013.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Derrick A. Gardner,

Clearance Clerk.

[FR Doc. 2013–02779 Filed 2–6–13; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–NEW]

Proposed Information Collection (Conduct the Point-of-Care Research Questionnaire) Activity: Comment Request

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Health Administration (VHA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed new collection, and allow 60 days for public comment in response to the

notice. This notice solicits comments on information needed to develop and implement a new research protocol in the VA.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before April 8, 2013.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov*; or to Cynthia Harvey-Pryor, Veterans Health Administration (10P7BFP), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420; or email: *cynthia.harvey-pryor@va.gov*. Please refer to ''OMB Control No. 2900–NEW (Conduct the Point-of-Care Research Questionnaire)'' in any correspondence. During the comment period, comments may be viewed online through the FDMS.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor (202) 461–5870 or FAX (202) 273–9381.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Conduct the Point-of-Care Research Questionnaire, VA Form 10–0557.

OMB Control Number: 2900–NEW (Conduct the Point-of-Care Research Questionnaire).

Type of Review: New collection.

Abstract: The data collected on VA Form 10–0557 will be used as a grant to evaluate patient and provider attitudes and willingness to participate in Point-of-Care Research (POC–R). POC–R is an intermediary approach to bridge the gap between clinical trials and observation studies. The POC–R provides a potential mechanism for improving the breadth and significant of clinical research programs in VA. The objectives of this study are twofold: (1) identify the barriers and facilitators to adoption of a Point-of-care research innovation program by assessing the perceptions and attitudes of patients; and (2) produce guidelines for VHA regarding implementation of POC–R.

Affected Public: Individuals or Households.

Estimated Annual Burden: 2,000 hours.

Estimated Average Burden Per Respondent: 15 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 8,000.

Dated: February 1, 2013.

By direction of the Secretary.

William F. Russo,

Deputy Director, Office of Regulations Policy and Management, Office of General Counsel, Department of Veterans Affairs.

[FR Doc. 2013–02789 Filed 2–6–13; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

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Part II

Environmental Protection Agency

40 CFR Parts 60 and 241

Commercial and Industrial Solid Waste Incineration Units: Reconsideration and Final Amendments; Non-Hazardous Secondary Materials That Are Solid Waste; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 60 and 241

[EPA–HQ–OAR–2003–0119 and EPA–HQ–RCRA 2008–0329; FRL–9764–1]

RIN 2060–AR15 and 2050–AG44

Commercial and Industrial Solid Waste Incineration Units: Reconsideration and Final Amendments; Non-Hazardous Secondary Materials That Are Solid Waste

AGENCY: Environmental Protection Agency.

ACTION: Final rule; notice of final action on reconsideration.

SUMMARY: This action sets forth the EPA's final decision on the issues for which it granted reconsideration in December 2011, which pertain to certain aspects of the March 21, 2011, final rule titled ''Standards of Performance for New Stationary Sources and Emissions Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units'' (CISWI rule). This action also includes our final decision to deny the requests for reconsideration with respect to all issues raised in the petitions for reconsideration of the final commercial and industrial solid waste incineration rule for which we did not grant reconsideration. Among other things, this final action establishes effective dates for the standards and makes technical corrections to the final rule to clarify definitions, references, applicability and compliance issues. In addition, the EPA is issuing final amendments to the regulations that were codified by the Non-Hazardous Secondary Materials rule (NHSM rule). Originally promulgated on March 21, 2011, the non-hazardous secondary materials rule provides the standards and procedures for identifying whether non-hazardous secondary materials are solid waste under the Resource Conservation and Recovery Act when used as fuels or ingredients in combustion units. The purpose of these amendments is to clarify several provisions in order to implement the non-hazardous secondary materials rule as the agency originally intended.

DATES: The May 18, 2011 (76 FR 28662), delay of the effective date amending subparts CCCC and DDDD at 76 FR 15703 (March 21, 2011) is lifted February 7, 2013. The amendments in this rule to 40 CFR part 60, subpart DDDD, are effective February 7, 2013, and to 40 CFR part 60, subpart CCCC, are effective August 7, 2013. The amendments in this rule to 40 CFR part 241 are effective April 8, 2013. The incorporation by reference of certain publications listed in that rule is effective February 7, 2013.

ADDRESSES: The EPA established a single docket under Docket ID Number EPA–HQ–OAR–2003–0119 for this action on the commercial and industrial solid waste incineration rule. The EPA also established a single docket under Docket ID Number EPA–HQ–RCRA–2008–0329 for this action on the non-hazardous secondary materials rule. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the EPA Docket Center, EPA West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744 and the telephone number for the Docket Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For further information regarding the commercial and industrial solid waste incineration reconsideration and final amendments, contact Ms. Toni Jones, Fuels and Incineration Group, Sector Policies and Programs Division (E143–05), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–0316; fax number: (919) 541–3470; email address: *jones.toni@epa.gov*, or Ms. Amy Hambrick, Fuels and Incineration Group, Sector Policies and Programs Division (E143–05), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–0964; fax number: (919) 541–3470; email address: *hambrick.amy@epa.gov*.

For further information regarding the Non-Hazardous Secondary Materials final rule, contact Mr. George Faison, Program Implementation and Information Division, Office of Resource Conservation and Recovery, 5303P, Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue NW., Washington, DC 20460–0002; telephone number: 703–305–7652; fax number: 703–308–0509; email address: *faison.george@epa.gov*.

I. Organization of This Document

The following outline is provided to aid in locating information in this preamble.

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A. Supplementary Information

Acronyms and Abbreviations. The following acronyms and abbreviations are used in this document.

ACI activated carbon injection
AF&PA American Forest & Paper Association
ANPRM Advanced Notice of Proposed Rulemaking
ANSI American National Standards Institute
APA Administrative Procedure Act
ARIPPA Anthracite Region Independent Power Producers Association
ASME American Society of Mechanical Engineers
AST activated sludge treatment
ASTM American Society for Testing and Materials
ATCM Air Toxic Control Measure
Btu British thermal unit
CAA Clean Air Act
CARB California Air Resources Board
CBI Confidential Business Information
CCA chromated copper arsenate
Cd cadmium
C&D construction & demolition
CDX Central Data Exchange
CFB circulating fluidized bed
CEMS continuous emissions monitoring systems
CERCLA Comprehensive Environmental Response, Compensation, and Liability Act
CFR Code of Federal Regulations
CISWI Commercial and Industrial Solid Waste Incineration
CO carbon monoxide
CO_2 carbon dioxide
Catalyst carbon monoxide oxidation catalyst
Cl_2 chlorine gas
CPMS continuous parametric monitoring system
CWA Clean Water Act
D/F dioxin/furan
dscm dry standard cubic meter
DSW Definition of Solid Waste
EG emission guidelines
EJ Environmental Justice
EOM extractable organic matter
EPA U.S. Environmental Protection Agency
ERT Electronic Reporting Tool
ERU energy recovery unit
ESP electrostatic precipitator
FF fabric filters
FR **Federal Register**
HAP hazardous air pollutants
HCl hydrogen chloride
HF hydrogen fluoride
Hg mercury
HMI hospital, medical and infectious
HMIWI Hospital, Medical and Infectious Waste Incineration
ICR Information Collection Request
Lb pound
LML lowest measured level
Mg milligram
Mn manganese
MACT maximum achievable control technology
MDL method detection level
mg/dscm milligrams per dry standard cubic meter
mmBtu/hr million British thermal units per hour
MSW Municipal Solid Waste
MW megawatts
MWC Municipal Waste Combustor
NAAQS National Ambient Air Quality Standards
NAICS North American Industrial Classification System
NCASI National Council on Air and Stream Improvement
ND nondetect
NESHAP National Emission Standards for Hazardous Air Pollutants
ng/dscm nanograms per dry standard cubic meter
NHSM non-hazardous secondary material(s)
NIST National Institute of Standards and Technology
NO_X nitrogen oxides
NSPS New Source Performance Standards
NTTAA National Technology Transfer and Advancement Act
OAQPS Office of Air Quality Planning and Standards
OMB Office of Management and Budget
OSWI Other Solid Waste Incineration
OSWER Office of Solid Waste and Emergency Response
O_2 Oxygen
PAH polycyclic aromatic hydrocarbons
Pb lead
PCBs polychlorinated biphenyls
PCDD polychlorinated dibenzodioxins
PCDF polychlorinated dibenzofurans
PIC product of incomplete combustion
PM particulate matter
POM polycyclic organic matter
ppm parts per million
ppmv parts per million by volume
ppmvd parts per million by dry volume
PQL practical quantitation limit
PRA Paper Reduction Act
PS Performance Specification
lb/MMBtu pound per million British thermal units
RCRA Resource Conservation and Recovery Act
RDL reported detection level
RFA Regulatory Flexibility Act
RIA Regulatory Impact Analysis
RIN Regulatory Information Number
RTO regenerative thermal oxidizer
RTR residual risk and technology review
SBA Small Business Administration
SBREFA Small Business Regulatory Enforcement Fairness Act

SISNOSE Significant Economic Impact on a Substantial Number of Small Entities
SMCRA Surface Mining Control and Reclamation Act of 1977
SNCR selective noncatalytic reduction
SO_2 sulfur dioxide
SSI Sewage Sludge Incineration
SSM startup, shutdown and malfunction
SVOC Semi-Volatile Organic Compound
SWDA Solid Waste Disposal Act
TBtu tera British thermal unit
TEOM Tapered Element Oscillating Microbalance
TEQ Toxic Equivalency
The Court U.S. Court of Appeals for the District of Columbia Circuit
TMB Total Mass Basis
TOX Total Organic Halogens
tpy tons per year
TSM Total Selected Metal
TTN Technology Transfer Network
UCL upper confidence limit
ug/dscm micrograms per dry standard cubic meter
UMRA Unfunded Mandates Reform Act
UL upper limit
UPL upper prediction limit
U.S.C. United States Code
USGS United States Geological Survey
VCS Voluntary Consensus Standards
VOC volatile organic compound
WWW Worldwide Web

B. Does this action apply to me?

Categories and entities potentially affected by this action are those that operate CISWI units and those that generate potentially affected NHSMs. The NSPS and EG, hereinafter referred to as ''standards,'' for CISWI affect the following categories of sources:

Category	NAICS [1] Code	Examples of potentially regulated entities
Any industrial or commercial facility using a solid waste incinerator.	211, 212, 486	Oil and Gas Extraction, mining (except oil and gas); Pipeline Transportation
	221	Utilities
	321, 322, 337	Wood Product Manufacturing, Paper Manufacturing, Furniture and Related Product Manufacturing
	325, 326	Chemical Manufacturing, Plastics and Rubber Products Manufacturing
	327	Nonmetallic Mineral Product Manufacturing,
	333, 336	Machinery Manufacturing, Transportation Equipment Manufacturing
	423, 44	Merchant Wholesalers, Durable Goods, Retail Trade
Any facility or entity generating a non hazardous secondary material that may be burned for fuel or destruction [2].	111	Crop Production
	112	Animal Production
	113	Forestry and Logging
	115	Support Activities for Agriculture and Forestry
	211	Oil and Gas Extraction
	212	Mining (except oil and gas)
	221	Utilities
	236	Construction of Buildings
	311	Food Manufacturing
	312	Beverage and Tobacco Product Manufacturing
	313	Textile Mills
	316	Leather and Allied Product Manufacturing
	321	Wood Product Manufacturing
	322	Paper Manufacturing
	324	Petroleum and Coal Products Manufacturing
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	326	Plastics and Rubber Products Manufacturing
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	339	Miscellaneous Manufacturing
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	486	Pipeline Transportation
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	611	Educational Services
	622	Hospitals
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	624	Social Assistance
	713930	Boating Clubs with Marinas
	721	Accommodation
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[1] North American Industry Classification System.
[2] Note that some of these NAICS may overlap with institutional facility types where incinerators are regulated by the Other Solid Waste Incinerators (OSWI) emission guidelines and NSPS.

This table is not intended to be exhaustive but rather provides a guide for readers regarding entities likely to be affected by the final action. To determine whether your facility would be affected by the final action, you should examine the applicability criteria in 40 CFR 60.2010 of subpart CCCC, 40 CFR 60.2505 of subpart DDDD, and 40 CFR 241. If you have any questions regarding the applicability of the final action to a particular entity, contact the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

C. Where can I get a copy of this document?

The docket number for the action regarding the CISWI NSPS (40 CFR part 60, subpart CCCC) and EG (40 CFR part 60, subpart DDDD) is Docket ID Number EPA–HQ–OAR–2003–0119.

Worldwide Web. In addition to being available in the docket, an electronic copy of the final action is available on the WWW through the TTN Web site. Following signature, the EPA posted a copy of the final action on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg*. The TTN provides information and technology exchange in various areas of air pollution control.

D. Judicial Review

Under the CAA section 307(b)(1), judicial review of this final rule is available only by filing a petition for review in The Court April 8, 2013. Under CAA section 307(d)(7)(B), only an objection to this final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. This section also provides a mechanism for us to convene a proceeding for reconsideration, ''[i]f the person raising an objection can demonstrate to EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of this rule.'' Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, Environmental Protection Agency, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave. NW., Washington, DC 20004, with a copy to the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20004. Note, under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce these requirements. Resource Conservation and Recovery Act sections of the rule would be subject to judicial review under RCRA.

E. Executive Summary

Purpose of the Regulatory Action

The EPA is promulgating final rules that establish standards for new and existing CISWI units. Section 129 of the CAA, titled ''Solid Waste Combustion,'' requires the EPA to develop and adopt standards for commercial and industrial solid waste incineration units pursuant to CAA sections 111 and 129. This final rule makes certain revisions to the final ''Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units,'' 76 FR 15704 (March 21, 2011), based on the issues proposed for reconsideration issues (76 FR 40582) and in response to public comments on the proposed CISWI reconsideration rule.

On May 18, 2011, the EPA issued a notice that delayed the effective dates of the March 21, 2011, CISWI rule (the ''Delay Notice''). 76 FR 28662 (May 18, 2011). As the result of that action, the 2000 CISWI rule remained in effect. The Court vacated the Delay Notice in January 2012. However, because the Delay Notice delayed the effectiveness of the CISWI rule from May 2011 through vacatur of that notice in January 2012, the revisions to the 2000 CISWI rule that were finalized in the 2011 CISWI rule were never codified in the CFR, but instead appear as notes after the corresponding provisions of the 2000 CISWI rule in the CFR. Although the issues on reconsideration were limited in the December 2011 CISWI reconsideration proposal, we had to include in that proposed reconsideration rule all of the regulatory changes that had been made since the 2000 rule because the 2011 CISWI rule was not codified in the CFR. Specifically, we included in the December 23, 2011, proposed reconsideration rule all of the regulatory changes the EPA had made to the 2000 CISWI rule in the 2011 CISWI rule, as well as the changes to the 2011 CISWI rule that the EPA proposed to make on reconsideration. In response to the Court's vacatur of the Delay Notice in January 2012, this final action lifts the delay of effectiveness so that the CFR can be revised to properly reflect the revisions to the 2000 CISWI rule that were finalized in the 2011 CISWI rule. This final action also contains regulatory text that amends the 2011 CISWI rule to address the reconsideration. Therefore, this final rule's amendatory language differs from that of the December 2011 reconsideration proposal as it amends the 2011 CISWI rule instead of the 2000 CISWI rule. This change to the amendatory baseline in no way alters our limitation of the issues for comment for which we granted reconsideration. We have provided in the CISWI docket a redline/strikeout file of the 2000 CISWI rule to help implementing agencies and affected sources to identify the sum total of the revisions made to the 2000 CISWI rule through today's final notice pursuant to the 2011 CISWI rule and this final action.

Summary of Major Provisions for the Final Reconsideration Rule

In general, the final rule establishes revised numeric emission limits for some new and existing CISWI units for certain of the nine pollutants listed in section 129(a)(4) of the CAA.[1]

The EPA established or revised standards for four subcategories of CISWI units in the 2011 CISWI rule: incinerators; small remote incinerators; ERUs; and waste-burning kilns. The 2011 CISWI rule also included two subcategories of ERUs. In this final rule, we have further subcategorized ERUs and subcategorized waste-burning kilns based on design type differences. Thus, the final rule includes three subcategories of ERUs and separate CO limits for two subcategories of waste-burning kilns.

We have further revised some of the CISWI limits proposed in the reconsideration notice in response to comments on CO span methodology and because we incorporated additional data, including new data submitted during the comment period. These changes primarily affect the ERU and waste-burning kiln subcategories but also affect some of the limits in each of the four subcategories.

To ensure compliance with the emission limits, this final rule establishes stack testing and continuous monitoring requirements. The rule allows sources to use CEMS if an owner

[1] The nine pollutants for which we must issue emission standards under section 129 are: PM, SO_2, HCl, NO_X, CO, Pb, Cd, Hg, D/F. CAA section 129(a)(4).

or operator chooses to do so. Continuous parameters and emissions levels (if used) are measured as either a 3-hour block or a 30-day rolling average basis, depending on the parameter being measured and the subcategory of CISWI.

Since sources may choose to cease or start combusting solid waste at any time due to market conditions or for other reasons, the final rule contains provisions that specify the steps necessary for sources to switch applicability between this final rule and other applicable emission standards issued pursuant to CAA section 112. This rule also contains revisions to some of the monitoring, recordkeeping and reporting requirements.

The date existing sources must comply with the final CISWI rule depends primarily on state plan approval but may be no later than the date 5 years after publication of this final rule in the **Federal Register**. For new sources, the effective date is either August 7, 2013, or the date of startup of the source, whichever is later. New sources are defined as sources that began construction on or after June 4, 2010, or commenced reconstruction or modification after August 7, 2013.

Costs and Benefits

The final rule affects 106 existing sources located at 76 facilities. The EPA projects an additional incinerator and five additional small remote incinerators to be subject to this rule over the next 5 years. This final rule applies to facilities in multiple sectors of our economy including small entities. Table 1 of this preamble summarizes the costs and benefits associated with this final rule. Note, these are the costs and benefits of the final 2011 CISWI rule as amended by today's final rule and replace the costs and benefits presented in the March 2011 final rule. For comparison, the 2011 final rule, at a 7 percent discount rate, had costs of $218 million and monetized benefits of $320 to $790 million (2008 dollars). (However, because the February 2011 RIA did not incorporate the final engineering costs and emission reductions estimates, it reported costs of $280 million and monetized benefits of $310 to $750 million (2008 dollars)).A more detailed discussion of the costs and benefits of this final rule is provided in section II.G of this preamble.

TABLE 1—SUMMARY OF THE MONETIZED BENEFITS, SOCIAL COSTS AND NET BENEFITS FOR THE FINAL CISWI NSPS AND EG IN 2015

[Millions of 2008$][1]

	3 Percent discount rate	7 Percent discount rate
Total Monetized Benefits[2]	$420 to $1,000	$380 to $930
Total Social Costs[3]	$258	$258
Net Benefits	$160 to $770	$120 to $670
Non-monetized Benefits	Health effects from exposure to HAP 780 tons of HCl, 2.5 tons of lead, 1.8 tons of Cd, 680 pounds of Hg, and 58 grams of dioxins/furans). Health effects from exposure to criteria pollutants (20,000 tons of CO_2 6,300 tons of SO_2, 5,400 tons of NO_2, and secondary formation of ozone). Ecosystem effects. Visibility impairment.	

[1] All estimates are for the implementation year (2015) and are rounded to two significant figures. These results reflect the lowest cost disposal assumption.

[2] The total monetized benefits reflect the human health benefits associated with reducing exposure to $PM_{2.5}$ through reductions of $PM_{2.5}$ precursors such as directly emitted particles, SO_2, and NO_X. It is important to note that the monetized benefits include many but not all health effects associated with $PM_{2.5}$ exposure. Monetized benefits are shown as a range from Pope, et al. (2002) to Laden, et al. (2006). These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because the scientific evidence is not yet sufficient to allow differentiation of effect estimates by particle type.

[3] The methodology used to estimate social costs for 1 year in the multimarket model using surplus changes results in the same social costs for both discount rates.

II. CISWI Reconsideration and Final Rule

A. Background Information

1. What is the history of the CISWI standards?

On December 1, 2000, the EPA promulgated NSPS and EG for CISWI units (60 FR 75338), hereinafter referred to as the 2000 CISWI rule. On January 30, 2001, the Sierra Club filed a petition for review in the Court challenging the EPA's final CISWI rule. On August 17, 2001, the EPA granted a Request for Reconsideration, pursuant to CAA section 307(d)(7)(B), submitted on behalf of the National Wildlife Federation and the Louisiana Environmental Action Network, related to the definition of ''commercial and industrial solid waste incineration unit'' and ''commercial or industrial waste'' in the 2000 CISWI rule. In granting the petition for reconsideration, the EPA agreed to undertake further notice and comment proceedings related to these definitions. On September 6, 2001, the Court entered an order granting the EPA's motion for a voluntary remand of the CISWI rule, without vacatur. The EPA requested a voluntary remand of the final CISWI rule to address concerns related to the EPA's procedures for establishing MACT floors for CISWI units in light of the Court's decision in *Cement Kiln Recycling Coalition* v. *EPA,* 255 F.3d 855 (DC Cir. 2001)(Cement Kiln). Neither the EPA's granting of the petition for reconsideration, nor the Court's order granting a voluntary remand, stayed, vacated or otherwise influenced the effectiveness of the 2000 CISWI rule. Therefore, the remand order had no effect on the effectiveness of the 2000 CISWI rule.

On February 17, 2004, the EPA published a proposed rule (CISWI Definitions Rule) soliciting comments on the definitions of ''solid waste,'' ''commercial and industrial waste,'' and ''commercial and industrial solid waste

incineration unit.'' On September 22, 2005, the EPA published in the **Federal Register** the final rule reflecting our decisions with respect to the CISWI Definitions Rule. The rule was challenged and, on June 8, 2007, the Court vacated and remanded the CISWI Definitions Rule. In vacating the rule, the Court found that CAA section 129 unambiguously includes among the incineration units subject to its standards, any facility that combusts any solid waste material, subject to four statutory exceptions. While the Court vacated the CISWI Definitions Rule, the 2000 CISWI rule remained in effect.

On March 21, 2011, the EPA promulgated revised NSPS and EG for CISWI units (76 FR 15704)(2011 CISWI rule). That action constituted a partial response to the voluntary remand of the 2000 CISWI rule and to the 2007 vacatur and remand of the CISWI Definitions Rule. In addition, the EPA addressed the 5-year technology review that is required under CAA section 129(a)(5). On the same day, the EPA issued a notice that it intended to reconsider certain aspects of the 2011 CISWI rule that warrant further opportunity for public comment (76 FR 15266).

Following promulgation of the 2011 CISWI rule, the EPA received petitions for reconsideration from the following organizations (''Petitioners''): Alaska Oil and Gas Association/Alaska Miners Association/ConocoPhillips (AOGA), American Chemistry Council (ACC), American Foundry Society (AFS), American Iron and Steel Institute (AISI) and American Coke and Coal Chemicals Institute (ACCCI), Anthracite Region Independent Power Producers Association (ARIPPA), American Petroleum Institute (API) and National Petrochemical and Refiners Association (NPRA), Auto Industry Forum (AIF), Citizens Energy Group (CEG), Council of Industrial Boiler Owners (CIBO), Earthjustice/Sierra Club, Edison Mission Energy, Hovensa L.L.C. and Tesoro Hawaii Corp., Industry Coalition (AF&PA et al.), JELD–WEN Inc., Portland Cement Association (PCA), Renovar Energy Corp., and Waste Management Inc. (WM). Copies of these petitions are provided in the docket (see Docket ID Number EPA–HQ–OAR–2003–0119). Petitioners, pursuant to CAA section 307(d)(7)(B), requested that the EPA reconsider numerous provisions in the 2011 CISWI rule.

On May 18, 2011, the EPA issued a notice to postpone the effective dates of the March 21, 2011, final CISWI rule. This notice also requested that the public submit additional data and information to the EPA by July 15, 2011, for review and consideration in the reconsideration proceedings.

On December 23, 2011, the EPA published a proposed rule soliciting comment on the issues on which the EPA was granting reconsideration. In March 2011, the EPA had publically stated its intent to reconsider some of these issues. 76 FR 15266. The EPA limited comment in the December 23, 2011, proposed rule to the specific issues on which it was granting reconsideration which included the following:

- Revising the subcategories and emission limits for ERUs and waste-burning kilns to reflect updated inventories and additional data.
- Establishing limitations on fuel switching provisions.
- Definitions of cyclonic burn barrels, burn-off ovens, soil treatment units, laboratory analysis units and space heaters from CISWI subcategories.
- Providing an affirmative defense for malfunction events.
- Revisions to the CO monitoring requirements.
- Establishing a full-load stack test requirement for CO coupled with continuous O_2 (trim) monitoring.
- Establishing a definition of ''homogeneous waste.''
- Responding to comments on the 2011 CISWI rule regarding the use of fuel variability in emission limit calculations.
- Responding to comments on the 2011 CISWI rule regarding the review of D/F data and non-detect methodology using three times the detection level.
- Responding to comments on the 2011 CISWI rule regarding providing an option for sources to use emissions averaging to demonstrate compliance.
- Establishing a definition for foundry sand thermal reclamation unit.
- Reinstating the definition of contained gaseous material.
- Revising the definition of chemical recovery unit.
- Allowing for the use of feed stream analysis or other supplemental information to demonstrate compliance.
- Responding to comments on the 2011 CISWI rule regarding providing percent reduction alternative standards.
- Providing parametric monitoring provisions for additional control device types.
- Revisions to the continuous monitoring provisions for large ERUs.
- Extending effective dates.
- Technical corrections and clarifications.

2. How is the definition of solid waste addressed in the final CISWI rule?

The RCRA definition of solid waste is integral in defining the CISWI source category. The EPA defines NHSMs that are solid waste under RCRA in the final ''Identification of Non-Hazardous Secondary Materials That Are Solid Waste'' Rulemaking. In an action parallel to the March 21, 2011, final CISWI rule, the EPA promulgated a final rule that identifies whether NHSMs are or are not solid waste when used as fuels or ingredients in combustion units. That action, hereinafter referred to as the ''2011 NHSM final rule,'' is relevant to the final CISWI rule because some ERUs and waste-burning kilns combust, in their combustion units, secondary materials that are solid waste under the 2011 NHSM final rule. Commercial and industrial units that combust solid waste are subject to standards issued pursuant to CAA section 129, rather than to standards issued pursuant to CAA section 112 that would otherwise be applicable to such units (e.g., units that would be boilers, process heaters or cement kilns if they were not combusting solid waste).

3. What is the relationship between this rule and other combustion rules?

These amendments address the combustion of solid waste materials (as defined by the Administrator under RCRA in the NHSM Definition rule) in combustion units at commercial and industrial facilities. If an owner or operator of a CISWI unit permanently ceases combusting solid waste, the affected unit would no longer be subject to the CISWI rule because the unit would not be a solid waste incineration unit subject to standards under CAA section 129. Standards issued pursuant to section 112 of the CAA may apply to CISWI units that cease combusting solid waste. For example, CAA section 112 standards applicable to boilers and process heaters at major sources and boilers at area sources would apply to boilers and process heaters that cease combusting solid waste. Boilers and process heaters that are located at commercial and industrial facilities and that combust solid waste are subject to CISWI as ERUs. The EPA has also finalized the CAA section 112 standards for the Portland Cement Manufacturing Industry (75 FR 21136, September 9, 2010). Cement kilns combusting solid waste are waste-burning kilns subject to CISWI, not the otherwise applicable CAA section 112 standards.

4. What is the response to the vacatur of effective dates?

On January 9, 2012, the Court vacated the May 18, 2011, Delay Notice, which delayed the effective dates of the 2011 CISWI rule. On February 7, 2012, the EPA issued a no action assurance letter

regarding certain notification deadlines in the March 2011 CISWI rule.

The EPA has conducted outreach to each EPA Regional Office and it has not found any new CISWI units that commenced construction since the proposed CISWI rule was published on June 10, 2010. The CAA defines a ''new source,'' in part, as any source that commences construction after the publication date of proposed CAA section 111 and 129 standards[2] CAA section 129(g)(2). Based on our outreach efforts, we do not believe there are any CISWI units that are in noncompliance with the NSPS contained in the final 2011 CISWI rule.

As explained above, today's final rule amendatory text reflects changes to the 2011 CISWI rule, not the 2000 CISWI rule as in the reconsideration proposal notice. We have provided in the CISWI docket a redline/strikeout file of the 2000 CISWI rule to help implementing agencies and affected sources to identify the sum total of the revisions made to the 2000 CISWI rule pursuant to the 2011 CISWI rule and this final action.

B. Summary of This Final Rule

As stated above, the December 23, 2011, proposed rule addressed specific issues and provisions the EPA identified for reconsideration. This summary of the final rule reflects the agency's final action in regards to those provisions identified for reconsideration and on other discrete matters identified in response to comments or data received during the comment period. Information on other provisions and issues not proposed for reconsideration is contained in the notice and record for the 2011 CISWI rule. 76 FR 15704 (March 21, 2011).

1. Subcategories of Affected Units and Emission Standards

This final rule defines a CISWI unit, in part, as any combustion unit at a commercial or industrial facility that is used to combust solid waste (as defined under RCRA)(40 CFR 60.2265 (NSPS) and 60.2875 (EG)). We have established standards in this final rule for the following four subcategories of CISWI units: Incinerators (i.e., units designed to burn discarded waste materials for the purpose of disposal); small, remote incinerators; ERUs (i.e., units that would be boilers or process heaters if they did not combust solid waste); and waste burning kilns (i.e., units that would be cement kilns if they did not combust solid waste). We have further subcategorized ERUs into three subcategories and waste burning kilns into two subcategories for CO emission limits only. Changes to the subcategories made since proposal are discussed below in section II.C of this preamble: ''Summary of Significant Changes Since Proposal.''

The final rule emission limits for new and existing sources in the solid-fuel burning ERU subcategory and the waste-burning kilns subcategories were revised based on changes to the inventories for those subcategories as discussed below in section II.C of this preamble: ''Summary of Significant Changes Since Proposal.'' Tables 2 and 3 of this preamble present the final emission limits for all subcategories for existing and new sources, respectively.

TABLE 2—COMPARISON OF EXISTING SOURCE MACT FLOOR LIMITS FOR 2000 CISWI RULE AND THE FINAL MACT FLOOR LIMITS

Pollutant (units) [a]	Incinerators (2000 CISWI limit)	CISWI Subcategories				
		Incinerators	ERUs—Solids	ERUs—Liquid/Gas	Waste-burning kilns	Small, remote incinerators
HCl (ppmv)	62	29	0.20 (biomass units)/13 (coal units).	[b] 14	[b] 3.0	300
CO (ppmv)	157	17	260 (biomass units)/95 (coal units).	35	110 (long kilns)/790 (preheater/precalciner).	64
Pb (mg/dscm)	0.04	0.015	0.014[b] (biomass units)/0.14[b] (coal units).	0.096	0.014[b]	2.1
Cd (mg/dscm)	0.004	0.0026	0.0014[b] (biomass units)/0.0095 (coal units).	0.023	0.0014[b]	0.95
Hg (mg/dscm)	0.47	0.0048	0.0022 (biomass units)/0.016 (coal units).	[b] 0.0024	0.011[b]	0.0053
PM, filterable (mg/dscm).	70	34	11 (biomass units)/160 (coal units).	110	4.6	270
Dioxin, furans, total (ng/dscm).	(no limit)	4.6	0.52[b] (biomass units)/5.1[b] (coal units).	[b] 2.9	1.3	4,400
Dioxin, furans, TEQ (ng/dscm).	0.41	0.13	0.12 (biomass units)/0.075[b] (coal units).	[b] 0.32	0.075[b]	180
NO_X (ppmv)	388	53	290 (biomass units)/ 340 (coal units).	76	630	190
SO_2 (ppmv)	20	11	7.3 (biomass units)/650 (coal units).	720	600	150

[a] All emission limits are expressed as concentrations corrected to 7 percent O_2.
[b] See the memorandum in the CISWI docket ''CISWI Emission Limit Calculations for Existing and New Sources for the Reconsideration Final Rule'' for details on this calculation.

[2] The date for determining whether a source is a ''new'' source is the publication date of the proposed standards. The final rule and reconsideration proposal contained a typographical error in 40 CFR 60.2015(a)(1) that did not specify the June 4, 2010, proposal date.

TABLE 3—COMPARISON OF NEW SOURCE MACT FLOOR LIMITS FOR 2000 CISWI RULE AND THE FINAL MACT FLOOR LIMITS

Pollutant (units) [a]	Incinerators (2000 limit)	Final CISWI subcategories				
		Incinerators	ERUs—Solids	ERUs—Liquid/Gas	Waste-burning kilns	Small, remote incinerators
HCl (ppmv)	62	0.091	[c]0.20 (biomass units)/13 (coal units).	[b]14	3.0 [b]	200
CO (ppmv)	157	17	240 (biomass units)/95 (coal units).	35	90 (long kilns)/190 (preheater/precalciner).	13
Pb (mg/dscm)	0.04	[b]0.015	0.014 [b] (biomass units)/0.14 [b] (coal units).	0.096	0.014 [b]	2.0
Cd (mg/dscm)	0.004	0.0023	0.0014 [c] (biomass units)/0.0095 (coal units).	0.023	0.0014 [b]	0.67
Hg (mg/dscm)	0.47	[b]0.00084	0.0022 [c] (biomass units)/0.016(coal units).	[d]0.00056	0.0037[b]	0.0035
PM, filterable (mg/dscm).	70	18	5.1 (biomass units)/160 (coal units).	110	2.2	[c]270
Dioxin, furans, total (ng/dscm).	(no limit)	[b]0.58	0.52 [b] (biomass units)/5.1 [b] (coal units).	(no limit)	0.51 [b]	1,800
Dioxin, furans, TEQ (ng/dscm).	0.41	0.13	0.076 [b] (biomass units)/0.075 [b] (coal units).	[d]0.093	0.075 [b]	31
NO_X (ppmv)	388	23	290 [c] (biomass units)/340 (coal units).	76	200 [b]	170
SO_2 (ppmv)	20	[c]11	7.3 [c] (biomass units)/650 (coal units).	720	28	1.2

[a] All emission limits are measured at 7 percent O_2.
[b] See the memorandum ''CISWI Emission Limit Calculations for Existing and New Sources for the Reconsideration Final Rule'' for details on this calculation.
[c] The NSPS limit equals the EG limit. The EG limit was selected as the NSPS limit.
[d] D/F TEQ and Hg limits for ERUs—liquid/gas were replaced with D/F TEQ limits for liquid fuel major source boilers. See ''CISWI Emission Limit Calculations for Existing and New Sources for the Reconsideration Final Rule'' for details.
[e] SO_2 limits for Waste-burning kilns were replaced with SO_2 limits for Portland Cement NSPS kilns. See ''CISWI Emission Limit Calculations for Existing and New Sources for the Reconsideration Final Rule'' for details.

2. Fuel Switching Provisions

The EPA is finalizing the proposed fuel switching provisions that address the situation where CISWI units cease combusting solid waste, and where existing commercial and industrial combustion units begin combusting solid waste (40 CFR 60.2330 for existing units and 40 CFR 60.2710 for new units). Units that cease combusting solid waste remain subject to CISWI for at least 6 months after solid waste is last added to the combustion chamber. After 6 months, sources must either comply with any applicable section 112 standard or, if they intend to combust solid waste in the future, opt to remain subject to CISWI and continue to comply with the applicable provisions. Combustion units located at commercial or industrial facilities that begin combusting solid waste are solid waste incineration units on the date they begin combusting solid waste. Existing units that begin combusting solid waste within 6 months of the effective date of the CISWI EG must comply with the standards on the effective date of those standards. Existing units that begin combusting solid waste after the effective date of the CISWI EG must comply with those standards at the time the unit begins combusting solid waste.

3. Definitions of Cyclonic Burn Barrels, Burn-off Ovens, Soil Treatment Units, Laboratory Analysis Units and Space Heaters

We are finalizing the proposed definitions for cyclonic burn barrels, burn-off ovens, soil treatment units, and laboratory analysis units. We have revised the proposed definition for space heaters to clarify applicability for units that meet the requirements of 40 CFR part 279. The final definitions describe the types of units and state that these different types of units are not incinerators, small remote incinerators, ERUs, or waste burning kilns. The EPA is including these definitions in the final rule to differentiate these units from the units for which the agency established standards in the 2011 CISWI rule and this final action.

4. Affirmative Defense for Malfunction Events

The EPA is retaining in the final rule the proposed affirmative defense to civil penalties for malfunction events. The EPA first included an affirmative defense in the 2011 final rule in an attempt to balance a tension, inherent in many types of air regulation, to ensure adequate compliance while simultaneously recognizing that despite the most diligent of efforts, emission standards may be violated under circumstances beyond the control of the source. This final reconsideration attempts to add clarification to the affirmative defense by revising some of the regulatory provisions that specify the elements that are necessary to establish this affirmative defense as proposed—with minor changes from proposal described later in this section.

Sources are required to comply with the CISWI standards at all times, and the EPA recognizes that even equipment that is properly designed and maintained can sometimes fail and that such failure may cause an exceedance of the relevant standard. The EPA must establish emission standards that ''limit the quantity, rate, or concentration of emissions of air pollutants on a continuous basis.'' 42 U.S.C. 7602(k) (defining ''emission limitation and emission standard''). See generally *Sierra Club* v. *EPA,* 551 F.3d 1019, 1021 (D.C. Cir. 2008.) The affirmative defense for malfunction events meets this requirement by ensuring that even where there is a malfunction, the emission standard is still enforceable through injunctive relief. See generally, *Luminant Generation Co.* v. *EPA,* 2012 U.S. App. LEXIS 15722 (5th Cir. 2012)

(upholding EPA's approval of affirmative defense provisions in a CAA State Implementation Plan). While ''continuous'' standards, on the one hand, are required, there is also case law indicating that in many situations it is appropriate for the EPA to account for the practical realities of technology. For example, in *Essex Chemical* v. *Ruckelshaus,* 486 F.2d 427, 433 (D.C. Cir. 1973), the D.C. Circuit acknowledged that in setting standards under CAA section 111 ''variant provisions'' such as provisions allowing for upsets during startup, shutdown and equipment malfunction ''appear necessary to preserve the reasonableness of the standards as a whole and that the record does not support the 'never to be exceeded' standard currently in force.'' See also, *Portland Cement Association* v. *Ruckelshaus,* 486 F.2d 375 (D.C. Cir. 1973). Though intervening case law such as *Sierra Club* v. *EPA* and the CAA 1977 amendments call into question the relevance of these cases today, they support the EPA's view that a system that incorporates some level of flexibility is reasonable.

The affirmative defense provisions allow sources to avoid civil penalties for exceedances caused by a malfunction event if the source demonstrates by a preponderance of the evidence that the malfunction event meets the definition of malfunction in 40 CFR 60.2. By incorporating an affirmative defense, the EPA has formalized its approach to upset events beyond the control of the source. In a Clean Water Act setting, the Ninth Circuit required this type of formalized approach when regulating ''upsets beyond the control of the permit holder.'' *Marathon Oil Co.* v. *EPA,* 564 F.2d 1253, 1272–73 (9th Cir. 1977). See also, *Mont. Sulphur & Chem. Co.* v. *United States EPA,* 2012 U.S. App. LEXIS 1056 (Jan 19, 2012) (rejecting industry argument that reliance on the affirmative defense was not adequate). But see, *Weyerhaeuser Co.* v. *Costle,* 590 F.2d 1011, 1057–58 (D.C. Cir. 1978) (holding that an informal approach is adequate). The affirmative defense provisions give the EPA the flexibility to both ensure that its emission standards are ''continuous'' as required by 42 U.S.C. 7602(k), and account for unplanned upsets and thus support the reasonableness of the standard as a whole. In addition, the affirmative defense provisions are designed to ensure that steps are taken to correct the malfunction, minimize emissions during the malfunction, and prevent future malfunctions.

We are promulgating revisions to the affirmative defense provisions in section 60.2120 and 60.2685 as described at proposal (76 FR 80461) and making some minor additional revisions. The terms ''exceedance'' and ''excess emissions'' and ''applicable emission limitations were being exceeded'' were replaced with the term ''violation'' to more accurately reflect that the affirmative defense is only available when there has been a violation of the standard. The phrase ''emission limit'' was changed to ''emission standards'' to reflect that the affirmative defense could be applicable to certain work practice standards. The word ''however'' was removed to incorporate more plain language into the regulation. The term ''notification'' was changed to ''reporting'' to reflect that the root cause analysis required under affirmative defense would be submitted with other periodic reporting. The term ''and monitoring'' was deleted because monitoring malfunctions are defined differently than malfunctions of process and control units and the affirmative defense is intended to apply to malfunctions to affected units that cause a failure to meet an emission standard. In multiple instances the word ''were'' was changed to ''was'' to improve the clarity of a provision. The term ''facility'' was changed to ''affected source'' to clarify that the affected source regulated by the rule must be operated in a manner consistent with good practices for minimizing emissions versus the entire facility. The phrase ''off shift and overtime labor were used, to the extent practicable to make these repairs'' was removed. The EPA no longer believes the language concerning the use of off-shift and overtime labor is necessary because the regulation requires that to establish the affirmative defense the owner must prove by a preponderance of the evidence that repairs were made as expeditiously as possible when a violation occurs. Although we believe that use of off-shift or overtime labor could be cited as evidence that the owner or operator expedited repairs, we do not believe this level of detail is necessary in the regulatory text. The written report required when asserting an affirmative defense was changed from a separate ''semiannual'' report to a report that is submitted with the first periodic compliance, deviation report, or excess emission report due after the event. Lastly, the requirement to notify the Administrator by telephone or facsimile within two business days'' was removed when we refined the affirmative defense reporting requirements based upon comments received.

5. Oxygen Correction Requirements and CO Monitoring Requirements

We are finalizing provisions for calculating the 30-day CO rolling average that allow uncorrected CEMS reading to be used during the period of operation from a cold start to bring the combustion unit up to minimal normal operating temperature. We are also allowing uncorrected CEMS readings to be used in 30-day average calculations for the period of operation following the last waste material (or material feed for waste burning kilns) being fed to the combustion unit during shutdown procedures of the unit. For every type of CISWI unit except waste-burning kilns, the period of time allowed for uncorrected CEMS data during a startup shall be 48 hours or less per startup event and shall be 24 hours or less for each shutdown event. For waste-burning kilns, the period of startup begins when the kiln's induced draft fan is turned on and fuel is being combusted and continues until continuous feed is introduced into the kiln, at which time the kiln is in normal operating mode. Shutdown begins when feed to the kiln is halted. Sources must indicate in the CEMS data records which CEMS data are obtained during the startup and shutdown periods. Since the O_2 correction calculation will affect all corrected CEMS data, we have expanded these provisions in the final rule to allow for uncorrected CEMS data for any pollutant that sources elect to measure continuously with CEMS and calculate 30-day rolling averages to demonstrate continuous compliance.

Additionally, we have finalized removal of continuous CO monitoring requirements for new and existing ERU units. We are instead requiring annual CO stack tests and continuous O_2 monitoring and we are allowing CO monitoring with CEMS as a compliance alternative. We have also removed the continuous CO monitoring requirements for new CISWI units in the other subcategories, but sources may demonstrate compliance using CO CEMS if they so choose. The authority to use uncorrected CEMS data during startup and shutdowns discussed above applies to all CISWI sources that elect to demonstrate compliance with any emission limits with a CEMS instead of performing annual stack tests. Changes to the CO and other optional CEMS monitoring requirements made since proposal are discussed below in Section II.C of this preamble: ''Summary of Significant Changes Since Proposal.''

6. Full-Load Stack Test Requirement for CO Coupled With Continuous O_2 Monitoring

We are finalizing the full-load stack test and continuous O_2 monitoring provisions in today's action that allow existing sources to use their current O_2 analyzer and O_2 trim systems to demonstrate continuous compliance. Based on comments received, we have made some clarifying changes to these provisions to be clear that existing O_2 trim systems and O_2 monitors may be used to demonstrate continuous compliance, as well as clarifications on establishing the operating limits for O_2 content. Changes to the continuous O_2 monitoring requirements made since proposal are discussed below in section II.C of this preamble: ''Summary of Significant Changes Since Proposal.''

7. Non-Detect Methodology Using Three Times the Detection Level

Since proposal, the EPA continued its review of sampling volumes and detection levels across various emission testing ICR efforts on various combustion sources to encompass additional pollutants measured using EPA Reference Method 29 (See memorandum ''Updated data and procedure for handling below detection level data in analyzing various pollutant emissions databases for MACT and RTR emissions limits'' in the CISWI docket). As a result of this analysis, we have determined recommended values for three times the RDL that may be used as a minimum emission limit value that can be accurately measured by most laboratories for Cd and Pb.[3]

Furthermore, based on comments on our application of this non-detect methodology approach to CO data measured using instrument methods, we have made some modifications to the span calculation approach used in the proposed rule. Changes to the emission limits for Cd, Pb and the span adjustment calculations for CO made since proposal are discussed below in section II.C of this preamble: ''Summary of Significant Changes Since Proposal.''

8. Definitions for Foundry Sand Thermal Reclamation Unit and Chemical Recovery Unit

We are finalizing the proposed definitions of ''foundry sand thermal reclamation unit'' and ''chemical recovery unit'' to clarify that these units are not incinerators, waste-burning kilns, ERUs or small, remote incinerators under subparts CCCC or DDDD.

9. Definition of Contained Gaseous Material

In today's final rule, we have reintroduced and finalized the definition for ''contained gaseous material'' as found in the 2000 CISWI rule as proposed. As discussed earlier, the Court's vacatur of the Delay Notice now requires this definition to be reintroduced since we are now amending the 2011 CISWI rule instead of making amendments to the 2000 CISWI rule as when we published the December 2011 reconsideration proposal.

10. Parametric Monitoring Provisions for Additional Control Device Types

In the proposed rule, we requested comment on whether there were additional control device types that we should identify monitoring provisions for in the rule. We received comments on this topic and, in today's final rule, are including monitoring provisions for sorbent injection rate for dry scrubber control devices (40 CFR 60.2165 and 40 CR 60.2730). We have also clarified that sources that elect to use optional CEMS to monitor continuous compliance for Hg, D/Fs or NO_2 may do so as a substitute for parametric monitoring of ACI and SNCR control devices, respectively. Changes to the parametric monitoring provisions made since proposal are discussed below in section II.C of this preamble: ''Summary of Significant Changes Since Proposal.''

11. Particulate Matter Continuous Monitoring Provisions for Large ERUs and Waste-Burning Kilns

In today's rule, we are finalizing some revisions to the monitoring requirements for ERUs with an annual average heat input rate greater than 250 MMBtu/hr and extending the same PM continuous monitoring provisions to waste-burning kilns. In the final 2011 CISWI rule, these units were required to monitor continuously for PM using a PM CEMS; however, the PM CEMS technology may not be sufficient to certify accurate monitor performance in the PM concentration range of the CISWI biomass ERU and waste-burning kiln limits. Therefore, we are requiring continuous PM parameter monitoring systems for these units similar to those being required for major industrial boilers and utility boilers. The EPA is further requiring that a site-specific parametric operating limit be established during the performance test, that there be continuous monitoring of that parametric limit using a PM CPMS, that four deviations within a 12-month operating period constitute a violation and trigger immediate corrective action and a Method 5 performance test within 30 days with an additional 15 days to reestablish a site-specific operating limit.

We have revised all operating parameter averaging for ERU units to be on a 30-day rolling average and allowed the sorbent injection parameter to be adjusted for varying ERUs based on load. Changes to the PM continuous monitoring provisions and operating parameter provisions made since proposal are discussed below in section II.C of this preamble: ''Summary of Significant Changes Since Proposal.''

12. Revised Definition of Waste-Burning Kiln

This final rule includes a definition of waste-burning kiln that has been revised since the March 2011 CISWI Rule. This definition helps clarify the EPA's intent regarding which types of Portland cement kilns are considered subject to CISWI standards and which kilns are subject to the Portland cement NESHAP. Since proposal, some additional language was added to this definition to further clarify our proposed definition. Changes to the definition of waste burning kiln made since proposal are discussed below in section II.C of this preamble: ''Summary of Significant Changes Since Proposal.''

13. Revised Definition of Solid Waste

In the March 21, 2011, final CISWI rule, we removed the definition of solid waste that was present in the 2000 CISWI Rule in light of the definition of solid waste in the final NHSM rule. Because applicability of section 129 hinges on sources combusting solid waste, we believe it is appropriate to include a definition of that term in the CISWI rule. For that reason, the final rule contains a definition of solid waste that refers to the final NHSM rule at 40 CFR 241.2.

14. Compliance Dates

In the final rule, we are revising the compliance dates for new and existing CISWI units to reflect the effective dates of this final rule. The compliance date for existing sources depends primarily on state plan approval but may be no later than the date 5 years after publication of this final rule in the **Federal Register**. The EG are implemented through a state implementation plan or a federal plan. Under the final amendments to the EG, and consistent with the CAA section 129, revised state plans containing the revised existing source emission limits

[3] The RDL methodology is consistent with the RDL methodology outlined in the December 2011 reconsideration proposal. 76 FR 80463.

and other requirements in the final amendments are due within 1 year after promulgation of the final reconsideration amendments. States must submit revised state plans to the EPA by February 7, 2014. The EPA will revise the existing federal plan to incorporate any changes and other requirements that the EPA has promulgated. The federal plan applies to CISWI units in any state without an approved state plan. Additional discussion of the state plan implementation schedule can be found at 76 FR 15711.

For new sources, the compliance date is either August 7, 2013 or the date of startup of the source, whichever is later. New sources are defined as sources that began construction on or after June 4, 2010, or commenced reconstruction or modification after August 7, 2013.

15. Revised New Source Performance Standards

In the 2011 CISWI rule and the proposed reconsideration rule, EPA determined that the best controlled similar unit under section 129(a)(2) was not a solid waste incineration unit for certain new source standards. Specifically, the new source limits for certain pollutants from waste burning kilns and ERUs were based on cement kilns and boilers, respectively. See memorandum ''CISWI Emission Limit Calculations for Existing and New Sources'' in the CISWI docket. Both the industrial boiler NESHAP and the Portland cement NESHAP are being revised, and additional data has been incorporated into the new source MACT analyses for those rules. As a result of the new data and analyses, several of the new source NESHAP limits are being revised and EPA is changing the following new source limits in CISWI based on the revised limits in the NESHAPs: NO_X for waste-burning kilns, and Hg and PCDD/PCDF for ERU-liquid/gas units.

C. Summary of Significant Changes Since Proposal

1. Revision of the Subcategories

Energy Recovery Units

In the final 2011 CISWI Rule, we established separate subcategories based on the types of fuels and wastes ERUs were designed to burn. Energy Recovery Units (e.g., units that would be boilers and process heaters but for that fact that they combust solid waste) designed to burn gaseous fuels and liquids that are solid waste were included in one primary subcategory and the other primary subcategory was for units designed to burn solid fuels or predominantly non-coal solid materials. In the final 2011 CISWI rule, the solid fuel ERU subcategory was further divided into separate subcategories for coal and biomass units, with separate limits for CO, NO_X and SO_2 to account for significant differences in unit design for these two types of fuels and the impacts the different unit designs have on emissions of these pollutants.

Because the public was not afforded an opportunity to comment on the revision to the ERU subcategory, we identified this as a reconsideration issue in the March 21, 2011, notice of intent to reconsider certain aspects of the 2011 CISWI Rule. Certain petitions for reconsideration supported the further subcategorization of the solid-fuel ERU subcategory and suggested that all nine emission limits should be divided between coal and biomass ERUs, instead of only having different limits for CO, NO_X and SO_2.

We granted reconsideration of our subcategorization approach for ERUs and proposed to establish different emission limits for PM, Cd, Pb, and D/F between coal and biomass units, in addition to establishing different limits for CO, NO_X and SO_2. We also solicited comment on whether we should also subcategorize solid-fuel ERUs for HCl and Hg.

Based on comments and information received during the comment period, we have determined that it is appropriate to subcategorize solid fuel ERUs for all nine CAA section 129 pollutants. We recognize that there are significant design and operational differences between biomass and coal ERU units that impact the generation of all nine regulated pollutants, and, for this reason, we are establishing separate emission standards for all nine pollutants from coal and biomass ERUs in this final rule.

In addition, since issuing the proposed reconsideration CISWI rule, we have received comments and data which allowed us to update our inventory of ERUs. The inventory adjustments we made more accurately reflect the inventory of solid waste combustion units. Based on comments from the operator of the units, we removed three units from the final rule inventory of biomass ERUs that were determined to be non-waste burning units and we re-analyzed the emission limits for the solid-biomass ERU subcategory. The commenter explained that, although permitted to burn materials that would be considered solid waste, these units had ceased burning the materials in question several years ago and would not recommence burning these in the future. Thus, at the time of testing, these units were not solid waste incineration units. We also received additional CO emissions data and re-analyzed the performance of the best-performing ERU in the solid-coal ERU subcategory. The emission limits in this final rule reflect the new inventory and emission data received; however, we have used the same methodology as in the 2011 CISWI rule and December 23, 2011, reconsideration proposal for establishing the emission limits.

Waste-Burning Kilns

Prior to the reconsideration proposal, the EPA performed an analysis of the materials being combusted in the entire inventory of Portland cement kilns in light of the final NHSM rule (See memorandum ''Revised Floors without Kilns that Would have been CISWI Kilns Had the Solid Waste Definition Applied'' in the CISWI docket). As a result of this analysis, we added 11 kilns to our inventory of waste-burning kilns. In addition to this, we further reviewed the Portland cement emissions test records and identified some additional test data for kilns that were added to the CISWI inventory following the March 21, 2011, final rule publication. This newly-identified data was extracted and compiled into the CISWI database, and then the MACT floor emission limits were re-calculated in the December 23, 2011, proposed rule to reflect the updated inventory and additional data. Following proposal, we were also notified of one additional waste-burning kiln and that one of the kilns in the inventory was not burning waste materials. We made these adjustments to our inventory, bringing the total waste-burning kiln inventory to 23 kilns. We recalculated the standards in this final rule to include all 23 waste burning kilns.

As with the new ERU standards, we have used the same methodology to establish today's emission limits as we used for the final 2011 CISWI rule. We have also retained the emissions concentration basis for the standards. However, Table 4 of this preamble presents the emission limits for PM, NO_X, SO_2 and Hg on a production basis for comparison.

TABLE 4—WASTE-BURNING KILN EMISSION LIMITS EXPRESSED IN PRODUCTION BASIS

Pollutant (units)	Existing kilns [a]	New kilns [a]
Hg (lb/MM ton clinker) ..	58	21
PM (lb/ton clinker)	0.026	0.013
NO_X (lb/ton clinker)	6.7	1.5

TABLE 4—WASTE-BURNING KILN EMISSION LIMITS EXPRESSED IN PRODUCTION BASIS—Continued

Pollutant (units)	Existing kilns [a]	New kilns [a]
SO_2 (lb/ton clinker)	8.9	0.4

[a] Approximate.

Small Remote Incinerators

After the reconsideration proposal, we received additional information from stakeholders of additional units in operation and planned for operation within the next year or two that would qualify as small remote incinerators. The resulting changes included moving one unit from the small remote incinerator subcategory to the incinerator subcategory due to the unit's proximity to a landfill in Alaska. An additional 15 small remote incinerators were added to our inventory of existing units, bringing the total of this subcategory to 28 units. This additional information resulted in changes to the emissions limits.

2. Revisions to the Monitoring Requirements

After the March 21, 2001 final rule, petitioners identified computational issues for correcting CO concentration measurements to 7 percent O_2 for periods when the O_2 content of the flue gas approaches the ambient air O_2 content during startup and shutdown periods for sources that demonstrate compliance with the CO limit using CEMS. The equation for the 7 percent O_2 correction is X ppm CO* $(20.9-7)/(20.9-\%O_2$ of flue gas stream). As seen by this equation, as the flue gas stream O_2 content gets closer to 20.9, the value of X is multiplied by an ever increasing factor. For example, when the stack gas O_2 content is 4 percent, the factor is 0.82. If the stack gas O_2 content is 20 percent, the factor increases to 15.4. Therefore, a flue gas CO concentration reading of 100 ppm would be corrected to 82 ppm for a stack gas at 4 percent O_2 content, but would become a 1,540 ppm corrected concentration for a stack gas at 20 percent O_2 content. In the extreme, at a 20.8 percent stack gas concentration (i.e., approximating ambient air O_2 content), the same 100 ppm measurement would be corrected to 13,900 ppm.

Petitioners noted that O_2 contents relatively close to ambient air often are maintained during combustion unit startup and shutdown in order to safely operate the combustion unit. Therefore, CO readings during these periods would be multiplied by an uncharacteristically high correction factor, and the resulting corrected CO concentrations inflated due to the 7 percent O_2 correction. Petitioners and commenters presented data that show these corrected data points would have the potential to drive the 30-day rolling average values beyond the emission limit for the affected units, but this would not be an accurate reflection of the CO emissions.

Petitioners suggested various approaches to remedy this situation, with one being to not require the 7 percent O_2 correction requirement during unit startup and shutdown for sources that demonstrate compliance with the CO limit using CEMS. In other words, the CEMS data as reported at stack gas concentration without O_2 correction would be included in the rolling average calculations for periods when the combustion unit is either being started up or shutdown instead of applying the O_2 correction to that data before it is included in the calculation of the 30 day rolling average. During all other operating periods, the CEMS data would be corrected to a 7 percent O_2 concentration prior to calculating the rolling average. Stated otherwise, the data obtained during startup and shutdown, which will not include the 7 percent O_2 correction, will be added to the O_2 corrected data collected during all other periods to calculate the 30-day average that is used to determine continuous compliance with the applicable CO limit for sources that demonstrate compliance using CEMS.

Prior to issuing the reconsideration proposal, we received data for one unit in one subcategory (coal ERUs) that indicated startups usually occur over a 4-hour period and shutdowns occur over a 1 hour period. Therefore, we proposed provisions for calculating the 30-day CO rolling average that would allow the source to use CEMS data that does not include the O_2 correction to be used during the first 4 hours of operation from a cold start and the 1 hour of operation following the last waste material being fed to the combustion unit during shutdown procedures of the unit. Since proposal, however, we received comments on this provision, primarily pointing out that longer periods are required to protect combustion equipment from rapid temperature swings, which could cause damage to the fireboxes or kiln surfaces. Commenters also contended that the limited information concerning the startup and shutdown periods during which the O_2 correction would not be required did not reflect the needs for all combustor types or control device configurations. We have therefore revised the shutdown and startup period of operation to be more generally applicable to CISWI units. In the case of ERUs, incinerators and small remote incinerators, we determined that the startup period should include the times prior to the source reaching the minimal operating temperature, but in no case longer than 48 hours. For shutdown, we determined as at proposal that shutdown begins after the last waste has been fed to the combustor prior to shutdown but we have revised the final rule to indicate that the shutdown period may not exceed 24 hours. We have, therefore, specified in the final rule an UL of 48 hours for startup periods to use uncorrected CEMS data and 24 hours for shutdown periods to use uncorrected CEMS data for ERUs, incinerators and small remote incinerators. For waste-burning kilns, these periods are triggered off of material feed to the kiln rather than solely waste feed. This addresses the fact that kilns, unlike other CISWI units, are producing product rather than solely disposing of waste or recovering energy. Therefore, for waste-burning kilns, startup begins when the kiln's induced fan is turned on and continues until continuous feed is introduced into the kiln at which time the kiln is in normal operating mode. Shutdown begins when feed to the kiln is halted.

As at proposal, sources must indicate in the CEMS data records which CEMS data are uncorrected because they were obtained during the startup and shutdown period.

The O_2 correction issue described above for CO CEMS data collected during startup and shutdown applies equally to other pollutants measured with a CEMS that is corrected to 7 percent O_2. The final CISWI rule allows sources to demonstrate compliance with any of the standards using CEMS, and, for this reason, we have expanded authorization to use uncorrected CEMS data during periods of startup and shutdown to all pollutants for which a source demonstrates compliance with CEMS. In the final rule, the 7 percent O_2 correction is not required during startup and shutdowns for any CISWI sources that elect to demonstrate continuous compliance with any of the emission limits with a CEMS instead of stack tests.

3. Oxygen Monitoring Requirements

At proposal, we included provisions and definitions in an attempt to ensure that sources would be able to use existing O_2 monitoring systems to meet the continuous O_2 monitoring requirements. However, commenters identified potential issues with our proposed provisions and definitions. To address these commenters' concerns, we

have revised the provisions in 40 CFR 60.2165 and 40 CFR 60.2730 to clarify the methodology for establishing and monitoring the O_2 level. Furthermore, the definition of ''oxygen analyzer system'' has been revised to clarify the appropriate locations and nomenclature of possible existing monitoring systems so that their use to meet these requirements is fully enabled.

4. Removal of the Definition of Homogeneous Waste

The EPA included in the final 2011 CISWI Rule a definition of homogenous waste and a process for evaluating claims that a particular waste stream is homogenous. The definition was added to the 2011 CISWI rule in response to comment. Because the determination of homogeneity of a waste stream is relevant to applicability of CAA section 129 to qualifying small power producers and qualifying cogeneration facilities, we determined it was reasonable to include a definition of ''homogenous waste'' and a process by which sources could obtain a determination that a waste stream is homogenous from the EPA.

In the 2011 CISWI Rule, the EPA stated that a determination concerning whether a waste is homogeneous is made on a case-by-case basis. The EPA added provisions to the CISWI final rule that require source owners or operators seeking the exemption to submit a request for a homogeneous waste determination to the EPA, and that they support their request with information describing the materials to be combusted and why they believe the waste is homogeneous. The 2011 CISWI rule also stated that the determination of what constitutes a homogeneous waste is not delegable to the state or local agencies. In the December 23, 2011, reconsideration proposal, we proposed for comment the definition of ''homogeneous waste'' and the provisions for making homogeneous waste determinations that were included in the 2011 CISWI rule.

Commenters generally did not agree with the proposed definition and provisions for making a homogeneous waste determination, arguing that the definition and provisions introduced ambiguities and stipulations that would prevent classification of many materials (including fossil fuels) as being ''homogeneous.'' We reevaluated the definition and provisions in light of the comments and determined that the definition and provisions could be interpreted in a manner that would be unduly restrictive; however, we also determined that commenters proposed alternative definitions and provisions were equally problematic. Therefore, the final rule does not include a definition of ''homogeneous waste''. We are also removing the requirement that qualifying small power producers and qualifying cogeneration facilities that combust solid waste obtain a determination from EPA that such waste is homogenous. Because the final rule does not include a homogenous waste definition or a process to obtain a determination from EPA, we believe that it is appropriate to inform the EPA when a unit qualifies as a small power generator or cogeneration facility as defined under section 129 because the site specific fact patterns for different types of waste may vary considerably. Therefore, the final rule requires qualifying small power producers and qualifying cogeneration facilities that combust solid waste notify the EPA that such waste is homogeneous. (40 CFR 60.2020 and 40 CFR 60.2555).

Section 129 states, in part, that the term ''solid waste incineration unit'' does not include:

> * * * qualifying small power production facilities, as defined in section *796 (17)(C)* of title *16*, or qualifying cogeneration facilities, as defined in section *796 (18)(B)* of title *16*, which burn homogeneous waste (*such as units which burn tires or used oil, but not including refuse-derived fuel*) for the production of electric energy or in the case of qualifying cogeneration facilities which burn homogeneous waste for the production of electric energy and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes * * * CAA Section 129(g)(1)(B) (*emphasis added*)

We believe that the parenthetical contained in the exemption that prohibits refuse derived fuel, which is made from municipal solid waste, from qualifying as homogenous waste and allows tires and used oil to qualify as homogenous wastes provides guidance on what constitutes a homogenous waste. We do not accept industry's assertion that any waste from a common source is homogeneous, or that in all cases combining two homogeneous wastes results in a homogeneous waste, as doing so could result in almost any waste stream being homogenous. We do not believe that is consistent with the statute. Instead, we believe Congress intended this exemption to apply only when the waste stream has a consistent makeup that allows the source and the enforcement authority to predict the range of emissions from the combustion of the waste on an ongoing basis.

In keeping with this interpretation, we maintain that the homogeneous wastes are generally material specific (e.g., tires or used oil). We believe this means that a homogeneous waste is of known origin and that it can be identified as a specific material or materials—using the example in the Act, certain used oils or scrap tires. By contrast, municipal solid waste can be identified as municipal solid waste as a general term, but it is not composed of only one or two specific type of waste; e.g. municipal solid waste cannot be identified as one specific material or group of materials. Regarding variability of the composition of homogeneous waste throughout, homogeneous waste may have variations in composition, but it should generally be within the range of operations which produce the waste (e.g., size, contaminant levels, state of matter.) We also believe that off-spec materials may be homogeneous, even if they are not homogeneous to the on-spec material, and that, if combusted together, both the on-spec and off-spec materials may require separate homogenous waste determinations. We also believe that homogeneous waste should have predictable known contaminant levels, even if those contaminant levels vary within a range. We may question the homogeneity of a specific material if it is adulterated such that it takes on the characteristics of a different type of waste (e.g., used oil which is so contaminated with PCB's from a leaking heat exchanger, such that the used oil takes on the characteristics of a waste PCB stream as opposed to a used oil stream) or where the BTU value of a waste is so altered that other fuels must be introduced to ensure combustion and preserve the purpose of combustion under the exemption, i.e. to produce energy.

5. Non-Detect Methodology Using Three Times the Detection Level

Prior to reconsideration proposal, the EPA conducted a review of sampling volumes and detection levels across various emission testing ICR efforts on various combustion sources (See memorandum ''Updated data and procedure for handling below detection level data in analyzing various pollutant emissions databases for MACT and RTR emissions limits'' in the CISWI docket). As a result of this analysis, we determined recommended values for three times the RDL (3xRDL) that may be used as a minimum emission limit value that can be accurately measured by most laboratories. These recommended values were then compared with calculated emission limits and, if the calculated limit was less than the recommended 3xRDL, the 3xRDL value was selected as the limit. Since the December 23, 2011, reconsideration proposal was published,

we have continued our review and determined 3xRDL values for additional metals measured using EPA Reference Method 29. These include recommended values for Cd and Pb and we have applied this methodology to those emission limits in addition to the D/F and Hg limits that were reevaluated in the reconsideration proposal. As discussed in the reconsideration proposal, the premise for this approach is the same as described in the final 2011 CISWI rule but using a broader data set to establish the 3xRDL value. We have not changed the methodology of the emission limit calculation or tabulation of the three times the detection limit value that was used in the final 2011 CISWI rule.

Since reconsideration proposal, some commenters have noted that the EPA Method 5 minimum catch values were below levels established in similar studies on this reference method. In light of these comments, we have reconsidered the 1 mg minimum catch value used in the reconsideration proposal and are now using a 1 mg minimum catch in establishing the final rule emission limits. Our review and determination of the 1 mg minimum catch are discussed in ''Minimum Detection Limit for EPA Method 5'' in the CISWI docket.

In a similar fashion, the CO span adjustment methodology has been further refined in consideration of comments on the approach used to adjust CO instrumental test methods readings in reconsideration proposal. The methodology for adjusting CO emission test run data to reflect the limitations from the instrument span used at testing is described in the ''CISWI Emission Limit Calculations for Existing and New Sources for the Reconsideration Final Rule'' memorandum in the CISWI docket.

6. Parametric Monitoring for Additional Control Device Types

In the December 23, 2011, reconsideration proposal, we stated that we believed the control devices with monitoring provisions expressly identified in the rules should encompass most types of control devices that we anticipate the various types of CISWI units will use to meet the emission limits. However, recognizing that a source might want to employ another type of control that is not addressed, we provided provisions for sources to petition for specific operating limits for alternative control devices to be established during a performance test. These provisions also allow specific operating limits to be established for CISWI units without any air pollution control devices, such as for units that employ material balance operating limits in conjunction with periodic stack testing to demonstrate continuous compliance.

We also determined that dry sorbent injection (or dry scrubbers) may be one type of additional control device that CISWI units may widely use to control acid gases. Commenters agreed with our statement and encouraged the EPA to identify operating parameters for dry scrubbing systems in the final rule. We have done so, by both defining ''dry scrubber'' in the rule, and specifying that the sorbent injection rate must be monitored and maintained at or above the operating rate established during the HCl performance test (40 CFR 60.2165 and 40 CFR 60.2730). Furthermore, we have determined that the sorbent injection rate for ERUs can be adjusted to reflect operating loads that are less than those during the performance testing. Commenters have made arguments that requiring a high sorbent injection rate during reduced boiler loads can lead to fouling and plugging issues, especially for acid gas sorbent injection. To address this particular concern, and to provide consistency with other industrial boiler rules, we are also providing this parametric monitoring provision for sorbent injection air pollution control devices.

Also regarding monitoring, we determined after proposal that we had not clarified in the rule that sources opting to use CEMS to measure NO_X, Hg or D/F were not required to monitor ACI rates (for Hg and D/F CEMS-equipped units) or SNCR parameter monitoring (for NO_X CEMS-equipped units). Our intent had been to not require applicable control device parameter monitoring if a CEMS was in use for the pollutant being controlled by the device. Control device parameter monitoring is an acceptable and established method for determining continuous compliance and it is appropriate to require such monitoring when coupled with period stack testing. However, direct, continuous emission measurements with a CEMS are sufficient for determining compliance for CISWI units without requiring parametric monitoring. In cases where CEMS data are available to directly measure regulated pollutants, operating parameter data would be duplicative.

7. Particulate Matter Continuous Monitoring Provisions for Large ERUs and Waste-Burning Kilns

In today's rule, we are finalizing monitoring requirements for ERUs with an annual average heat input rate greater than 250 MMBtu/hr. As we stated in the proposal, recent EPA experience with the utility boiler source category has led the EPA to allow PM CEMS as an alternative, rather than a requirement. Industry commenters have maintained that there were several problems with implementing the monitoring requirements to demonstrate compliance using a PM CEMS and with the requirements to conduct a periodic audit of the PM CEMS in accordance with PS 11 of appendix B and Procedure 2 of appendix F to part 60. As we discuss in response to these comments later in this preamble (See II.E), the PM CEMS technology may not be sufficient to certify accurate monitor performance in the PM concentration range of the CISWI biomass ERU limits. Furthermore, in related ongoing work on the Portland cement source category, we realize that similar concerns regarding PM CEMS are applicable. Therefore, we are also removing PM CEMS (PS–11) requirements for waste-burning kilns, and instead, requiring PM CEMS equipment for these units that are used for continuous parametric monitoring rather than for direct measure of compliance with the numerical PM emissions limit, similar to those being required for major industrial boilers and utility boilers. However, PM CEMS (PS–11), are still allowed as an option for coal ERUs, incinerators and small remote incinerators, since the emission limits for these subcategories do not pose the same technical concerns as for biomass ERUs and waste-burning kilns. To be consistent with these other rules, we have incorporated 30-day rolling averages to be measured with PM CPMS. The EPA is further requiring that a site-specific parametric operating limit be established during the performance test, that there be continuous monitoring of that parametric limit using a PM CPMS, that an exceedance of that site-specific operating limit be reported as a deviation and trigger immediate corrective action and a Method 5 performance test within 45 days.

8. Compliance Dates

At reconsideration proposal, we proposed to extend the compliance dates for existing units in the incinerator, ERU and waste-burning kiln subcategories. We are finalizing the revision of the effective dates for those three subcategories and, based on comments received, we are also extending the compliance date for units in the small remote incinerator subcategory. The EPA proposed to amend the standards for CO for all subcategories of CISWI; to further

subcategorize certain subcategories; to change several other pollutant standards for incinerator, ERU and waste burning kilns subcategories; to change the compliance regime from CEMS-based to stack-test/parametric-monitoring based for certain pollutants and unit types; and to change the compliance calculation provisions for sources that are required or that elect to use CEMS to demonstrate continuous compliance. These proposed changes may occasion the need for additional time for sources to study the possibility of different control and monitoring strategies than would have been considered if we had not amended the 2011 CISWI rule. New compliance strategies may require time to implement. New engineering studies may be needed, potential suppliers identified, a new bidding/procurement process undertaken and the appropriate construction and operating permits obtained. Significant plant redesign, in the form of new ductwork and new fan design and changes in the main control equipment may be needed. See US EPA, Engineering and Economic Factors Affecting the Installation of Control Technologies for Multipollutant Strategies, October 2002. Depending on the type of control, this normally requires 15–27 months. Multiple control systems may take longer. Id. Installation of controls normally occurs at times of unit outages, which will likely end up being at differing times of the year for each of the CISWI subcategories. For example, for waste-burning kilns, this would occur during winter months (to coincide with kiln outages during low production seasons). However, for small remote incinerators, facility retrofits would need to occur while road access to the site is available and climatic conditions allow for construction. Also, small remote incinerators have the additional component of having to increase the footprint of the site to accommodate additional space for control devices and waste segregation facilities. This additional permitting requirement and construction effort is not something other CISWI subcategories have to face but adds an additional consideration to developing a compliance strategy. In general, though, the differing construction constraints for the various subcategories of CISWI likely mean that there will be a wide variety to the rate of progress towards compliance for the differing CISWI sources. Further, commenters have argued that, due to the delay of the final 2011 CISWI rule, uncertainty on selecting a compliance strategy was created, essentially putting internal compliance implementation activities on hold until the reconsideration was complete. As a result of these considerations, we have finalized extending compliance for all subcategories of CISWI. Comments on extending the compliance date and our responses to these comments are found in the ''Summary of Comments and Responses to the CISWI Reconsideration'' document in the CISWI docket.

The compliance date for existing CISWI sources subject to standards in this final rule is 5 years after the date of publication of this final rule or 3 years after the state plan is approved, whichever happens earlier. This date is being finalized in order to provide facilities sufficient time to install controls or to make other compliance-related decisions. However, the CAA section 129(f)(2) does require that the promulgated standards be effective ''as expeditiously as practicable after approval of a State plan,'' so that states have the flexibility to determine that the standards for existing units within their purview may have a compliance date which is less than the allowable 3 years following approval of the state plan. For new sources, the EPA is finalizing the proposed change of the compliance date to 6 months after the date of publication of the final reconsideration rule or at startup, whichever is later.

9. Definition of Waste-Burning Kiln

In the December 23, 2011, reconsideration proposal, we proposed revisions to the definition of ''waste-burning kiln'' to indicate that the term ''does not include a kiln that is feeding non-hazardous secondary ingredients exclusively into the cold end of the kiln.'' In proposing this language, the EPA intended to codify principles set out in a previous action granting and denying reconsideration of the NESHAP for Portland cement kilns. See 76 FR 28318, 28322 (May 17, 2011); see also Memorandum ''Revised Floors Without Kilns That Would Have Been CISWI Kilns Had the Solid Waste Definition Applied'' (EPA, April 25, 2011) (which memorandum is summarized in the May 17 **Federal Register** notice). The May 17, 2011, notice and April 25, 2011, memorandum state in essence that combustion does not occur in any region of a cement kiln except the hot end and that cement kiln dust added to the hot end of a cement kiln also is not combusted since it is inorganic and essentially inert.

The language used at proposal captured some but not all of these principles, since it referred only to the ''cold end'' of a cement kiln, as pointed out by a number of commenters. The EPA is revising the definition in the final rule to accurately reflect the May 17 preamble and April 25 memorandum discussion of when combustion occurs in a cement kiln. In addition, we are adding the fact that combustion in a cement kiln does also take place in the combustion zone of a precalciner or riser duct burner.

One further clarification is appropriate. The May 17, 2011, preamble contains one reference to legitimacy criteria for determining when a secondary material is being recycled. 76 FR at 28322/1–2. The threshold issue for determining if a unit is subject to section 129 is whether it ''combusts'' solid waste material (see section 129 (g)(1)). For cement kilns, this determination does not necessarily turn on legitimacy of recycling, but rather on the nature of the cement kiln process. Consequently, if combustion of solid waste is not occurring, a unit is not a CISWI, irrespective of whether or not legitimate recycling is occurring.

10. Exemption for Other Solid Waste Incineration (OSWI) Units

Following publication of the December 23, 2011, reconsideration proposal, we realized that the CISWI rule did not contain any language to clarify overlap with another CAA section 129 regulation applicable to OSWI units. The CISWI rule already contains exemptions for MWCs, HMIWIs and SSIs, but omitted similar language for OSWI units. Therefore, in this final rule, we are providing language in 40 CFR 60.2020 and 60.2555 that clarifies that incineration units that are subject to 40 CFR part 60 subparts EEEE or FFFF are exempt from the CISWI rule.

D. Technical Corrections and Clarifications

We are also including some technical corrections and clarifications in the final rule, as outlined below:

- Operating parameter limits during performance testing—While we believe it is intrinsic that established operating parameter limits do not apply during subsequent performance testing since they are being confirmed or reestablished during the subsequent testing, we provided language in the proposed rule in the NSPS to clarify that they are waived during performance testing (40 CFR 60.2145(c)). However, we inadvertently omitted this clarifying language in the emission guidelines so we have added clarifying language in the final emission guidelines at 40 CFR 60.2710(c).
- Bypass stacks on waste-burning kilns—While not included in the final

rule text, we are clarifying here that the definition of ''bypass stack'' in today's final rule does not have the same meaning as an ''alkali bypass'' used by some waste-burning kilns that manufacture Portland cement.

• Clarifying that, consistent with CAA section 129(f)(1), June 4, 2010, is the appropriate new source applicability date in 40 CFR 60.2015(a)(1).

• Revising the title of Table 2 to subpart DDDD to clarify that these emission limits apply to incinerators which are currently subject to CISWI emission limits promulgated in the 2000 CISWI rule.

• Clarifying that petitions for specific operating limits for control devices not listed in this subpart must be submitted to the Administrator at least 60 days before the performance test is scheduled to begin (40 CFR 60.2115 and 40 CFR 60.2680).

• Providing definitions of ''30-day rolling average'' and ''responsible official'' to clarify what is meant by these terms.

• Adding text to the provisions for PM monitoring provisions for ERUs to clarify that the 250 MMBtu/hr threshold is based upon the average annual heat input rate, consistent with how this threshold is applied in the industrial boiler NESHAP.

• Revising the affirmative defense text to clarify that these provisions apply to violations of standards and to further clarify the reporting requirements and criteria for sources seeking to assert an affirmative defense (40 CFR 60.2120 and 40 CFR 60.2685).

• Revising the recordkeeping provisions in 40 CFR 60.2175(v) and 40 CFR 60.2740(u) to reflect the categorical non-waste determination provisions of 40 CFR 241.4.

• Revising the electronic reporting provisions in 40 CFR 60.2235 and 40 CFR 60.2795 to clarify the timing and mechanism for submitting these reports and to be consistent with the electronic reporting language in more recent rulemakings.

• Revising the definition of ''process change'' to clarify the intended types of changes that would require re-testing.

• Making corrections to the D/F calculation methodologies for toxic equivalency basis and adding calculation methodology provisions for D/F TMB.

• Revising the definition of ''space heater'' to clarify applicability for units that meet the requirements of 40 CFR 279.

• Revising the emission limits for those pollutants for which data available from a similar source was determined to be better suited for calculating the new source limits. Notably, this is the case for NO_X for waste-burning kilns, and for Hg and PCDD/PCDF for ERU-liquid/gas units. These revisions reflect updates made to emission limits of the selected similar sources.

E. Major Public Comments and Responses

We have included some of the major comment topics and our responses below in the preamble. All other comments and responses are provided in the ''Reconsideration Response to Public Comments Document'' in the CISWI docket.

Solid-Fuel ERU Subcategorization

Comment: Several commenters support the proposed separate coal and biomass standards for D/Fs, CO, NO_X, SO_2, PM, Cd and Pb. However, these commenters further urge the EPA to establish separate standards for HCl and Hg for coal and biomass. Commenters state that the EPA's recognition that design and operational differences between combustors designed to combust coal and those designed to combust biomass is evidence to support subcategorizing emission limits for all pollutants. One commenter discussed differences in biomass and coal fuel rank, and the significant boiler design differences in furnace height and volume that exist between units designed to combust different fuel ranks of coal-fired boiler furnaces. As an example, one commenter noted that a low-rank coal (high slagging lignite) furnace can be 1.65 times the plan area, and 1.45 times the furnace height, of a similar capacity furnace combusting a high rank coal (medium volatile bituminous). The commenter stated that this large difference exists even among varying grades of coal, with biomass units being fuels of even lower rank than lignite. Therefore, according to the commenter, furnace area and height (and hence, volume) are significantly different between ERUs designed to combust coal and those designed for biomass combustion. The commenter highlighted an analysis of their existing boilers to see the feasibility of substituting biomass for coal. The commenter's results indicated that, due to fundamental design attributes of their coal-fired units, they could only co-fire up to 20 percent biomass in the units. The commenter explained that this limitation was due to design issues pertaining to the unit being designed for coal, such as superheater tube spacing, number and location of soot blowers, fouling characteristics of biomass ash and the impact the high moisture levels of biomass fuels have on fan capacity. The commenter stated that these findings further support that coal and biomass are not interchangeable within ERUs and therefore supports subcategorizing emission limits between the two types of unit. The commenter also contended that the EPA acknowledged significant design differences and their impacts on Hg emissions during development of the Utility MACT Final Rule. The commenter urges the EPA to take a similar approach in CISWI. One commenter agreed with differentiation between coal-fired and biomass ERUs but supported keeping solid-fuel ERUs together for purposed of HCl and Hg emission limits. Another commenter argued that all of the EPA's subcategories are unlawful and arbitrary, noting that their reasons for this belief were given in their comments on the 2010 proposal.

Response: Based on our proposal and follow-up comments summarized below, the EPA is finalizing separate limits for all nine pollutants for biomass and coal ERUs. We agree with comments concerning differences in moisture content between biomass and coal-fired units. We reviewed data in the CISWI database and see that the stack gas moisture content of coal-fired ERUs is around 11.6 percent and is about 19.2 percent for the biomass ERUs. We have considered the technical arguments provided by commenters on CISWI ERUs, other technical differences we have previously considered in our decision to subcategorize ERUs and how these design differences impact pollutant emission characteristics of the ERU. As a result, we have determined that subcategorizing all nine pollutant emission limits between coal and biomass solid-fuel ERUs is appropriate for the final CISWI rule.

One commenter supported the differentiation between coal and biomass, but in keeping HCl and Hg limits together. However, for the reasons given above, we have determined that all nine pollutants should be subcategorized.

Contained Gaseous Material

Comment: Commenters support the EPA retaining the 2000 CISWI rule's definition of ''contained gaseous material.'' Some commenters believe that the EPA should expressly include the definition of ''contained gaseous material'' in the amendatory text to confirm that the definition is back in the CISWI rule.

Response: We believe that the commenters misunderstood what the EPA proposed. Specifically, the basis of

the reconsideration proposal amendatory text was the 2000 CISWI rule—not the 2011 CISWI rule—because the 2011 CISWI rule had not been codified in the CFR pursuant to the Delay Notice. Therefore, by not including the amendatory instruction to delete the definition in the 2000 rule in the proposed reconsideration rule, we proposed to retain the definition as contained in the 2000 CISWI rule. However, as explained above, due to the vacatur of the Delay Notice, the 2011 CISWI rule is in effect and the definition of contained gaseous material does not appear in that rule. For that reason, we are including the definition of ''contained gaseous material'' found in the 2000 CISWI rule in today's final rule.

Comment: Many commenters who supported the EPA retaining the 2000 CISWI rule's definition of ''contained gaseous material'' also urged the Agency to make clear that this definition should apply when interpreting the term ''solid waste'' under RCRA.

Response: As aforementioned, the Agency is including the definition of ''contained gaseous material'' found in the 2000 CISWI Rule in today's final rule. Specifically, the definition of ''contained gaseous material'' is codified today, consistent with the 2000 CISWI Rule, as meaning, ''gases that are in a container when that container is combusted.''[4]

CAA section 129(g)(6) states that the definition of ''solid waste'' shall have the meaning established by the Administrator pursuant to RCRA. We agree that the definition of contained gaseous materials in the final CISWI rule is consistent with the interpretation of that term under RCRA for the purpose of defining when non-hazardous secondary materials are solid wastes when combusted in CISWI units.[5] As discussed in more detail in the NHSM portion of the December 2011 reconsideration proposal and in various letters issued by EPA,[6] the NHSM rulemaking did not change any previous EPA position as it relates to whether ''contained gaseous material'' is a solid waste under RCRA.''[7]

We note, however, that although gases must be ''contained'' to be solid wastes under RCRA, EPA maintains separate and independent authority under RCRA to regulate certain types of uncontained gases whether or not they themselves are solid wastes (e.g., gases emitted from the management of hazardous waste).[8]

Comment: Some commenters also requested that EPA clarify that landfill gas is not considered to be a ''contained gaseous material'' and/or a ''solid waste'' under RCRA.

Response: We agree with commenters that landfill gases must be in a container when that container is combusted to be considered ''contained gaseous material'' under today's final CISWI regulations.

However, given that landfill gas is emitted from solid waste (i.e., non-hazardous solid waste landfills or municipal waste landfills), EPA has distinct and independent authority under RCRA to regulate this material as part of our authority to regulate solid waste landfills (for example, in order to address the risk of explosions posed by methane emissions per 40 CFR 258.23).[9]

Oxygen Correction During Startup and Shutdown

Comment: Commenters generally support allowing the use of uncorrected CEMS data during startup and shutdown. Several commenters are concerned that the 4- hour startup and a 1-hour shutdown period (derived from a single coal fired unit) are not sufficient for all the CISWI unit types and technologies. Other commenters believe there should be no time limitations on shutdown and startups. One commenter, however, believes the proposed time limit is appropriate. Some commenters recommend using the Boiler MACT rule approach using load to define when the O_2 corrections do not apply.

Commenters also urge the EPA to eliminate the O_2 correction for all CEM-measured emission limits, not just CO, during startup and shutdown periods. Commenters also support making this allowance available to all types of CISWI unit, not only ERUs.

Response: In today's final rule, we are retaining the provision that allows sources to use uncorrected CO CEMS data during periods of startup and shutdown. Based on comments and the technical justifications for allowing the use of uncorrected CEMS data identified during the comment period, we are expanding this provision to any pollutant for which continuous compliance is being determined using CEMS as explained above in ''Section II.C: Summary of Significant Changes Since Proposal.''

Particulate Matter Continuous Monitoring Provisions for Large ERUs and Waste-Burning Kilns

Comment: Several commenters supported the EPA's proposal to remove requirements for PM CEMS (using PS–11) for continuous compliance for large ERUs and waste-burning kilns, stating that PM CEMS usefulness and application issues of these monitors are uncertain. Commenters asserted that, for biomass ERUs and sources with low PM concentration, PM CEMS were not adequate to accurately monitor low PM concentrations. Commenters further contended that PM CPMS are essentially the same thing as PM CEMS, and that there were no clear instructions on how to ''certify'' PM CPMS, as was required in the proposed rule. Commenters added that they do not understand how the recording of hourly and 30-day rolling averages of the output from these monitors will be useful to demonstrate

[4] See 65 FR at 75359 and 75373.

[5] Note that for the purposes of CISWI, contained gaseous materials are limited to gases in a container when that container is combusted. This limitation is due to the fact that CAA section 129 is focused exclusively on combustion of non-hazardous solid wastes. On the other hand, RCRA is focused on more than just combustion of non-hazardous solid wastes (e.g., treatment, storage, and disposal of hazardous and non-hazardous wastes); thus, this limitation is inapplicable to RCRA. We also note that the term 'container' as used in this definition is broader than the term as used in the hazardous waste regulations (see 40 CFR 260.10, definition of container). Specifically, the term here is not limited to a portable device, but also includes stationary containers. We believe that these interpretations under the CAA and RCRA are consistent.

[6] For example, see June 25, 2012 letter from Assistant Administrator Mathy Stanislaus to Paul Noe. A copy of this letter has been placed in the docket for today's rulemaking.

[7] See 76 FR at 80472–80473.

[8] RCRA section 3002(a) directs EPA to establish standards for hazardous waste generators and RCRA section 3004(a) directs EPA to establish performance standards for all facilities that treat, store or dispose of hazardous waste. Both of these provisions grant authority to control gaseous emissions from hazardous waste management as may be necessary to protect human health and the environment. RCRA sections 3004(n), and (o)(1)(B), further direct EPA to regulate air emissions from, respectively, hazardous waste treatment, storage and disposal facilities; and hazardous waste incinerators. The authority provided in RCRA section 3004(q) to regulate fuel produced from hazardous waste also encompasses gaseous fuels (when they are produced from hazardous wastes).The authority provided in RCRA section 3004(u) to control ''releases'' of hazardous constituents from solid waste management units at a facility seeking a RCRA permit also encompasses gaseous releases (when the gases are hazardous constituents). The authority granted under these sections of the statute is independent of EPA's authorities over solid waste. As an example, EPA has authority to regulate emissions generated during treatment of hazardous waste, including volatilization and incineration of hazardous waste.

[9] RCRA Subtitle D gives EPA authority to set standards for non-hazardous waste disposal facilities, including standards for air emissions. For example, EPA's criteria for municipal solid waste landfills, established pursuant to RCRA sections 1008(a)(3), 2002, 4004(a), and 4010(c), generally address air quality by prohibiting the open burning of waste and by setting limits on the concentration of explosive gases (i.e., methane). See also March 6, 1986 Letter from Marcia E. Williams to Mr. H. Lanier Hickman, Jr., which states, ''[W]e believe it is clear that the U.S. Environmental Protection Agency (EPA) has the authority under both Sections 3004(n) and 4004(a) of RCRA, as well as the CAA, to regulate gaseous emissions from hazardous and non-hazardous waste landfills.''

performance or evaluate compliance with a PM limit. One commenter suggested that the EPA remove the PM CPMS requirements altogether for all industrial boilers.

Response: We are revising the PM CEMS requirements in the final rule as explained above.

In responding to this comment specifically, we believe it is useful to review the procedures and acceptance criteria of PS–11, the protocol mandated by the 2011 final CISWI rule.

Performance Specification-11

PS–11 is structured differently than other PSs that apply to validating the performance of gaseous pollutant CEMS. This is primarily because the pollutant, PM, is defined entirely by the test method specified by regulation to measure it. As the industry commenters note, there are no independent standard reference materials for PM concentrations as there are for gaseous pollutants (e.g., NIST traceable compressed gases for validating SO_2 or NO_X instrumental measurements). The only reference standard for determining the PM concentration in an air or stack gas sample is the reference test method. In the case of the CISWI final rule, the rule specifies EPA Method 5 for measuring filterable PM concentration (e.g., in mg/dscm).

Performance Specification 11 provides procedures and acceptance criteria for validating the performance of several types of PM CEMS technologies. Although there are multiple instrument and data reporting operational performance checks in PS–11 that are similar in concept to those for gaseous pollutant CEMS, there is a principal PM CEMS performance requirement that is distinctly different. That difference is the development of a site-specific PM CEMS correlation or mathematical response curve. There are two key procedural elements to developing that correlation. First, PS–11 requires that the source conduct stack test runs using an EPA PM test method (e.g., Method 5) and simultaneously collect corresponding PM CEMS output data. Second, the source must vary the operation of the control device manually in order to produce a range of PM concentrations. Performance Specification 11, section 8.6, requires at least five test runs at each of three different operating conditions (i.e., low, mid and high PM concentrations) for a total of 15 or more test runs that range from 25 to 100 percent of allowable emissions. Then the source must use the test method data and the corresponding PM CEMS output data to develop an equation (i.e., a calculated linear or nonlinear curve) that will be used to define the relationship between the PM CEMS output and the test method measured PM concentrations. Each site-specific correlation must meet several PS–11 acceptance criteria including limits on confidence interval and tolerance interval equating to ±25 percent of the applicable emissions limit.

Discussion of Technical Issues

In prior comments submitted to the EPA on the PM CEMS requirements for waste-burning kilns, one issue raised about conducting the testing to meet the PS–11 correlation development requirement is the impracticality of varying the emissions from a FF control device. Many CISWI units subject to the standards use FF control devices.

We agree with commenters that there are typically few, if any, physical adjustments one can apply to a FF or to the waste-burning kiln process to change the outlet PM concentration significantly. A FF produces essentially a constant outlet concentration even with changes to the inlet loading or flow (*http://www.epa.gov/ttnchie1/mkb/documents/ff-pulse.pdf*). Although PS–11 allows some flexibility when control device perturbations are not possible, the resulting correlation would apply for only the narrow range of concentrations measured during the testing. The result would be that the PM CEMS would be correlated only for a relatively small range of conditions below the applicable compliance limit. This range would not necessarily include situations where the standard might be exceeded. Without the ability to calculate emissions should the FF performance change from initial test conditions (e.g., bag leaks begin to develop), such a limited correlation range would render the PM CEMS less reliable for calculating long term average concentrations or emissions rates and for verifying compliance. Additionally, it is difficult and resource intensive to modify baghouse control efficiency in a way that is representative of normal operations at a waste-burning kiln.

Commenters also cited problems in developing correlations in stack gases with variable PM constituents and physical characteristics when using light scatter or scintillation detection PM CEMS devices. As noted above and in the EPA's technology background documents (e.g., *http://www.epa.gov/ttn/emc/cem/pmcemsknowfinalrep.pdf* and *http://www.epa.gov/ttn/emc/cem/r4703-02-07.pdf*), the correlations developed for these types of instruments are inherently dependent on the particle structure, size and other physical characteristics as well as PM mass in the exhaust gases for each site. Put another way, these light-based PM CEMS produce a signal that can vary when different fuels or raw materials are introduced to the kilns or ERU even when the FF outlet mass concentration remains unchanged.

To the extent that physical characteristics of the PM in the stack remain stable, correlations for light-based PM CEMS meeting PS–11 performance criteria can represent mass rates to the degree of accuracy required by PS–11. For example, there are various design structures used in some light-based PM CEMS devices that can mitigate the effects of changes in the physical aspects of particles on measurement uncertainty. In addition to the type of light effect measured (e.g., Rayleigh or Mie scattering or light scintillation), the detector wavelength and the frequency are design factors that will affect how the PM CEMS responds to small changes in the physical appearance of the PM.

On this point, we note that if a source owner were concerned about the ability of a light-based PM CEMS to meet the requirements of PS–11 because of variable physical characteristics of particles in the stack, there is at least one other PM CEMS technology based more directly on mass measurement rather than on light scatter or light scintillation characteristics. The currently available Beta gauge technology does not suffer from this particular technical problem. The Beta attenuation PM CEMS, also called Beta gauge, extracts a sample for the stack gas and collects the PM on a filter tape. The device periodically advances the tape from the sampling mode to an area where the sample is exposed to Beta radiation. The detector measures the amount of Beta emitted by the sample and that amount can be directly related to the mass of PM on the filter. The Beta gauge sensitivity or detection limit can be enhanced (i.e., lowered) with greater sample volumes produced from sampling intervals up to an hour or longer.

Another PM mass detector projected for greater use as PM CEMS is the TEOM. Often used in measuring ambient levels of PM, the TEOM operates on a basic principle that can be made traceable to NIST laboratory standards. The TEOM can provide a continuous measure of PM mass in a sample extracted from the stack and routed to the detector. Tapered element oscillating microbalance based PM CEMS are not yet commercially available.

Commenters identified another factor contributing to the difficulty of meeting PS–11 correlation requirements for low PM concentrations corresponding to a low applicable emissions limit, as with the promulgated PM standards here for waste-burning kilns and biomass ERUs. We have recently reevaluated the capabilities of the EPA Method 5 for measuring low concentrations of PM (See the memo ''Revision of Estimated Method 5 Detection Limit'' in the CISWI docket) and have determined a Method 5 method detection limit of approximately 2 mg/dscm for a 1-hour test run. The uncertainty of a measurement with Method 5 at this PM concentration would be from 50 to 100 percent (i.e., ±1 to 2 mg/dscm). We can determine a PQL using ~3 × method detection limit to reduce that Method 5 measurement uncertainty to ±10 to 20 percent. That means that the PQL for a 1-hour test run with Method 5 would be approximately 6 mg/dscm ±0.6 to 1.2 mg/dscm.

The CISWI PM emissions limit for existing waste-burning kiln sources is 3.6 mg/dscm, and is 11 mg/dscm for biomass ERUs. The new source limits are the same for waste-burning kilns but are 5.1 mg/dscm for biomass ERUs. As noted above, PS–11 specifies acceptable criteria for a correlation directly related to the applicable emissions limit. For a PM CEMS set up to measure compliance with a 3.6 mg/dscm limit, the inherent uncertainty associated with a 1-hour Method 5 measurement (±0.6 to 1.2 mg/dscm) would constitute more than half of the ±25 percent of the applicable PS–11 acceptance threshold (i.e., ±0.9 mg/dscm) of the mid-level PS–11 correlation test (i.e., the correlation for the middle of the three PS–11 correlation points). Factoring in the inherent PM CEMS response variability and the uncertainty associated with the representative sampling (e.g., PM and flow stratification), we agree with commenters that trying to satisfy PS–11 at such low concentrations using 1-hour Method 5 test runs would be problematic. This drawback applies regardless of the type of PM CEMS technology used.

As commenters to the Portland Cement NESHAP have noted, one can improve the method detection capabilities of the Method 5 or other filterable PM test method by increasing sampling volume and run time. For example, a test run time of about 2 hours will improve the Method 5 PQL to about 3 mg/dscm. The measurement uncertainty associated with a 2-hour test run at 3 mg/dscm would be about ±0.3 to 0.6 mg/dscm. At this level, the uncertainty associated with the PM test method measurements alone would be about half of the correlation limit allowed in PS–11. To achieve a PQL of 1 mg/dscm and a measurement uncertainty of about ±0.01 to 0.2 mg/dscm, one would need to conduct a test run of 6 hours or longer. As noted above, the PS–11 correlation calculations would also have to account for any PM CEMS analytical and measurement variability.

Using data from longer Method 5 test runs will improve the probability of a PM CEMS meeting PS–11 correlation requirements but, as commenters note, will also raise practicality concerns without completely resolving the issue. For example, the time to complete 15 1-hour test runs under three different emissions conditions may be 3 to 6 days of field work, while the time to complete 15 6-hour test runs under three different emissions conditions will require at least 2 weeks of field work in order to produce and maintain the operating conditions associated with three different emissions rates. Longer test runs lower the variability of Method 5 PM measurements at near detection limit levels from ± 50 percent to below ± 25 percent; however, the variability of Method 5 results at these low levels represents a significantly larger portion of the ± 25 percent correlation requirement of PS–11 than would Method 5 data collected at higher PM concentrations. Method 5 measurement uncertainty becomes increasingly greater with lowering PM concentration and thus reference measurement variability hinders the PS–11 correlation process the most for the best performing sources. Thus, the ultimate result might still lack certainty and would also pose the most difficulty and uncertainty to those sources with lower PM concentrations (potentially disadvantaging more efficient operators).

Although longer Method 5 test runs and longer beta gauge sampling times reduce difficulties with PS–11 correlation for a PM CEMS, the EPA believes that this correlation will not be technically achievable for a significant number of waste-burning kiln and biomass ERU sources, a result in part due to the Method 5 PM emissions measurement variability at the low concentrations necessary to maintain compliance with the standard. The PM CEMS correlations then become approximations more qualitative than quantitative with high levels of uncertainty at low concentrations (i.e., the correlations do not meet PS–11 requirements). This characteristic exists regardless of the type of PM CEMS technology used by the source since it involves variability not only of the PM CEMS but also the Method 5 test data, variability of raw material and additive feeds to the waste-burning kiln, and the changing particle sizes, shapes, and density with process operations (e.g., mill on versus mill off, type of fuel being used in the ERU).

Making PM CEMS work at low concentrations (<10 mg/dscm) at waste-burning kiln and biomass ERU sources is not impossible; although, to expect that correlations would be achievable at all low emissions sources would be unrealistic. Additionally, the technical limitations do not mean that PM CEMS cannot be used to monitor for compliance. A PM CEMS that does not meet the EPA correlation requirements can still produce data indicative of trends and changes in emissions control. Particulate Matter CEMS technology can be effective in monitoring control device performance (see, e.g., 77 FR 9371 (February 16, 2012)) where the EPA established PM CPMS parametric operating limits for electric utility steam generating units.

A Monitoring Approach Alternative to PM CEMS and PS–11

To address technical issues associated with PM CEMS meeting PS–11 correlation requirements at low PM emissions concentrations from waste-burning kilns and biomass ERUs, the impracticability in perturbing FF emission rates to establish PS 11 correlation curves, and the potentially variable PM emissions characteristics expected from waste-burning kilns, the EPA is finalizing the change of the compliance basis for the PM emissions limit from PM CEMS. For monitoring continuous compliance, the rule requires PM CEMS equipment but, as explained below, that equipment would be used for continuous parametric monitoring rather than for direct measure of compliance with the numerical PM emissions limit.

Specifically, this final rule recognizes the value of PM monitoring technology sensitive to changes in PM emissions concentrations and use of such a tool to assure continued good operation of PM control equipment. This approach avoids the PM CEMS calibration (i.e., PS–11 correlation). Therefore, the EPA is including provisions that a site-specific parametric operating limit be established during the performance test, that there be continuous monitoring of that parametric limit using a PM CPMS, that an exceedance of that site-specific operating limit be reported as a deviation and trigger immediate corrective action and a Method 5 performance test within 45 days.

In the May 2012 Proposed National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants The EPA proposed the use of PM CPMS for continuous monitoring of PM emissions as a 30-day rolling average established by identifying the average PM CPMS response corresponding to the highest 1-hour PM compliance test. Failure to meet this 30-day rolling average would result in retesting. Industry commented that this requirement would trigger unnecessary retests for many facilities, especially for cleaner sources. This is a legitimate issue. To avoid a perverse result, the EPA is modifying the way PM CPMS operating limits are established. Sources whose compliance with the PM emission standard are shown to be 75 percent or below the emission limit in the PM method 5 compliance test will set their PM parametric operating limit to be a 30-day rolling average equivalent to that 75 percent level. Sources whose compliance with the PM emission standard are above 75 percent of the emission limit will establish their operating limit as a 30-day rolling average equal to the average PM CPMS values recorded during the PM compliance test. It should be noted that this provision does not affect the actual emission limit that must be met.

F. What other actions are we taking?

In this final action, we are denying requests for reconsideration on all issues contained in the petitioners' requests for reconsideration that we did not include in the December 23, 2011, proposed rule. The issues for which we are denying reconsideration failed to meet the standard for reconsideration under CAA section 307(d)(7)(B) and we determined that reconsideration was not otherwise appropriate. Specifically, on these issues, the petitioner has failed to show the following: That it was impracticable to raise their objections during the comment period; or that the grounds for their objections arose after the close of the comment period; and/or that their concern is of central relevance to the outcome of the rules. We have concluded that no clarifications to the underlying rules are warranted for the 19 remaining petitioners' issues for the reasons set forth in the memorandum titled ''Denied CISWI Petition Issues'' found in the CISWI docket. The following issues are addressed in that memorandum.

- Work practice standards should be used for startup/shutdowns and malfunctions.
- Exempt or revise limits for units combusting de minimis amounts of waste.
- Clarify applicability of CISWI standards to marine vessel units or units located on the outer continental shelf.
- Clarify applicability to temporary or portable units.
- Reduce performance testing requirements to be more consistent with requirements of other rules.
- Reconsider elimination of provisions that allow missing CEMS data.
- Do not include emissions data for combination boiler units.
- CISWI does not satisfy CAA 112(c)(6) requirements for POM and PCB.
- MACT floor statistical approach concerns.
- MACT floor must reflect the average, the UPL is not the same as the average emission level.
- MACT floor pollutant-by-pollutant approach concerns.
- Non-detect methodology is unlawful.
- Beyond-the-floor analysis is unlawful and arbitrary.
- Compliance cost and wildlife concerns for small remote incinerators.
- ''Refinery gas'' definition should be included in the CISWI rule.
- Clarify that construction and demolition wood is not a solid waste.

G. What are the impacts associated with the amendments?

1. What are the primary air impacts?

We have estimated the potential emissions reductions from existing sources that may be achieved through implementation of the emission limits. However, we realize that some CISWI owners and operators are likely to determine that alternatives to waste incineration are viable, such as further waste segregation or sending the waste to a landfill or MWC, if available. In fact, sources operating incinerators, where energy recovery is not a goal, may find it cost effective to discontinue use of their CISWI unit altogether. Therefore, we have estimated emissions reductions attributable to existing sources complying with the limits, as well as those reductions that would occur if the facilities with incinerators and small, remote incinerators decide to discontinue the use of their CISWI unit and use alternative waste disposal options.

For units combusting wastes for energy production, such as ERUs and waste-burning kilns, the decision to combust or not to combust waste will depend on several factors. One factor is the cost to replace the energy provided by the waste material with a traditional fuel, such as natural gas. Another factor would be whether the owner or operator is purchasing the waste or obtaining it at no cost from other generators, or if they are generating the waste on-site and will have to dispose of the materials in another fashion, such as landfills. Lastly, these units would have to compare the control requirements needed to meet the CISWI emission limits with those needed if they stop burning solid waste and are then subject to a NESHAP instead. As mentioned before, we have attempted to align the monitoring requirements for similar non-waste-burning sources as closely as possible in an effort to make them consistent and to help sources make the cross-walk between waste and non-waste regulatory requirements as simple as possible.

The emissions reductions that would be achieved under this final rule using the definition of solid waste under RCRA and the proposed CISWI emission limits are presented in Table 5 of this preamble.

TABLE 5—EMISSIONS REDUCTIONS FOR MACT COMPLIANCE AND ALTERNATIVE DISPOSAL OPTIONS FOR EXISTING CISWI USING THE EMISSION LIMITS

Pollutant	Reductions achieved through meeting MACT (ton/yr)	Reductions achieved assuming incinerators and small, remote incinerators use alternative disposal (ton/yr) [a]
HCl	772.2	784.3
CO	20,093	20,058
Pb	2.5	2.71

TABLE 5—EMISSIONS REDUCTIONS FOR MACT COMPLIANCE AND ALTERNATIVE DISPOSAL OPTIONS FOR EXISTING CISWI USING THE EMISSION LIMITS—Continued

Pollutant	Reductions achieved through meeting MACT (ton/yr)	Reductions achieved assuming incinerators and small, remote incinerators use alternative disposal (ton/yr) [a]
Cd	1.807	1.809
Hg	0.341	0.344
PM (filterable)	2,397	2,401
dioxin, furans	0.000062	0.000064
NO_X	5,292	5,399
SO_2	6,211	6,262
Total	34,771	34,909

[a] The estimated emission reduction does not account for any secondary impacts associated with alternate disposal of diverted ERU fuel.

The EPA expects that many existing CISWI owners and operators may find that alternate disposal options are preferable to complying with the standards for the incinerator and small, remote incinerator subcategories. Our experience with regulations for MWC, HMIWI and, in fact, CISWI, has shown that negative growth in the source category historically occurs upon implementation of CAA section 129 standards. Since CISWI rules were promulgated in 2000 and have been in effect for existing sources since 2005, many existing units have closed. At promulgation in 2000, the EPA estimated 122 units in the CISWI population. In comparison, the incinerator subcategory in this rule, which contains any such units subject to the 2000 CISWI rule, has 27 units. The EPA is not aware of any construction of new units since 2000 so we do not believe there are any units that are currently subject to the 2000 CISWI NSPS. The revised CISWI rule is more stringent so we expect this trend to continue. However, the EPA does recognize that some facilities may opt to replace aging incinerator units with new units where it is cost effective or alternative disposal options are not feasible, as may be the case with some incinerators, or in very remote locations. We estimate that there could be one new incineration unit within the next 5 years following this final rule, and possibly five new small remote incinerators within that time. In these cases, we have developed model CISWI unit emissions reduction estimates for these subcategories using the current existing unit baseline, based on average emission concentration values and sizes from our current inventory and the new source emission limits. Table 6 of this preamble presents the model plant emissions reductions that are expected for new sources.

TABLE 6—EMISSIONS REDUCTIONS ON A MODEL PLANT BASIS

Pollutant	Emission reduction for CISWI subcategory model units (tpy unless otherwise noted)	
	Incinerator	Small, remote incinerator
HCl	2.62	0.0
CO	0.0	0.25
Pb	0.55	0.11
Cd	0.15	0.019
Hg	0.0026	0.00036
PM (filterable)	103	10.7
D/F (total mass) [a]	0.0011	0.0
NO_X	11.3	0.0
SO_2	5.1	4.5
Total	122	22.0

[a] D/F estimates are given in lb/yr.

We do not anticipate that any new energy recovery or waste-burning kiln units will be constructed and will instead use alternative waste disposal methods or alternative fuels that will not subject them to the CISWI rule. For example, whole tires obtained from approved tire management programs and tire-derived fuel from which the metal has been removed is not considered solid waste under the definition of solid waste. Consequently, new cement kiln owners will assess their regulatory requirements under CISWI for burning whole tires or tire-derived fuel that does not have metals removed against the costs associated with removing the metal or obtaining tires from an approved source and complying with the applicable NESHAP instead of the CISWI rule. Our research suggests that metal removal is routinely practiced and that several state waste tire management programs are already in place and would most likely be a viable option for new kiln owners so that they would not be subject to the CISWI regulations. Indeed, we expect that all existing cement kilns that are classified as being waste-burning solely due to whole tires will, by the effective date for the CISWI standards, find a way to obtain their tires through an approved

tire management plan. Likewise, new sources could engineer their process to minimize waste generation in the first place or to separate wastes so that the materials sent to a combustion unit would not meet the definition of solid waste to begin with. For waste that is generated, our cost analyses have found that alternative waste disposal is generally available and less expensive.

2. What are the water and solid waste impacts?

In our analysis, we have selected the lowest cost alternative (i.e., compliance or alternative disposal) for each facility. We anticipate affected sources will need to apply additional controls to meet the emission limits. These controls may use water, such as wet scrubbers, which would need to be treated. We estimate an annual requirement of 71 billion gallons per year of additional water would be required as a result of operating additional controls or increased sorbent use.

Likewise, the addition of PM controls or improvements to controls already in place will increase the amount of particulate collected that will require disposal. Furthermore, ACI may be used by some sources, which will result in additional solid waste needing disposal. The annual amounts of solid waste that would require disposal are anticipated to be approximately 25,400 tpy from PM capture and 13,700 tpy from ACI.

Perhaps the largest impact on solid waste would come from owners and operators who decide to discontinue the use of their CISWI unit and instead send waste to the landfill or MWC for disposal. Based on tipping fees and availability, we would expect most, if not all, of this diverted waste to be sent to a local landfill. As we discuss above, it may be that a good portion of the incinerators would determine that alternative disposal is a better choice than compliance with the standards. We estimate that approximately 110,600 tpy of waste would be diverted to a landfill.

For new CISWI units, we estimate an annual requirement of 980,000 gallons per year of additional water would be required as a result of operating additional controls. The annual amounts of solid waste that would require disposal are anticipated to be approximately 6.8 tpy from PM capture and 4.7 tpy from ACI.

3. What are the energy impacts?

The energy impacts associated with meeting the emission limits would consist primarily of additional electricity needs to run added or improved air pollution control devices. For example, increased scrubber pump horsepower may cause slight increases in electricity consumption and sorbent injection controls would likewise require electricity to power pumps and motors. In our analysis, we have selected the lowest cost alternative (i.e., compliance or alternative disposal) for each facility. By our estimate, we anticipate that an additional 217,400 MW-hours per year would be required for the additional and improved control devices.

As discussed earlier, there could be instances where owners and operators of ERUs and waste-burning kilns decide to cease burning waste materials. In these cases, the energy provided by the burning of waste would need to be replaced with a traditional fuel, such as natural gas. Assuming an estimate that 50 percent of the energy input to ERUs and kilns are from waste materials, an estimate of the energy that would be replaced with a traditional fuel if all existing units stopped burning waste materials, is approximately 56 TBtu/yr.

For new CISWI units, we anticipate that 94 MW-hours per year would be required for additional and improved control devices. Since we do not anticipate any new energy recovery or waste-burning kiln units to be constructed, there would be no additional estimate for energy that would be replaced with a traditional fuel.

4. What are the secondary air impacts?

For CISWI units adding controls to meet the emission limits, we anticipate minor secondary air impacts. The combustion of fuel needed to generate additional electricity and to operate RTO controls would yield slight increases in emissions, including NO_X, CO, PM and SO_2 and an increase in CO_2 emissions. Since NO_X and SO_2 are covered by capped emissions trading programs, and methodological limitations prevent us from quantifying the change in CO and PM, we do not estimate an increase in secondary air impacts for this rule from additional electricity demand.

We believe it likely that the incinerators may elect to discontinue the use of their CISWI unit and send the waste to the landfill or other disposal means. As we discussed in the solid waste impacts above, this could result in approximately 110,600 tpy of waste going to landfills. By using the EPA's Landfill Gas Estimation Model, we estimate that, over the 20-year expected life of a CISWI unit, the resulting methane generated by a landfill receiving the waste would be about 96,400 tons. If this landfill gas were combusted in a flare, assuming typical flare emission factors and landfill gas chlorine, Hg and sulfur concentrations, the following emissions would be expected: 20 tons of PM; 8 tons of HCl; 16 tons of SO_2; 890 tons of CO; 46 tons of NO_X; and 1.4 lbs of Hg.

Similar to existing units, we anticipate minor secondary air impacts for new CISWI units adding controls as discussed above.

5. What are the cost and economic impacts?

We have estimated compliance costs for all existing units to add the necessary controls and monitoring equipment, and to implement the inspections, recordkeeping and reporting requirements to comply with the final CISWI standards. We have also analyzed the costs of alternative disposal for the subcategories that may have alternative options to burning waste, specifically for the incinerators and the small, remote incinerators that may have an alternative to incineration. In our analysis, we have selected the lowest cost alternative (i.e., compliance or alternative disposal) for each facility. Based on this analysis, we anticipate an overall total capital investment of $816 million with an associated total annual cost of $271 million ($2008). For comparison, the 2011 final rule, estimated an overall total capital investment of $652 million with an associated total annual cost of $232 million ($2008). The annualized cost of today's final rule are approximately 17% higher than those of the final 2011 CISWI rule. The changes in cost result from revising the inventories of the ERUs, waste-burning kilns, and small remote incinerators as discussed in Section II.C. of this preamble: ''Summary of Significant Changes Since Proposal.''

Under the rule, the EPA's economic model suggests the average national market-level variables (prices, production-levels, consumption, international trade) will not change significantly (e.g., are less than 0.001 percent).

The EPA performed a screening analysis for impacts on small entities by comparing compliance costs to sales/revenues (e.g., sales and revenue tests). The EPA's analysis found the tests were below 3 percent for four of the five small entities included in the screening analysis.

In addition to estimating this rule's social costs and benefits, the EPA has estimated the employment impacts of the final rule. We expect that the rule's direct impact on employment will be small. For the reconsideration final, the estimated employment changes range

between −400 to +900 employees, with a central estimate of +200.

We have not quantified the rule's indirect or induced impacts. For further explanation and discussion of our analysis, see the introductory memo and Section 3 of the RIA.

For new CISWI units, we have estimated compliance costs for units coming online in the next 5 years. This analysis is based on the assumption that one new incinerator will come online over 5 years and that three new small remote incinerators will come online in the next year, followed by one new small remote incinerator per year for subsequent years. Additionally, it was assumed that each model unit will add the necessary controls, monitoring equipment, inspections, recordkeeping and reporting requirements to comply with NSPS limits. Based on our analysis, we anticipate an overall total capital investment of $9.3 million over 5 years with an associated total annual cost (for 2015) of $2.7 million.

6. What are the benefits?

We estimate the monetized benefits of this regulatory action to be $420 million to $1.0 billion (2008$), 3 percent (discount rate) in the implementation year (2015). The monetized benefits of the regulatory action at a 7 percent discount rate are $380 million to $930 million (2008$). Using alternate relationships between $PM_{2.5}$ and premature mortality supplied by experts, higher and lower benefits estimates are plausible but most of the expert-based estimates fall between these two estimates.[10] Since the reconsideration proposal, we have made several updates to the approach we use to estimate mortality and morbidity benefits in the PM NAAQS RIAs (U.S. EPA, 2012a,b) [11] [12], including updated epidemiology studies, health endpoints, and population data. Although we have not re-estimated the benefits for this rule to apply this new approach, these updates generally offset each other, and we anticipate that the rounded benefits estimated for this rule are unlikely to be different than those provided below. More information on these updates can be found in the PM NAAQS RIAs .A summary of the monetized benefits estimates at discount rates of 3 percent and 7 percent is in Table 7 of this preamble.

TABLE 7—SUMMARY OF THE MONETIZED BENEFITS ESTIMATES FOR THE CISWI NSPS AND EG IN 2015

[Millions of 2008$] [a] [b]

Pollutant	Estimated emission reductions (tpy)	Total monetized benefits (3% Discount Rate)	Total monetized benefits (7% Discount Rate)
$PM_{2.5}$	917	$210 to $510	$190 to $460.
$PM_{2.5}$ Precursors			
SO_2	6,262	$180 to $450	$170 to $410.
NO_X	5,399	$26 to $64	$24 to $58.
Total		$420 to $1,000	$380 to $930.

[a] All estimates are for the implementation year (2015) and are rounded to two significant figures so numbers may not sum across rows. All fine particles are assumed to have equivalent health effects but the benefit-per-ton estimates vary between precursors because each ton of precursor reduced has a different propensity to form $PM_{2.5}$. Benefits from reducing HAP are not included.

These benefits estimates represent the total monetized human health benefits for populations exposed to less $PM_{2.5}$ in 2015 from controls installed to reduce air pollutants in order to meet these standards. To estimate human health benefits of this rule, the EPA used benefit-per-ton factors to quantify the changes in $PM_{2.5}$-related health impacts and monetized benefits based on changes in SO_2 and NO_X emissions. These estimates are calculated as the sum of the monetized value of avoided premature mortality and morbidity associated with reducing a ton of $PM_{2.5}$ and $PM_{2.5}$ precursor emissions. To estimate human health benefits derived from reducing $PM_{2.5}$ and $PM_{2.5}$ precursor emissions, we used the general approach and methodology laid out in Fann, Fulcher, and Hubbell (2009).[13]

To generate the benefit-per-ton estimates, we used a model to convert emissions of direct $PM_{2.5}$ and $PM_{2.5}$ precursors into changes in ambient $PM_{2.5}$ levels and another model to estimate the changes in human health associated with that change in air quality. Finally, the monetized health benefits were divided by the emission reductions to create the benefit-per-ton estimates.

These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because the scientific evidence is not yet sufficient to support the development of differential effects estimates by particle type. Directly emitted $PM_{2.5}$, SO_2 and NO_X are the primary precursors affected by this rule. Even though we assume that all fine particles have equivalent health effects, the benefit-per-ton estimates vary between precursors depending on the location and magnitude of their impact on $PM_{2.5}$ levels, which drive population exposure. For example, SO_2 has a lower benefit-per-ton estimate than direct $PM_{2.5}$ because it does not form as much $PM_{2.5}$, thus, the exposure would be lower and the monetized health benefits would be lower.

It is important to note that the magnitude of the $PM_{2.5}$ benefits is largely driven by the concentration response function for premature mortality. Experts have advised the EPA

[10] Roman, et al., 2008. Expert Judgment Assessment of the Mortality Impact of Changes in Ambient Fine Particulate Matter in the U.S. Environ. Sci. Technol., 42, 7, 2268–2274.

[11] U.S. Environmental Protection Agency (U.S. EPA). 2012a. *Regulatory Impact Analysis for the Proposed Revisions to the National Ambient Air Quality Standards for Particulate Matter.* EPA–452/R–12–003. Office of Air Quality Planning and Standards, Health and Environmental Impacts Division. June. Available at *http://www.epa.gov/ttnecas1/regdata/RIAs/PMRIACombinedFile_Bookmarked.pdf.*

[12] U.S. Environmental Protection Agency (U.S. EPA). 2012b. *Regulatory Impact Analysis for the Final Revisions to the National Ambient Air Quality Standards for Particulate Matter.* EPA–452/R–12–003. Office of Air Quality Planning and Standards, Health and Environmental Impacts Division. December. Available at *http://www.epa.gov/pm/2012/finalria.pdf.*

[13] Fann, N., C.M. Fulcher, B.J. Hubbell. 2009. ''The influence of location, source, and emission type in estimates of the human health benefits of reducing a ton of air pollution.'' Air Qual Atmos Health (2009) 2:169–176.

to consider a variety of assumptions, including estimates based on both empirical (epidemiological) studies and judgments elicited from scientific experts, to characterize the uncertainty in the relationship between $PM_{2.5}$ concentrations and premature mortality. For this rule, we cite two key empirical studies, the American Cancer Society cohort study [14] and the extended Six Cities cohort study.[15] In the RIA for this rule, which is available in the docket, we also include benefits estimates derived from expert judgments and other assumptions.

The EPA strives to use the best available science to support our benefits analyses. We recognize that interpretation of the science regarding air pollution and health is dynamic and evolving. After reviewing the scientific literature and recent scientific advice, we have determined that the no-threshold model is the most appropriate model for assessing the mortality benefits associated with reducing $PM_{2.5}$ exposure. Consistent with this recent advice, we are replacing the previous threshold sensitivity analysis with a new LML assessment. While a LML assessment provides some insight into the level of uncertainty in the estimated PM mortality benefits, the EPA does not view the LML as a threshold and continues to quantify PM-related mortality impacts using a full range of modeled air quality concentrations.

Most of the estimated PM-related benefits in this rule would accrue to populations exposed to higher levels of $PM_{2.5}$. Using the Pope, et al., (2002) study, 85 percent of the population is exposed at or above the LML of 7.5 $\mu g/m^3$. Using the Laden, et al., (2006) study, 40 percent of the population is exposed above the LML of 10 $\mu g/m^3$. It is important to emphasize that we have high confidence in $PM_{2.5}$-related effects down to the lowest LML of the major cohort studies. This fact is important, because as we estimate PM-related mortality among populations exposed to levels of $PM_{2.5}$ that are successively lower, our confidence in the results diminishes. However, our analysis shows that the great majority of the impacts occur at higher exposures.

Every benefit analysis examining the potential effects of a change in environmental protection requirements is limited, to some extent, by data gaps, model capabilities (such as geographic coverage) and uncertainties in the underlying scientific and economic studies used to configure the benefit and cost models. Despite these uncertainties, we believe the benefit analysis for this rule provides a reasonable indication of the expected health benefits of the rulemaking under a set of reasonable assumptions. This analysis does not include the type of detailed uncertainty assessment found in the 2006 $PM_{2.5}$ NAAQS RIA because we lack the necessary air quality input and monitoring data to run the benefits model. In addition, we have not conducted any air quality modeling for this rule. The 2006 $PM_{2.5}$ NAAQS benefits analysis [16] provides an indication of the sensitivity of our results to various assumptions.

It should be emphasized that the monetized benefits estimates provided above do not include benefits from several important benefit categories, including reducing other air pollutants, ecosystem effects and visibility impairment. The benefits from reducing HAP have not been monetized in this analysis, including reducing 20,000 tons of carbon monoxide, 780 tons of HCl, 2.5 tons of lead, 1.8 tons of cadmium, 680 pounds of mercury, and 58 grams of total D/F each year. Although we do not have sufficient information or modeling available to provide monetized estimates for this rulemaking, we include a qualitative assessment of the health effects of these air pollutants in the RIA for this rule, which is available in the docket.

For more information on the benefits analysis, please refer to the RIA for this rulemaking, which is available in the docket.

III. NHSM Final Revisions

A. Statutory Authority

The EPA is promulgating these regulations under the authority of sections 2002(a)(1) and 1004(27) of the RCRA, as amended, 42 U.S.C. 6912(a)(1) and 6903(27). Section 129(a)(1)(D) of the CAA ((42 U.S.C. 7429) directs the EPA to establish standards for CISWIs, which burn solid waste. Section 129(g)(6) of the CAA provides that the term ''solid waste'' is to be established by the EPA under RCRA. Section 2002(a)(1) of RCRA authorizes the agency to promulgate regulations as are necessary to carry out its functions under the Act. The statutory definition of ''solid waste'' is provided in RCRA section 1004(27).

B. NHSM Rule History

The agency first solicited comments on how the RCRA definition of solid waste should apply to NHSMs used as fuels or ingredients in combustion units in an ANPRM, which was published in the **Federal Register** on January 2, 2009 (74 FR 41). We then published a NHSM proposed rule on June 4, 2010 (75 FR 31844), which the EPA issued in final form on March 21, 2011 (76 FR 15456). The March 2011, NHSM final rule codified the standards and procedures for identifying which non-hazardous secondary materials are ''solid waste'' when used as fuels or ingredients in combustion units.

In October 2011, the agency announced it would be initiating new rulemaking proceedings to revise certain aspects of the NHSM rule.[17] On December 23, 2011, we then published a proposed rule, which addressed specific targeted amendments and clarifications to the part 241 regulations (76 FR 80452). These proposed revisions and clarifications were limited to certain issues on which the agency had received new information, as well as targeted revisions that the agency believed were appropriate in order to allow implementation of the rule as the EPA originally intended.[18] As stated throughout the preamble to the proposed rule, the agency was not reopening the entire NHSM rule for reconsideration and would not respond to comments directed toward rule provisions that were not specifically identified in this proposal.[19] Therefore, any comments that were submitted outside the scope of the proposal, or for which the EPA did not solicit comment,

[14] Pope, et al., 2002. ''Lung Cancer, Cardiopulmonary Mortality, and Long-term Exposure to Fine Particulate Air Pollution.'' Journal of the American Medical Association 287:1132–1141.

[15] Laden, et al., 2006. ''Reduction in Fine Particulate Air Pollution and Mortality.'' *American Journal of Respiratory and Critical Care Medicine.* 173: 667–672.

[16] U.S. Environmental Protection Agency, 2006. Final Regulatory Impact Analysis: $PM_{2.5}$ NAAQS. Prepared by Office of Air and Radiation. October. Available on the Internet at *http://www.epa.gov/ttn/ecas/ria.html.*

[17] See October 14, 2011, Letter from Administrator Lisa P. Jackson to Senator Olympia Snowe. A copy of this letter has been placed in the docket for today's rule (EPA–HQ–RCRA–2008–1873).

[18] For more information regarding the intent of the December 23, 2011, proposed rule, see 76 FR 80469. For more information regarding the scope of the proposed rule, see 76 FR 80470–80474.

[19] For example, see 76 FR 80470: ''The EPA is soliciting comment only on these targeted changes and is not reopening any other issues in the final NHSM rule. Comments that go beyond the scope of this narrow RCRA rulemaking will not be addressed by the Agency when it finalizes today's proposed rule.'' See also 76 FR 80474 ''As noted above, the intent of this proposal is to identify certain specific aspects of the rule which EPA is reconsidering and on which it is soliciting public comment. The Agency is not reopening the entire rule for reconsideration and will not respond to comments directed toward rule provisions that are not specifically identified in this proposal.'' and 76 FR 80482 ''The Agency is not considering any change to the self-implementing, mandatory nature of the § 241.3 standards for individual facilities and will not respond to any comments on this topic.''.

are not addressed in this final rule, or in the Response to Comments document that has been prepared for this final rule.

The Agency also notes that even though the NHSM final rule will become effective on April 8, 2013, existing facilities that currently burn NHSMs will have a substantial amount of time before having to comply with the CISWI standards, as the compliance date for existing CISWI sources subject to CAA 129 standards is 5 years after the date of publication of the CISWI final rule or 3 years after the state plan is approved, whichever happens earlier. In addition, the Boiler MACT rule provides until February 7, 2016, for existing sources to comply with the standards. We recognize that new sources will have to comply with these rules sooner than do existing sources. Thus, we believe that there will be more than adequate time for persons to determine whether or not a NHSM sent to a combustion unit is a solid waste.

C. Introduction—Summary of Regulations Being Finalized

In today's rule, the EPA is finalizing certain amendments and clarifications to the 40 CFR part 241 regulations on which we have received new information, as well as specific targeted revisions that are appropriate in order to allow implementation of the rule as the EPA originally intended. The regulations being issued today are summarized below. The intent of this summary is to give a brief overview of the revised part 241 regulations. More detailed discussions, including the agency's responses to comments received on the proposed rule and its rationale for decisions being made in this final action, are included in section III.D of this preamble. In addition, in an effort to aid the regulated community, the EPA is including in the docket for today's rule an informational redline/strikeout version that identifies the specific changes to the regulatory text, as compared to the March 2011, final rule.[20]

1. Revised Definitions

In today's rule, the EPA is finalizing revisions to the three definitions discussed in the proposed rule: (1) ''clean cellulosic biomass,'' (2) ''contaminants,'' and (3) ''established tire collection programs.'' In addition, based on comments received on the proposed rule, the agency is also finalizing a revised definition of ''resinated wood.'' These revised definitions will be codified in 40 CFR 241.2.

a. Clean Cellulosic Biomass

In today's action, the EPA is issuing a revised definition of ''clean cellulosic biomass'' that: (1) Makes clear that the list of biomass materials are examples within the definition and is not intended to be an exhaustive list; and (2) provides a more comprehensive list of clean cellulosic biomass to guide the regulated community. These revisions do not change the agency's intent under the March 2011 final rule, but identify additional materials that are ''clean cellulosic biomass,'' and, thus, are traditional fuels under these regulations. A discussion of relevant comments regarding the definition of clean cellulosic biomass, as well as our rationale for making these determinations, can be found in section III.D.1.a of this preamble.

b. Contaminants

In today's action, the EPA is issuing a final definition of ''contaminants'' to clarify what constituents will be considered contaminants for the purposes of the contaminant legitimacy criterion. Revisions include: (1) The replacement of a reference to ''any constituent that will result in emissions'' with a specific list of constituents to be considered as contaminants based on their status as a precursor to air emissions; (2) the removal from the definition of specific CAA section 112(b) and 129(a)(4) pollutants that are not expected to be found in any NHSM or are adequately covered elsewhere in the definition; and (3) the removal of the phrase ''including those constituents that could generate products of incomplete combustion'' from the definition. A discussion of relevant comments regarding the contaminants definition, as well as our rationale for making these determinations, can be found in section III.D.1.b of this preamble.

c. Established Tire Collection Programs

In today's action, the EPA is finalizing a revised definition of ''established tire collection program'' in order to account for ''off-specification'' (including factory scrap) tires that are contractually arranged to be collected, managed and transported between a tire manufacturer (including retailers or other parties involved in the distribution and sale of new tires) and a combustor, which is analogous to how scrap tires removed from vehicles are managed. The off-specification tires are not removed from vehicles[21] and are handled under contractual arrangements which ensure they are not discarded. A description of how the changes to the definition accommodate the management of off-specification tires can be found in section III.D.1.c of this preamble. In addition to the proposed changes, we are revising the definition to specifically include tires that were not abandoned and were received from the general public at tire collection program events. A discussion of relevant comments regarding the definition, as well as our rationale for making this determination, can be found in section III.D.1.c of this preamble.

d. Resinated Wood

In today's action, the EPA is issuing a revised definition of ''resinated wood'' that includes additional materials in order to be more representative of the universe of resinated wood residuals that are currently used as fuels throughout the wood product manufacturing process. Revisions include: (1) Replacing the phrase ''containing resin adhesives'' with the phrase, ''containing binders and adhesives,'' and (2) specifically including ''off-specification resinated wood products that do not meet a manufacturing quality or standard'' within this definition. A discussion of relevant comments regarding the resinated wood definition, as well as our rationale for making this determination, can be found in section III.D.3.b of this preamble.

2. Contaminant Legitimacy Criterion for NHSM Used as Fuels

In today's action, the EPA is issuing in final form a revised contaminant legitimacy criterion for NHSMs used as fuels to provide additional details on how contaminant comparisons between NHSMs and traditional fuels may be made. Revisions include: (1) The ability to compare groups of contaminants where technically reasonable; (2) the clarification that ''designed to burn'' means can burn or does burn, and not necessarily permitted to burn; (3) the ability to use traditional fuel data from national surveys and other sources beyond a facility's current fuel supplier; and (4) the ability to use ranges of traditional fuel contaminant levels when making contaminant comparisons, provided the variability of NHSM contaminant levels is also considered. A discussion of relevant comments regarding the contaminant legitimacy criterion for NHSMs used as fuels, as

[20] This document has been titled, ''NHSM 2012 Final Rule Regulation Changes'' and is placed in Docket No: EPA–HQ–RCRA–2008–0329.

[21] ''Removal from vehicles'' had been a component of the definition.

well as our rationale for making these determinations, can be found in section III.D.2 of this preamble.

3. Categorical Non-Waste Determinations for Specific NHSM Used as Fuels

In today's final rule, the agency is codifying determinations that certain NHSMs are non-wastes when used as fuels. Based on all available information, the EPA has determined that the following NHSMs are categorically not a solid waste when burned as a fuel in combustion units: (1) Scrap tires that are not discarded and are managed under the oversight of established tire collection programs, including tires removed from vehicles and off-specification tires; (2) resinated wood; (3) coal refuse that has been recovered from legacy piles and processed in the same manner as currently-generated coal refuse; and (4) dewatered pulp and paper sludges that are not discarded and are generated and burned on-site by pulp and paper mills that burn a significant portion of such materials where such dewatered residuals are managed in a manner that preserves the meaningful heating value of the materials.

a. Scrap Tires

In today's action, the agency is adding scrap tires that are not discarded and are managed under the oversight of established tire collection programs, including tires removed from vehicles and off-specification tires (including factory scraps), to the categorical list of non-waste fuels (see 40 CFR 241.4(a)(1)) as proposed. Based on this categorical non-waste determination, facilities burning the scrap tires that qualify for the provision will not need to demonstrate that this NHSM meets the legitimacy criteria on a site-by-site basis. Further, the addition to the new categorical non-waste provision at 40 CFR 241.4(a)(1) eliminated the need for the previous scrap tire provision at 40 CFR 241.3(b)(2)(i),[22] which has been removed and reserved in today's final rule. A discussion of relevant comments regarding the scrap tire provision, as well as our rationale for making this determination, can be found in section III.D.3.a of this preamble.

b. Resinated Wood

In today's action, the agency is listing resinated wood as a non-waste fuel in 40 CFR 241.4(a)(2), as proposed. The EPA has evaluated resinated wood and, based on all available information, including consideration of the legitimacy criteria, as well as other relevant factors, has determined that resinated wood is not a solid waste when used as a fuel. Based on this categorical non-waste determination, facilities burning resinated wood residuals as a fuel will not need to demonstrate that this NHSM meets the legitimacy criteria on a site-by-site basis.

Further, the addition of this categorical non-waste determination (40 CFR 241.4(a)(2)) eliminated the need for the previous resinated wood provision at 40 CFR 241.3(b)(2)(ii),[23] which has been removed and reserved in today's final rule. A discussion of relevant comments regarding the categorical non-waste determination for resinated wood, as well as our rationale for making this determination, can be found in section III.D.3.b of this preamble.

c. Coal Refuse

In today's action, the agency has determined that coal refuse that has been recovered from legacy piles and processed in the same manner as currently-generated coal refuse, is a non-waste fuel in 40 CFR 241.4(a)(3). This determination is based on the fact that: (1)Legacy coal refuse processed in the same manner as currently-generated coal refuse meets the definition of processing (as codified in 40 CFR 241.2); and (2)the EPA's assessment that such materials meet the legitimacy criteria for fuels (as codified in 40 CFR 241.3(d)(1)) when compared to currently-generated coal refuse, which the agency considers to be within the definition of a traditional fuel (as codified in 40 CFR 241.2). Based on this categorical non-waste determination, facilities burning these materials as a fuel will not need to demonstrate that this NHSM meets the legitimacy criteria on a site-by-site basis. A discussion of relevant comments regarding the categorical non-waste determination for coal refuse that is recovered from legacy piles and processed, as well as our rationale for making this determination, can be found in section III.D.5.b of this preamble.

d. Pulp and Paper Sludge

In today's action, the EPA has determined that dewatered pulp and paper sludges that are not discarded and are generated and burned on-site by pulp and paper mills that burn a significant portion of such materials where such dewatered residuals are managed in a manner that preserves the meaningful heating value of the materials are non-waste fuels in 40 CFR 241.4(a)(4). This determination for pulp and paper sludge as a categorical non-waste represents the agency's finding, after balancing the regulatory legitimacy criteria with other relevant factors, that the burning of this material is an integral part of facility operations, and as described in the categorical listing is for energy recovery and not discard. Based on this categorical non-waste determination, facilities meeting the description of this determination and burning these materials as a fuel will not need to demonstrate that this NHSM meets the legitimacy criteria on a site-by-site basis. A discussion of relevant comments regarding the categorical non-waste determination for pulp and paper sludges, as well as our rationale for making this determination, can be found in section III.D.5.a of this preamble.

4. Rulemaking Petition Process for Other Categorical Non-Waste Determinations (40 CFR 241.4(b))

In today's final rule, the agency is finalizing a rulemaking petition process that provides persons with an opportunity to submit a rulemaking petition to the Administrator, seeking a categorical determination for additional NHSMs to be listed in 40 CFR 241.4(a) as non-waste fuels. The process for submitting a rulemaking petition to the agency, as well as the factors a successful application must include, is listed in 40 CFR 241.4(b). A discussion of relevant comments regarding the petition process for the categorical listings, as well as our rationale for the categorical rulemaking petition process, can be found in section III.D.4 of this preamble.

5. Streamlining of the 40 CFR 241.3(c) Non-Waste Determination Petition Process

In today's final rule, the agency is streamlining the non-waste determination provisions under 40 CFR 241.3(c). The public participation process was streamlined to

[22] The scrap tire provision in the 2011 NHSM final rule is now removed and the section reserved in today's final rule: ''(b) The following non-hazardous secondary materials are not solid wastes when combusted:

(2) The following non-hazardous secondary materials that have not been discarded and meet the legitimacy criteria specified in paragraph (d)(1) of this section when used in a combustion unit (by the generator or outside the control of the generator):

(i) Scrap tires used in a combustion unit that are removed from vehicles and managed under the oversight of established tire collection programs.''

[23] The resinated wood provision in the 2011 NHSM final rule is now removed and the section reserved in today's final rule: ''(b) The following non-hazardous secondary materials are not solid wastes when combusted:

(2) The following non-hazardous secondary materials that have not been discarded and meet the legitimacy criteria specified in paragraph (d)(1) of this section when used in a combustion unit (by the generator or outside the control of the generator):

(ii) Resinated wood used in a combustion unit.''

accommodate petitions that apply to multiple combustors. In particular, the regulations were adjusted to indicate that the appropriate office in the EPA headquarters may handle petitions that cross multiple regions. Furthermore, if a determination is made that the NHSM is a non-waste, the decision will be retroactive and apply on the date the petition was submitted. A discussion of relevant comments regarding the streamlining of the 40 CFR 241.3(c) non-waste determination petition process, as well as our rationale for the streamlining changes made to the non-waste determination process, can be found in section III.D.6 of this preamble.

6. Revised Introductory Text for 40 CFR 241.3(a)

In today's final rule, the agency has decided not to revise the introductory text of 40 CFR 241.3(a). In its December 2011 proposed rule, the EPA considered revising this introductory text to state that NHSMs are ''presumed to be'' solid wastes, rather than ''are'' solid wastes. While the proposed change was not expected to be a substantive change to the rule, but merely a reflection of the record at the time, it did engender some confusion among commenters. Based on the comments received, we have decided not to issue revised introductory text 40 CFR 241.3(a) and, thus, this section will continue to read as codified in the March 2011 NHSM final rule. A discussion of relevant comments regarding the introductory text of 40 CFR 241.3(a), as well as our rationale for this decision, can be found in section III.D.7 of this preamble.

D. Comments on the Proposed Rule and Rationale for Final Decisions

In this section, the EPA addresses major comments the agency received regarding the targeted revisions that were proposed to certain part 241 provisions in the December 23, 2011, proposal. In discussing the comments received on the proposal, we also provide the rationale for making the revisions that are finalized in today's action. As previously discussed, the agency specifically stated that it would not address comments that go beyond the scope of this narrow RCRA rulemaking.

1. Revised Definitions

a. Clean Cellulosic Biomass

The proposed rule suggested revising the March 2011 definition of ''clean cellulosic biomass'' to list additional examples of biomass materials that are appropriately included within this definition. These fuels are not secondary materials or solid wastes unless discarded. Clean biomass is ''biomass that does not contain contaminants at concentrations not normally associated with virgin biomass materials'' (codified in 40 CFR 241.2).

This regulatory revision would not change the agency's intent under the March 2011 final rule, but would identify additional materials that are ''clean cellulosic biomass,'' and, thus, would be a traditional fuel under these regulations. While the list of clean biomass materials is only illustrative and not exhaustive, it is now more comprehensive than the list that appeared in the definition included in the 2011 NHSM final rule.

One of the materials within the definition is clean C&D wood. In light of some confusion in comments regarding C&D wood, the EPA is clarifying the meaning of the term in the definition of ''clean cellulosic biomass.'' Construction & demolition wood actually may be placed into different categories, depending upon its origin. In accordance with the traditional fuels definition in section 241.2, clean C&D wood could be combusted as a traditional fuel if it does not contain contaminants at concentrations not normally associated with virgin wood.

However, the final NHSM rule also addressed C&D wood that may contain contaminated material.[24] There is no need to repeat these discussions here, except to clarify what the final rule means. In general, contaminated C&D wood that has been processed to remove contaminants, such as lead-painted wood, treated wood containing contaminants, such as arsenic and chromium, metals and other non-wood materials, prior to burning, likely meets the processing and legitimacy criteria for contaminants, and thus can be combusted as a non-waste fuel (see further discussion in response to comments below).

Comment: One commenter noted that the EPA's specific inclusion of ''untreated wood pallets'' implicitly accepts that small amounts of non-wood material inherent to the pallets, such as screws or plastic fasteners, do not render those materials solid waste under the rule, and de minimis amounts of non-biomass material would not require these types of materials to be burned in incinerators under the CISWI rule.

Another commenter requested that the EPA reconsider use of the word ''untreated'' when referring to wood pallets. The commenter argues that the EPA does not define the word ''untreated'' and its use could create confusion. Rather, the commenter recommends that ''untreated'' be replaced with the word ''clean,'' which is an adjective used in the definition to distinguish other materials (e.g., *''clean construction and demolition wood''*).

Response: Wood pallets are refurbished or recycled for other uses by pallet recyclers. When the useful life of the pallet is finished, the recyclers typically remove the small amount of non-wood material inherent to pallets that would inhibit combustion, such as screws or plastic fasteners. The pallets are then ready for use as fuel, and the non-wood material would not impact whether the material can be burned in combustion units that meet the CAA section 112 emission standards. The agency is not aware of instances where the pallets are used as fuel directly by the original users and non-wood material is left remaining in the pallet. Such pallets would not be considered clean cellulosic biomass under the rule.

With respect to the other comment, the EPA does not agree, that the term ''untreated'' wood pallet be replaced with the term ''clean'' wood pallet. The term ''clean'' is defined in the traditional fuels definition as described above, and applies to all the materials listed in the definition of clean cellulosic biomass, which includes untreated wood pallets. It would be redundant to define ''clean'' biomass as including ''clean'' wood pallets. The point is that some wood pallets may contain treated wood, such as CCA treated wood, and inclusion of the term ''untreated'' with wood pallet would help emphasize that such treated wood would not be considered ''clean'' under the definition of clean cellulosic biomass.

Comment: Several commenters indicated that the definition of clean cellulosic biomass remains ambiguous because it continues to include the caveat that: ''Clean biomass is biomass that does not contain contaminants at concentrations not normally associated with virgin biomass materials.'' Thus, notwithstanding the EPA's attempt at expanding the definition of clean cellulosic biomass, the commenters believed that this sentence should be removed because it perpetuates uncertainty. It is not clear what comparisons are permissible and what concentration levels are appropriate.

The commenters also indicated that this sentence perpetuates the EPA's erroneous interpretation of its authority under RCRA. A material does not become a waste when burned for energy recovery just because it may contain contaminants—prior to combustion—not normally associated with virgin biomass. It becomes a waste only if it is

[24] See 76 FR 15485.

combusted for the purpose of disposal, rather than for energy recovery.

Response: The agency disagrees with the commenter that defining the term ''clean'' leads to ambiguity in identifying which materials are clean cellulosic biomass. On the contrary, defining the term ''clean'' is meant to ensure that contaminated cellulosic material being burned, such as lead-painted wood or arsenic treated wood, does not introduce contaminants (as defined in 40 CFR 241.2) not normally associated with virgin biomass materials.

The agency wishes to emphasize, however, that determinations that the cellulosic biomass used as a fuel or ingredient is clean, do not presuppose any testing of contaminant levels. Persons can use expert or process knowledge of the material to justify decisions regarding presence of contaminants.

With respect to the comment that burning of contaminated material does not make it a waste, the agency has not reopened this issue for this rule and stands by its responses in the rulemaking record for the March 2011 final rule.[25]

Comment: One commenter provided the example of whether treated seeds that contain additives are considered contaminants in virgin biomass. These additives may not be found in virgin seeds but are not harmful at the concentrations found in the seeds. The commenter questioned whether any concentration above ''natural'' (concentration levels found in virgin material), especially when combusted as fuel, would be prohibited and require additional waste regulation.

Response: Seeds may be treated with pesticides and hormones to aid in germination. Such chemicals do not generally include contaminants as defined in section 241.2; therefore, such treated seeds would be considered clean cellulosic biomass.

Comment: Several commenters indicated that, as part of the EPA's changes in the definition of clean cellulosic biomass, it is proposing to consider treated or painted wood the same as ''virgin'' wood if it has lower than de minimis levels of contamination. While adoption of numerical values in the rule would require additional provisions for measurements and would require additional notice, the commenter believes that such clarity is important for successful implementation of the rule. Such limits would be applied to ''clean'' C&D material, for instance, among other potential fuel types. The term de minimis is not defined numerically in the proposed rule and the commenters argue that without a specific numerical de minimis limit, sources would not have a clear understanding of whether they fall under the CISWI or hazardous waste incinerator rules. The commenter recommended that the EPA define and allow for public comment on the levels associated with the term de minimis and base the de minimis levels on contaminant levels found in typical ''virgin'' wood.

Response: Regarding the addition of a definition for de minimis amounts of contaminants remaining in processed wood, the agency does not believe it appropriate to identify specific concentration levels. Rather, the agency interprets de minimis as that term is commonly understood; i.e., insignificant or negligible amounts of contamination such as small wood sliver containing lead paint).

As indicated above, there also appears to be confusion among commenters regarding two different categories of C&D wood—''clean C&D wood'' that is a traditional fuel, and C&D wood that has been processed to remove contaminants. Under the 2011 NHSM final rule, C&D wood that has been processed to remove contaminants, such as lead-painted wood, treated wood containing contaminants, such as arsenic and chromium, metals and other non-wood materials, prior to burning, likely meets the processing and legitimacy criteria for contaminants, and thus can be combusted as a non-waste fuel but would not be considered ''clean C&D wood.'' Such C&D wood may contain de minimis amounts of contaminants and other materials provided it meets the legitimacy criteria for contaminant levels. To meet the contaminant legitimacy criterion, concentration levels of contaminants in the processed C&D wood must be comparable to or less than the levels in the traditional fuel the unit was designed to burn, whether wood or another traditional fuel (see section III.D.2 for a discussion on contaminant comparisons). In contrast, ''clean C&D wood'' is a traditional fuel that does not require processing and meets the definition of ''clean'' (i.e., C&D wood that does not contain contaminants at concentrations not normally associated with virgin biomass (wood)). Thus, de minimis amounts of contaminants and other material appropriate for processed C&D wood would not be appropriate for clean wood that is a traditional fuel.

Comment: One commenter argued that states should have discretion about how to determine appropriate fuel quality but it should be no less stringent than limits set by the EPA. There should be a distinction between de minimis levels of contamination in C&D wood and a fuel quality standard.

Response: We do not necessarily disagree with the commenter. That is, as discussed in the final rule, part 241 does not preempt a state's statutory or regulatory standards and states are free to establish fuel quality standards for C&D wood. However, we would also note that as solid waste is defined by the EPA under RCRA, such state standards would not necessarily impact the status of the material as it relates to which combustion units are subject to CAA section 129 (56 FR 15546).

b. Contaminants

The December 2011 rule proposed to clarify what constituents will be considered contaminants by making the definition of ''contaminants'' more specific. However, the proposal maintained the fundamental approach—and was intended to cover the same constituents—as the March 2011 final rule.

The March 2011 final rule and the December 2011 proposed rule identified the same three ways a chemical can be labeled a contaminant. First, it may be one of the 187 HAP currently listed in CAA section 112(b); second, it may be one of the nine pollutants listed under CAA section 129(a)(4); and third, it may be one of a handful of chemicals whose combustion will result in the formation of listed CAA section 112(b) and section 129(a)(4) pollutants (e.g., sulfur that will result in SO_2).

The definition proposed in December provided clarification by listing the constituents that belong to the third group.[26] Specifically, the proposed

[25] See, for example, 76 FR 15523–4: ''If a non-hazardous secondary material contains contaminants that are not comparable to those found in traditional fuels, and those contaminants are related to pollutants that are of concern at solid waste combustion units, then it follows that discard is occurring. The contaminants in these cases could not be considered a normal part of a legitimate fuel and are being discarded, either through destruction in the combustion unit or through releases into the air. Units that burn such materials are therefore most appropriately regulated under the CAA section 129 standards for solid waste incinerators.'' See also 76 FR 15485, which states: ''[A]s we have noted previously, the criterion or test for determining whether a material is burned as a waste or a commodity fuel is the level of the contaminant in the secondary material itself—that is destruction of contaminants indicates a waste treatment activity rather than a commodity fuel.''

[26] Eleven metal elements directly identified in CAA section 112(b) were also listed in the proposed definition to provide the regulated community with a complete list of elements that are considered ''contaminants'' under the rule.

revision replaced a potentially ambiguous reference to ''any constituent that will result in emissions'' with the four specific elements the agency intended to be considered as contaminants (chlorine, fluorine, nitrogen, and sulfur) based on their status as a precursor to air emissions. In all four cases, the CAA pollutant itself (e.g., SO_2) is not likely to be present in the NHSM prior to combustion, and the only way to measure constituents prior to combustion ''that will result in emissions'' of that pollutant is to measure a known precursor (e.g., sulfur) instead. For each of the four precursor elements listed as contaminants in the proposal, the expected fate for the precursor during combustion is formation of the aforementioned pollutant and the precursor makes no substantive contribution to the material's value as a fuel. For these reasons, the agency proposed to specifically identify chlorine, fluorine, nitrogen, and sulfur as contaminants in place of HCl, HF, NO_X and SO_2. By limiting the list of precursors considered contaminants to these four elements, the revised definition also made clear that the agency did not intend to include other elements present in contaminants (such as hydrogen and carbon) as contaminants themselves.

The December 2011 proposed rule also removed from the definition of contaminants those pollutants in CAA sections 112(b) and 129(a)(4) that we do not expect to find in any NHSM. Specifically:

- Chlorine gas, HCl, HF, NO_X, and SO_2 were removed from the definition because they are unlikely to be found in NHSMs prior to combustion and had been replaced by the elements chlorine, fluorine, nitrogen and sulfur as discussed above;
- Fine mineral fibers were removed because they are releases from the manufacturing and processing (not combustion) of non-combustible rock, glass or slag into mineral fibers;
- Particulate matter and coke oven emissions were removed because they are products of combustion unlikely to exist in NHSMs prior to combustion;
- Cresol isomers m-cresol, o-cresol, and p-cresol were removed because the listed pollutant cresols/cresylic acid includes these three isomers;
- Xylene isomers m-xylene, o-xylene, and p-xylene were removed because the listed pollutant xylenes includes these three isomers; and
- Diazomethane, white phosphorus, and titanium tetrachloride were removed because their high reactivity makes their presence in NHSMs very unlikely.

In addition, two phrases present in the March 2011 final rule ''contaminants'' definition were not included in the December 2011 proposed rule definition. First, the phrase concerning constituents ''that will result in emissions of the air pollutants'' was removed since the regulated community had expressed confusion that in determining whether or not a NHSM meets the contaminant legitimacy criterion, emissions from the combustion unit were to be evaluated. The EPA disagreed and directed readers to the language in sections 241.3(d)(1)(iii) and 241.3(d)(2)(iv). These sections state that contaminant comparisons are based on the presence of contaminants in the NHSM (or products made from NHSMs in the case of ingredients), not the resulting emissions. The proposed revision also inserted the phrase ''prior to combustion'' into the contaminants definition to further emphasize that the NHSMs, not the emissions that result from NHSMs, are to be evaluated when conducting contaminant comparisons. The rationale for evaluating the NHSM, and not emissions, can be found in the record for the March 2011 final rule.[27] The proposal merely added language to ensure the rule is consistent with the agency's intent.

The second phrase proposed to be removed from the March 2011 final rule definition was a reference to ''those constituents that could generate products of incomplete combustion,'' also referred to as PICs. This reference was removed from the definition because it was duplicative and potentially misleading. Specifically, this phrase was not necessary because all PICs that the agency considers air pollutants—including dioxins, dibenzofurans, PCBs and PAHs—are listed in CAA sections 112(b) or 129(a)(4) and are thus already included in the ''contaminants'' definition. More importantly, the phrase was potentially misleading because PIC formation depends heavily on combustion conditions, such as air/fuel ratio and mixing. These conditions are controlled to limit emissions and neither these conditions nor emissions are the subject of this rule. The NSHM itself is the subject of this rule. Thus, the removal of both phrases clarified, but did not alter, the constituents subject to the contaminant legitimacy criterion.

The EPA believes that comments have not changed the basis for listing specific precursors to air emissions as contaminants, nor have they changed the basis for either excluding specific constituents from the definition or removing the references to ''that will result in emissions of the air pollutants'' and ''constituents that could generate products of incomplete combustion'' from the definition. Thus, the EPA is adopting the reasoning from the proposal and revising the definition of contaminants to incorporate these concepts.

The EPA has decided, however, to make several modifications to the regulatory language of the December 2011 proposed rule based on comments received and information in the rulemaking record. First, in the final definition issued today, precursors will only be considered contaminants for NHSMs used as fuels; precursors will not be considered contaminants for NHSMs used as ingredients. Furthermore, precursors will not be considered contaminants if they do not form their corresponding pollutants. Also, opacity has been removed from the contaminants definition. Finally, the phrase ''prior to combustion'' has not been inserted into the contaminants definition, as had been proposed. Contaminants in NHSMs used as fuel in combustion units must still be evaluated prior to combustion, and persons must still evaluate the NHSM itself (not emissions), but the agency has determined that the topic of when to evaluate contaminants is more appropriate to address in the legitimacy criteria than in the contaminants definition.

Additional reasoning for keeping the rule provisions as proposed, and for any modifications to the proposed language, are described in the following responses to comments.

Comment: Several commenters stated that the definition of contaminants should focus on contaminants released as combusted emissions. One commenter argued that contaminants should be compared between emitted contaminants and emission standards. A second commenter reiterated previous comments that contaminant levels should be related to the air emissions and not the content of the material. For support, commenters cited that the EPA reversed its position in the proposal by using possible air emissions as the basis for establishing what contaminants need to be compared.

Response: The EPA has previously stated that contaminant levels before and after combustion can be important indicators of legitimacy and it maintains the position from the March 2011 final rule that non-waste fuels must be similar in composition to traditional

[27] For example, see 76 FR 15524–15525.

fuels prior to combustion.[28] Because combustion and emission control processes can destroy or remove contaminants, a comparison of emissions profiles alone only tells one how well the combustion unit is operating, not whether the NHSM is being used as a legitimate non-waste commodity fuel.[29]

The EPA disagrees with the comment that the agency reversed its position on the consideration of emissions in the proposal by including precursors to air emissions as contaminants. The agency notes that a difference exists between comparing ''emissions'' and comparing ''contaminants that will result in emissions,'' the exact language used in the March 2011 final rule. The EPA has clarified what it intended by ''contaminants that will result in emissions'' in today's final action. This clarification involves the listing of specific precursors known to result in emissions of air pollutants when combusted; it also involves the removal of specific pollutants known not to be present in NHSMs.

Comment: Two commenters expressed concern that the proposed definition of contaminants conflicted with the contaminant legitimacy criterion for NHSMs used as ingredients in combustion units. Commenters stated that both the definition of contaminants, as proposed, and the existing contaminant legitimacy criterion for ingredients were clear when read separately but were contradictory when taken together. The commenters encouraged the EPA to clarify the regulatory text. Specifically, the commenters noted that for ingredients, contaminants could not be evaluated prior to combustion and then used to compare products produced using NHSMs to products produced using traditional materials.

Response: The EPA has decided not to include language from the December 2011 proposed rule in the definition of contaminants that emphasized when NHSM contaminant levels are to be evaluated (*i.e.,* before or after combustion). While the proposed additional language made clear that NHSMs used as a *fuel* were to be evaluated for contaminants ''prior to combustion,'' the agency agrees with the two commenters who argued that the proposed language conflicts with the contaminant legitimacy criterion for *ingredients.* The contaminant criterion for ingredients requires comparisons to be made between products produced with and without NHSMs, but until the products exist, they cannot be compared.

As such, the agency has decided not to adopt the proposed additional language addressing when contaminants are to be evaluated *in the definition of contaminants.* The agency proposed similar language in the December 2011 rule addressing this topic *in the contaminant legitimacy criterion* and the agency is adopting that language in today's final rule. The agency has determined that the legitimacy criteria themselves (40 CFR 241.3(d)(1)(iii) for fuels and 40 CFR 241.3(d)(2)(iv) for ingredients) are more appropriate places to address this topic.

The EPA has also decided to add language to the definition of contaminants clarifying that the specification of particular precursors to air emissions (i.e., chlorine, fluorine, nitrogen and sulfur) as contaminants does not apply to the contaminant legitimacy criterion for ingredients. As identified by the commenters, the contaminant criterion for ingredients requires comparisons to be made between products produced with and without NHSMs. Products can only be compared after combustion has occurred, at which point there will be no benefit to measuring levels of precursors.

The agency also notes that it does not envision a situation where NHSMs containing chlorine, fluorine, nitrogen or sulfur would be used as ingredients in such a way that would emit higher levels of HCl, HF, NO_X or SO_2 than would be emitted using traditional ingredients without the material being considered a solid waste. In all cases, ingredients must provide a valuable contribution to the product being produced, and that product must itself be valuable, in order to not be considered a solid waste. For an ingredient to provide value, the agency expects the ingredient to remain in a product rather than be destroyed or released via emissions. This is a key reason why the contaminant legitimacy criterion for ingredients focuses on products (i.e., toxics along for the ride) rather than emissions. Furthermore, the legitimacy criteria for ingredients cannot be used to avoid the legitimacy criteria for fuels if the material is being used for both purposes.

Comment: Several commenters questioned the rationale for including precursors to air emissions as ''contaminants'' under the proposed revised definition. Some indicated that the concept is far removed from the true meaning of ''discard,'' with one comment stating that the EPA has no legal, rational or scientific basis for considering the presence of sulfur or nitrogen in NHSMs as evidence of intent to discard SO_2 or NO_X during combustion. To support this argument, the commenter first noted that the EPA has no record basis for assuming that the intent of the combustor is to discard the constituent, rather than to generate energy. Second, the commenter noted that whether or not a boiler has emissions of regulated air pollutants, such as SO_2 or NO_X when it combusts a precursor will depend, not on an intent to discard these pollutants, but on boiler operation and design.

Two commenters also stated that the preamble discussion on precursors demonstrates how far removed the EPA's rationale for this rulemaking is from the concept of discard. They noted that the EPA is requiring combustors to document and keep records regarding the fact that CO is not present in NHSMs, and, under CISWI, would identify the NHSM as waste if this documentation is not maintained. The commenters failed to see how this has anything to do with a determination that a material is a waste under RCRA.

Response: The EPA disagrees with these comments. Precursors to emissions of identified air pollutants are important and appropriate to address as contaminants in NHSMs prior to combustion. It is also necessary to tailor the definition of contaminants to the realities of the combustion process, during which precursors present in NHSMs used a fuel—many of which are solid or liquid—are transformed into air pollutants.

However, the agency agrees with those commenters who argued that the revised definition, as proposed, may be too broad with regard to precursors that may not form air pollutants in all cases. For example, if the combustion of nitrogen does not form NO_X in a particular situation, the agency did not intend in its December 2011 proposed rule to consider nitrogen as a contaminant in that particular situation.[30] The EPA noted in the proposed rule that chlorine, fluorine, nitrogen and sulfur will form pollutants of concern in most circumstances, but the agency does acknowledge that specific technologies and practices may prevent these transformations from happening in the first instance, particularly with regard to nitrogen (one

[28] See 76 FR 15525.

[29] Id.

[30] See March 16, 2012 Response from James R. Berlow, Director, Program Implementation and Information Division, EPA's Office of Resource Conservation and Recovery to Fadi K. Mourad, DTE Energy Services, Inc. A copy of this response letter has been placed in the docket for today's rulemaking and is also available at *http://www.epa.gov/epawaste/nonhaz/define/index.htm.*

example being the use of Low NO_X burners with Over-Fire Air). Thus, the contaminants definition issued in today's final rule does not consider constituents that are normally precursors to CAA section 112(b) or 129(a)(4) pollutants to be contaminants if a specific technology or practice prevents them from forming their corresponding pollutants.

The definition codified in 40 CFR 241.2 only includes chlorine, fluorine, nitrogen and sulfur as contaminants in cases where ''combustion will result in the formation of hydrogen chloride (HCl), hydrogen fluoride (HF), nitrogen oxides (NO_X), or sulfur dioxide (SO_2).'' When compared to the December 2011 proposed rule, the only constituents no longer considered contaminants due to this modification are chlorine that will not form HCl during combustion, fluorine that will not form HF during combustion, nitrogen that will not form NO_X during combustion and sulfur that will not form SO_2 during combustion. This is consistent with the March 2011 NHSM final rule, under which these constituents would not be contaminants when they would not ''result in emissions'' of CAA section 112(b) or section 129(a)(4) pollutants.

Although the EPA is not currently aware of any technologies or practices that prevent chlorine, fluorine or sulfur in NHSMs from forming their associated pollutants during combustion (the EPA is aware of such examples with nitrogen), the agency considers it reasonable and appropriate to adopt the same language for all four precursors to allow for future technological advances preventing the transformation of these elements into pollutants during combustion.

Comment: One commenter stated that the consideration of precursors to air emissions as contaminants could be used to make the most fundamental of all elements, hydrogen, a contaminant because it is present in nearly all regulated pollutants. The presence of hydrogen in a NHSM could then be considered evidence of intent to discard pollutants that contained hydrogen.

Response: Under the proposed contaminants definition, only the specific precursor elements listed (chlorine, fluorine, nitrogen and sulfur) are considered contaminants. The EPA determined in the proposal, and adopts as its final decision today, that these are the only four precursors necessary to evaluate when comparing contaminants between NHSMs and traditional fuels. The agency specifically decided not to include hydrogen on this list. Whereas combustion of chlorine, fluorine, nitrogen and sulfur typically leads to the formation of CAA section 112(b) or 129(a)(4) air pollutants, combustion of hydrogen typically leads to the formation of water vapor.

Comment: Several commenters opposed the inclusion of precursors as contaminants on the ground that the formation of related pollutants depends more on boiler operation and design, process chemistry and feedstock characteristics than on the levels of precursors present in the NHSMs.

Response: The EPA recognizes that unit design and operating conditions can impact the transformation of chlorine, fluorine, nitrogen and sulfur into air pollutants. Rather than viewing this as a reason to ignore the pollutants these elements commonly form, the agency views this as further evidence why precursor levels must be considered when determining which set of CAA standards—which in turn regulate unit operating conditions—should apply.

Comment: Two commenters suggested that the EPA follow a different approach for defining contaminants and use a method similar to what the agency used for the used oil specification in 40 CFR 279.11. In each case, the commenter suggested that for NHSMs, the definition of contaminants should be limited to sulfur, nitrogen, chlorine, Cd, Hg and lead because those are the elements Congress addressed in CAA section 129. This approach, they argued, would be similar to what the EPA did when developing the used oil specifications. The point the commenters wished the agency to draw from the used oil specification approach is that it addressed elemental species, as opposed to individual compounds. Using sulfur as an example, the commenters reasoned that it is the underlying presence of sulfur-bearing materials in the NHSMs, as opposed to individual sulfur-containing compounds on the section 112(b) list, which effects emissions of SO_2.

Response: The EPA disagrees with the approach outlined by the commenters and has issued a final definition of contaminants based on both the CAA section 112(b) and the CAA section 129(a)(4) lists, as was proposed. We do agree with the commenters, however, that identifying precursors that will form certain CAA pollutants in the definition of contaminants is appropriate. The approach outlined by the commenters appears to be based on two premises that the EPA has previously considered and decided not to adopt.

First, the commenters do not think the definition of contaminants should reference both the CAA section 112(b) and CAA section 129(a)(4) lists. The agency previously explained its decision to use both lists in the March 2011 final rule and does not believe comments have offered any new information that would change the basis for this decision. The EPA previously discussed that both lists of constituents are appropriate because both lists are to be considered by the EPA when developing emission standards.[31] Furthermore, the agency has previously explained that CAA section 129 provides that the term ''solid waste'' shall have the meaning promulgated by the EPA under RCRA and that the EPA has the authority to interpret RCRA to decide whether NHSMs are solids wastes or not.[32] The agency notes that it has carefully considered the CAA section 112(b) and 129(a)(4) lists of pollutants and removed those constituents that would not be appropriate to evaluate in NHSMs.

Second, the commenters base their proposed approach to defining contaminants purely on emissions. The agency agrees that emissions may be a means of discard but contaminants that are destroyed by the combustion process or incorporated into products may not have emission standards established under CAA section 129. Combustion may still be a means of discard in these instances. Thus, a definition of contaminants based only on the CAA section 129 emissions standards only tells one how well the combustion unit is operating, not whether the NHSM is being used as a legitimate non-waste commodity.[33]

Comment: Several commenters addressed the specific constituents proposed to be removed from the definition of contaminants. In general, comments were supportive of the concept that constituents unlikely to be found in NHSMs prior to combustion or adequately measured elsewhere in the definition should be removed from the definition.

Multiple commenters asked that CO also be removed from the definition because it is unlikely to be found in NHSMs. The same commenters asked that opacity be removed from the definition because it can only be measured in emissions and is not directly related to any one specific constituent in NHSMs. Particulate matter and coke oven emissions were removed, noted the commenters, because they are products of combustion unlikely to exist in NHSMs

[31] See 76 FR 15524–15525. See also, 75 FR 31883.

[32] See 76 FR 15469–15470. See also, 76 FR 15473.

[33] See 76 FR 15525.

prior to combustion, and the same can be said for CO and opacity.

One commenter expressed concern that asbestos had been removed from the list due to the removal of ''fine mineral fibers'' as a contaminant. The commenter explained that asbestos is commonly found in construction and demolition debris and asbestos particles in smoke are deadly. Excluding fine mineral fibers from regulation explicitly ignores the possibility of such contamination in C&D debris, noted the commenter, and asbestos should be a regulated contaminant.

Response: The EPA has issued a final rule containing the language removing constituents from the definition of contaminants as proposed, with one change. The agency has removed ''opacity'' from the final definition of contaminants as well. Similar to PM and coke oven emissions, there is no practical way to measure opacity in NHSMs prior to combustion or in products made using NHSMs. In fact, the EPA did not intend for opacity to be included in the definition of contaminant under the previous definition. A visual property of an emissions stream, opacity is not even a constituent, let alone a constituent that can be measured in NHSMs prior to combustion or in products made using NHSMs. As such, removing it from the definition will provide clarity without effecting any practical change to the definition.[34]

The agency has not removed CO from the definition of contaminants because, contrary to comments that it is unlikely to be found in any NHSM, it is likely to be present in gaseous NHSMs and is not adequately measured elsewhere in the ''contaminants'' definition. However, as we discuss in the December 2011 proposed rule, CO is unlikely to be found in solid or liquid NHSMs and EPA expects that persons can use process knowledge to justify not testing for CO in these cases.[35]

The agency has removed the fine mineral fibers group from the definition of contaminants, as proposed, because they are not expected to be found in NHSMs. Fine mineral fibers, as regulated under CAA section 112(b) are releases from the manufacturing and processing of non-combustible rock, glass or slag into mineral fibers and are not produced during the combustion process. Asbestos, on the other hand, has been set apart from the fine mineral fibers group in CAA section 112(b), and thus, it is set apart in the NHSM rule. To be clear, asbestos is included in the definition of contaminants in today's final rule and it would be a contaminant regardless of whether the fine mineral fibers group was removed or not. In summary, the following 12 CAA section 112(b) and section 129(a)(4) pollutants have been removed from the definition of contaminants: HCl, Cl_2, HF, NO_X, SO_2, fine mineral fibers, PM, coke oven emissions, opacity, diazomethane, white phosphorus and titanium tetrachloride.

c. Established Tire Collection Programs

The 40 CFR 241.2 definition for ''established tire collection program,'' as established by the March 2011 promulgation in the **Federal Register**, was as follows: ''Established tire collection program means a comprehensive collection system that ensures scrap tires are not discarded and are handled as valuable commodities in accordance with section 241.3(b)(2)(i) from the point of removal from the vehicle through arrival at the combustion facility.''

In the December 2011, NHSM proposed rule, the EPA proposed to revise this definition (and the related criteria for non-waste tires now at 40 CFR 241.4(a)(1)) in order to account for off-specification tires. The term ''off-specification tires'' is intended to also include ''factory scraps.'' The off-specification tires are not removed from vehicles and are handled under contractual arrangements which ensure they are not discarded. The definition was modified to include ''contractual arrangement'' to provide that not only ''collection systems,'' but also contractual arrangements for tire collection would be appropriate. The requirement for the tires to be removed from the vehicle was eliminated[36] since it is not applicable to off-specification tires. The revised definition is sufficient to encompass the agency's intent in describing these programs and continues to ensure that these scrap tires are not discarded and are handled as valuable commodities through arrival at the combustion facility. Further, the addition to the new categorical non-waste provision at 40 CFR 241.4(a)(1) eliminated the need for the previous scrap tire provision at 40 CFR 241.3(b)(2)(i),[37] (which has been removed and reserved in today's final rule) therefore, the reference to that provision was removed in the definition. The agency proposed to revise the definition as follows: ''Established tire collection program means a comprehensive collection system or contractual arrangement that ensures scrap tires are not discarded and are handled as valuable commodities through arrival at the combustion facility.''

The definition in today's final rule includes the revisions to the definition we proposed in December 2011. In addition, the agency is including in the definition ''tires that were not abandoned and were received from the general public at collection program events.'' This revision is being made based on comments received on the proposed rule as discussed below. Under today's revised definition, established tire collection programs could also include a ''contractual arrangement.'' If, for example, the state is sponsoring special events where they take tires back from the general public, those tires would also be included. Thus, the definition in today's final rule is ''Established tire collection program means a comprehensive collection system or contractual arrangement that ensures scrap tires are not discarded and are handled as valuable commodities through arrival at the combustion facility. This can include tires that were not abandoned and were received from the general public at collection program events.''

While the agency did receive comments on the specific proposed changes described above, a number of commenters rephrased or restated previous arguments which conclude that any tires burned for energy recovery are not wastes, even if previously discarded. Conversely, one commenter reiterated its previous arguments which conclude that all used tires are waste, even if burned for energy recovery. Today's rule is responding only to the specific proposed revisions to the regulations and the requests for comment in the proposal. For the response to other issues, refer to the record for the 2011 NHSM final rule (76 FR 15456). Many of the commenters who provided comments on tires intertwined the ''established tire collection program'' definition issues

[34] Neither Table 7 nor Table 8 in the December 2011 proposed rule included opacity. See 76 FR 80478–80480.

[35] See 76 FR 80475.

[36] The related tire provision at 241.4(a)(1) allows for tires that are off-specification or are removed from vehicles.

[37] The scrap tire provision in the 2011 NHSM final rule is now removed and the section reserved in today's final rule: ''(b) The following non-hazardous secondary materials are not solid wastes when combusted:

(2) The following non-hazardous secondary materials that have not been discarded and meet the legitimacy criteria specified in paragraph (d)(1) of this section when used in a combustion unit (by the generator or outside the control of the generator):

(i) Scrap tires used in a combustion unit that are removed from vehicles and managed under the oversight of established tire collection programs.''

with the related topic of the categorical non-waste provision for scrap tires. For a discussion of those comments, refer to the response to comments for the categorical non-waste provision for scrap tires (section III.D.3.a.). The EPA is not reopening its decision that these scrap tires are not wastes. That decision, however, justifies a categorical exclusion where there is not a need to make case-by-case determinations regarding discard in the first instance and the legitimacy criteria.

Comment: Several commenters mentioned that, in some cases, the public individually takes tires to state-run tire collection program events. These are tires that the general public owns and were typically removed from their vehicle. These are not abandoned tires. These collection events, in some cases, are held by the combustor under the state's environmental program oversight. In those cases, the combustors enter into agreements with local communities to hold these events during which local residents are allowed to bring tires to facilities to be recycled, including used as alternative fuels. The scope of tire collection programs also may allow the public to take used tires which they may have stored in their garages, or elsewhere on their property, directly to a combustion facility—in many cases a cement kiln.

Under the EPA's current definition of tire collection programs, the commenters said it is not clear whether these tires would qualify as those collected under an ''established tire collection program.'' Commenters generally agreed that these tires are not abandoned and should be utilized as non-waste fuels without processing.

Response: The EPA agrees with the commenters that tires that have not been discarded and are collected directly from the public at tire collection events are intended to qualify for the 40 CFR 241.4(a)(1) requirement to be ''managed under the oversight of established tire collection programs.'' The agency agrees that these tires are not abandoned and when collected under established tire collection program events, they are considered to be non-waste fuels, just as the other tires handled by established tire collection programs are non-waste. To make this point clear, the EPA has modified the regulatory language. Please refer to the Response to Comment document for more details on these collection events and the responses.

2. Contaminant Legitimacy Criterion for NHSMs Used as Fuels

Under the December 2011 proposed rule, revisions to the contaminant legitimacy criterion for NHSMs used as fuel provided details on how contaminant comparisons could be made in practice. The proposal maintained the fundamental approach of the March 2011 final rule, but the proposed criterion better reflected the EPA's intent to allow certain flexibilities when making contaminant comparisons.

First, the proposal replaced ''contaminants'' with the phrase ''contaminants or groups of contaminants'' to clarify that, when deciding how to compare contaminants between NHSMs and traditional fuels, persons do not have to make comparisons on a contaminant-by-contaminant basis in all cases. When technically reasonable, comparisons may be made on a group of contaminants-by-group of contaminants basis.

The December 2011 rule also proposed to codify language from the preamble to the March 2011 final rule clarifying that when selecting which traditional fuel(s) a unit is designed to burn, persons are not limited to the traditional fuel the unit is currently permitted to burn. Persons may choose any traditional fuel the unit can burn or does burn, whether or not it is permitted to burn such fuel.

In addition, the proposed regulations included text confirming that, when comparing contaminant levels between NHSMs and traditional fuels, persons are not limited to data from the specific traditional fuel being replaced. National surveys of traditional fuel contaminant levels are one example of another acceptable data source. Neither the March 2011 final rule nor the December 2011 proposed rule required persons to compare contaminants in their NHSM to contaminants in the specific traditional fuel source they burn (or would otherwise burn). As an example, the proposal noted that persons who would otherwise burn coal may use any as-burned coal available in coal markets in making a comparison between the contaminants in their NHSM and the contaminants in coal—they are not limited to coal from a specific coal supplier they have used in the past or currently use.

Finally, the proposed regulations included text confirming that, when comparing contaminant levels between NHSMs and traditional fuels, persons are not limited to comparing average concentrations. Traditional fuel contaminant levels can vary considerably and the full range of contaminant values may be used.

Two other issues arose prior to the December 2011 proposed rule that, while not leading to specific regulatory changes in the proposal, still merited a discussion in the proposal. The first issue was that contaminant legitimacy criterion determinations do not require testing contaminant levels, in either the NHSM or an appropriate traditional fuel. Persons can use expert or process knowledge to justify decisions to either rule out certain constituents or determine that the NHSM meets the contaminant legitimacy criterion. The second issue was that persons may use data from a group of similar traditional fuels for contaminant comparisons, provided the unit could burn each traditional fuel. The idea grows from the ''designed to burn'' concept explained in the March 2011 final rule and codified in today's final rule, and it allows a person with a unit that can or does burn similar traditional fuels (e.g., anthracite, lignite, bituminous and sub-bituminous coal) to group those traditional fuels when making contaminant comparisons.

The EPA believes that comments have not changed the basis for making the decisions to expressly allow grouping of contaminants, to interpret ''designed to burn'' to mean can burn or does burn regardless of permit status, and to affirm that persons can use ranges and national surveys of traditional fuel data when making contaminant comparisons between NHSMs and traditional fuels. Comments have also not changed the agency's basis for making the decisions that testing is not required and that persons can group similar traditional fuels for the purposes of contaminant comparisons. Thus, the EPA is adopting the reasoning from the proposal and revising the contaminant legitimacy criterion for NHSMs used as a fuel to incorporate these concepts.

The EPA has decided, however, to make one modification to the proposed contaminant legitimacy criterion based on comments received and information in the rulemaking record. The final criterion issued today includes additional language clarifying the appropriate use of ranges when making contaminant comparisons between NHSMs and traditional fuels. To use the full range of contaminant values in traditional fuels, persons should also account for the variability in NHSM contaminant levels.

Additional details and rationale for the proposed revisions concerning the grouping of contaminants, the meaning of designed to burn, and the use of ranges and traditional fuel data in making contaminant comparisons are discussed in section III.D.2.b, section III.D.2.c, and section III.D.2.d below. Additional reasoning for keeping the rule provisions as proposed and for any modifications to the proposed language

are described in the responses to comments included in these sections.

a. General Comments on the Revised Contaminant Legitimacy Criterion

The EPA is not responding to issues that the agency decided in the March 2011 rule and has not reopened for comment. Specifically, the agency has previously discussed and did not solicit comments in this rule on why the concept of legitimacy is important in determining whether a secondary material is genuinely recycled or is, in fact, discarded.[38] The agency has also previously discussed and did not solicit comments in this rule on why contaminant comparisons to traditional fuels are an appropriate and mandatory factor in determining legitimacy for NHSMs used as fuels in combustion units.[39] The agency has also previously discussed and did not solicit comments in this rule on why the ''comparable to or lower than'' standard is more appropriate than the ''not significantly higher than'' standard.[40] The agency has also previously discussed that the NHSM Rule differs from the DSW Rule in that it is tailored specifically for application to NHSMs used in combustion units.[41]

Comment: Industry commenters overwhelmingly supported the proposed revisions to the contaminant legitimacy criterion, stating that the revisions would help provide regulatory certainty and give the regulated community more confidence in their self-determinations.

Environmental groups, on the other hand, expressed concern that the combination of flexibilities present in the proposed revisions to the contaminant legitimacy criterion will allow facilities to compare contaminant levels in C&D debris and other wood waste to the highest contaminant levels found in coal, even if the facility is not permitted to burn coal. They believed that this should not be permitted and argued that C&D wood should not contain contaminant levels higher than found on average in virgin biomass.

State comments were mixed, with one commenter supporting the proposed revisions and another commenter expressing concern that the revisions would weaken the states' permitting authorities and create an incentive for combustors to burn dirtier traditional fuels.

Response: The EPA has decided to retain the concepts proposed to the contaminant legitimacy criterion because these changes more accurately reflect the EPA's intent under the March 2011 final rule. The agency maintains that these concepts are reasonable and provide a necessary degree of certainty for persons seeking to comply with the rule. This is explained in more detail in sections III.D.2.b (groups of contaminants), III.D.2.c (meaning of designed to burn), and III.D.2.d (allowable contaminant comparisons) of this preamble.

At the same time, comments from both industry and environmental groups have highlighted, in the agency's opinion, a need for additional clarity in the regulatory text on the appropriate use of ranges when making contaminant comparisons between NHSMs and traditional fuels. Accordingly, the EPA has made a minor adjustment to the criterion to ensure that ranges are not used inappropriately in contaminant comparisons (i.e., the highest traditional fuel contaminant values should not be compared to average NHSM contaminant values). See section III.D.2.d of this preamble for a more detailed description of this specific change to the contaminant legitimacy criterion.

The agency disagrees with state concerns that the NHSM rule will weaken the states' permitting authorities. State permitting authorities must still approve permit changes and this final rule does not affect discretion of the permitting authorities in acting on requests for permit modifications. The agency also disagrees with state concerns that the NHSM rule will create an incentive for combustors to burn dirtier traditional fuels. The EPA understands how restricting contaminant comparisons to traditional fuels the unit currently burns could provide an incentive for the facility to burn traditional fuel with high contaminant levels. When facilities do not actually have to burn that traditional fuel to make comparisons, however, that incentive is effectively removed.

Comment: One commenter requested that the proposed revisions to the contaminant legitimacy criterion be added to each option for demonstrating that NHSMs are non-wastes when used in combustion units, whether it is the on-site documentation, the EPA petition process or the categorical non-waste determination process proposed in 40 CFR 241.4.

Response: Revisions to the contaminant legitimacy criterion codified today in 40 CFR 241.3(d)(1) apply to all options for demonstrating that a NHSM is not a solid waste when used as a fuel in a combustion unit. The revised legitimacy criterion is embedded in the self-implementing options outlined in 40 CFR 241.3(b)(1) for use within the control of the generator and 40 CFR 241.3(b)(4) for NHSMs that are processed and then used in a combustion unit. The revised legitimacy criterion is also embedded in the optional EPA petition process outlined in 40 CFR 241.3(c). The revised legitimacy criterion is also referenced as a factor to be considered in the categorical non-waste determination process outlined in 40 CFR 241.4.

Comment: Several commenters expressed concern that the proposed revisions to the contaminant legitimacy criterion, although an improvement over the 2011 Final NHSM Rule, may not provide the regulated community with enough information to be confident in their compliance status. Two commenters noted that the EPA has overlooked the analytical complexities inherent in the contaminant legitimacy criterion and the many opportunities it creates for disagreement between facility operators and regional and state regulators. One of these commenters asked the EPA to both define the term 'comparable' and clarify sampling and analytical methodologies to be used when measuring contaminant levels. Other commenters advised the EPA to increase predictability as much as possible by developing a disciplined process for making contaminant comparisons and providing real time transparency for such decisions.

Similarly, two commenters expressed concern that even after a source makes a fuel determination, the EPA could take a different view of the NHSMs and conclude that they were solid wastes. The risk sources face is noncompliance with the CAA and these commenters contended that the issue is too critical for the EPA to leave the contaminant legitimacy criterion so vague. Over time, as the EPA develops a record for decisions (particularly comparable contaminant determinations), one of these commenters urged the EPA to establish a database and immediately post determinations for other sources to review.

Other commenters supported the proposed revisions to the contaminant legitimacy criterion and indicated that they provided sufficient clarification. One commenter noted that changes to the language of the criterion and the additional clarification provided in the preamble to the December 2011 proposed rule provide key additional detail on making contaminant comparisons and allow additional flexibility where appropriate. The same commenter urged the EPA to maintain

[38] See 75 FR 31870.

[39] See 75 FR 31871–31872. See also, 76 FR 15524–15525.

[40] See 75 FR 31872. See also, 76 FR 15523.

[41] See 75 FR 31870.

that flexibility if the agency develops additional guidance on making contaminant comparisons in the future.

Response: The EPA has retained the approach included in the proposed rule that provides information on how contaminant comparisons can be made and the agency will continue to make its traditional fuel data and legitimacy determinations transparent through the EPA Web site.[42]

The agency recognizes the need for regulatory certainty, a need that has been addressed by revisions to the definition of contaminants and the contaminant legitimacy criterion in today's final rule. Contaminants have been specifically listed, additional clarity on NHSMs/traditional fuel comparisons has been provided and several comparison methodologies have been provided in the preamble as examples that could be used by the regulated community. Comments from the regulated community have been supportive both of these changes and of the agency's efforts to update traditional fuel data that can be used for contaminant comparisons.[43] In addition, a number of interpretative letters have been written that address specific fact situations as presented by a specific facility and these letters have been posted on the EPA's Web site.[44] These letters serve as examples of acceptable ways to demonstrate legitimacy.

The EPA must balance the need for regulatory certainty, however, with the need for flexibility, which many commenters also believe is important. As the agency has previously discussed, the legitimacy criteria must be flexible enough to account for future changes in commodities, technologies, markets and fuel prices.[45] Previous comments have stressed the preference for a qualitative approach, and the agency has agreed, noting that numerical specifications may be impractical due to the multiplicity of fuels and ingredients.[46] The agency has also previously discussed that a numerical definition of 'comparable' would be impractical given differences in the typical concentration levels of various contaminants, choosing instead to offer several examples.[47] While the agency will consider future guidance on contaminant comparisons, it has determined that no one approach is appropriate for every legitimacy determination given the variety of traditional fuels, NHSMs and combustion units that currently exist and will likely increase in the future.

Comment: One commenter noted that both the March 2011 NHSM final rule and the proposal implicitly place the burden on the combustion facility to determine if a fuel derived from NHSMs meets the legitimacy criteria. In the utility industry, the commenter explained, it is common practice for utilities to rely on fuel marketers to establish and verify fuel quality, and the regulatory burden on utilities combusting such secondary materials as fuels could be reduced if the EPA clarified the circumstances under which a facility would be entitled to rely on the fuel quality representations of its suppliers. The commenter suggested that the EPA clarify that a utility may rely in good faith on the representations of its suppliers that NHSMs meet the codified legitimacy criteria, or, alternatively, that utilities be required only to periodically test the quality of NHSM-derived fuels obtained from third parties to rely on their suppliers' representations.

Response: The EPA notes that while fuel suppliers may provide their customers with documentation supporting a legitimacy determination, persons who burn NHSMs are ultimately responsible for the materials burned at their units. As stated in the proposed rule, however, the agency adopts as its decision for this final rule that initial assessments would not need to be repeated as long as the facility continues to operate in the same manner and use the same type of NHSM as when the original assessment was made.[48]

b. Grouping of Contaminants

The December 2011 proposed revision to the contaminant legitimacy criterion for NHSMs used as a fuel began with the following sentence: ''The non-hazardous secondary material must contain contaminants or groups of contaminants at levels comparable in concentration to or lower than those in traditional fuel(s) which the combustion unit is designed to burn.'' The phrase 'or groups of contaminants' was not present in the language from the March 2011 NHSM Final Rule but was included in the December 2011 NHSM Proposed Rule to clarify that groups of contaminants could be evaluated in determining whether a NHSM meets the contaminant legitimacy criterion.

In particular, the proposed rule noted that groups of contaminants in NHSMs could be compared to similar groups in traditional fuels where the grouped contaminants shared physical and chemical properties that influence their behavior in the combustion unit prior to the point where emissions occur. Volatility, the presence of specific elements and compound structure were three such properties identified in the proposal and one approach to grouping contaminants was shown that included groups for TOX, nitrogenated HAP, VOCs, SVOCs, dioxins and furans, PCBs, PAHs and radionuclides. The agency also noted that persons may consider other groupings that they can show are technically reasonable.

Grouping of contaminants is a standard practice often employed by the agency as it develops regulations. In fact, the monitoring standards included in the CAA sections 112 and 129 regulations also utilize the grouping concept and they apply to the same combustion units impacted by the NHSM rule (i.e., industrial, commercial and institutional boilers and process heaters and CISWI units). For example,

- Volatile hydrocarbons and semi-volatile hydrocarbons can both be expected to result from incomplete combustion; therefore, the emission standards promulgated under the CAA regulations are grouped into one category: CO.[49]
- Halogenated organics are expected to contribute to emissions of dioxin and acid gases (HCl and HF); therefore, the emission standards promulgated under the CAA are grouped into two categories: D/F and HCl.[50]
- Nitrogenated compounds are expected to contribute to emissions of NO_X; therefore, the emission standards promulgated under the CAA are grouped into one category: NO_X.[51]

In addition, a number of the seemingly ''individual'' pollutants listed in sections 112 and 129 of the CAA are actually classes of structurally-related compounds (*e.g,* PCBs, POM, D/F, cyanide compounds, cresols, glycol ethers, radionuclides, xylenes, antimony compounds, arsenic compounds, beryllium compounds and cadmium compounds).

[42] The EPA maintains a NHSM Web page with current information on contaminant levels in traditional fuels, examples of legitimacy determinations and other information at *http://www.epa.gov/epawaste/nonhaz/define/index.*

[43] *Contaminant Concentrations in Traditional Fuels: Tables for Comparison, November 29, 2011,* can be found at *http://www.epa.gov/epawaste/nonhaz/define/index.*

[44] See NHSM rule Web site *http://www.epa.gov/epawaste/nonhaz/define/index.htm.*

[45] See 75 FR 31870.

[46] See 75 FR 31871.

[47] See 76 FR 15524 and 15542.

[48] See 76 FR 80481.

[49] Area Source Boilers NESHAP, Major Source Boilers NESHAP, and Commercial and Industrial Solid Waste Incinerators NESHAP.

[50] Major Source Boilers NESHAP and Commercial and Industrial Solid Waste Incinerators NESHAP.

[51] Commercial and Industrial Solid Waste Incinerators: NESHAP.

All comments discussing the agency's proposal to expressly allow the grouping of contaminants supported the agency's position. Thus, the EPA is adopting the language from the proposal and revising the contaminant legitimacy criterion for NHSM used as a fuel to allow contaminants to be compared on a contaminant-by-contaminant basis or, where reasonable, on a group of contaminants-by-group of contaminants basis. Any additional reasoning for keeping the revision as proposed, without modification, is described in the responses to comments below.

Comment: In general, comments overwhelmingly supported the ability to group contaminants when making contaminant comparisons in accordance with the legitimacy criteria. *Comment*ers stated that codification of this concept would provide regulatory certainty and allow for more meaningful comparisons, similar to the manner in which the EPA measures emissions at combustion units. Commenters noted that the ability to group contaminants will facilitate compliance because most existing test methods, including the EPA methods, call for the grouping of analytes. Commenters believed that the grouping concept is an appropriate mechanism to recognize the variability in contaminant levels inherent in fuels. Commenters also appreciated the examples of appropriate contaminant groups provided in the proposed rule along with the ability to compare other technically reasonable groups (76 FR 80477–80480).

Two commenters stated that each mention of the word ''contaminants'' should be changed to ''contaminants or groups of contaminants'' in the regulatory text to further clarify that a comparison to groups of contaminants is intended.

Response: The EPA has retained the language specifically allowing grouping in the contaminant legitimacy criterion for NHSMs used as a fuel. The EPA adopts the reasoning in the December 2011 rule as its final reasoning, as further supported with reasoning discussed in the comment responses below. While the EPA has retained the language allowing the grouping of contaminants, the agency does not consider it necessary to change every instance of ''contaminant levels'' and ''contaminants'' to ''contaminants or groups of contaminants'' in order to make it sufficiently clear that contaminant grouping is allowed. The agency also notes that not all contaminants are necessarily intended to be grouped, including individual elemental contaminants, asbestos, CO and phosphine.[52]

Comment: The ability to group metal contaminants was suggested by several commenters. One commenter held that all 11 metals should be specifically included as one group. Another commenter noted that with the exception of Hg, all metals should be grouped. Yet another commenter suggested that metals could be grouped into a volatile metals group and a non-volatile metals group.

Response: First, we would note that the agency is not limiting groups to the specific approach suggested in the proposed rule. The tables in the proposed rule suggest, but do not limit persons to, an approach, including groups for TOX, nitrogenated HAPs, VOCs, SVOCs, dioxins/furans, PCBs, PAHs and radionuclides, with other contaminants left to be evaluated on an individual contaminant-by-contaminant basis. Flexibility exists for persons to consider other appropriate groups that they can show are technically reasonable, with additional text in the proposal stating that other groups should share physical and chemical properties that influence behavior in the combustion unit prior to the point where emissions occur. Volatility, the presence of specific elements and compound structure are three such properties.[53]

However, we do not consider the grouping of total metals to be appropriate. Specifically, metals vary across all three parameters—volatility, the presence of specific elements and compound structure—that were discussed as appropriate to consider when constructing contaminant groups. First, many factors influence metal volatility in combustion units, and to the extent that trends in metal volatility have been recognized, a wide disparity exists between metals. Mercury, as one commenter noted, is highly volatile, more so than any other metals listed in the contaminants definition. Metals can be grouped into volatile, semi-volatile and low-volatile categories, but it is important to note that these distinctions can vary based on design differences in combustion units, operating temperatures, the physical form and species of the metal and the presence of chlorine.[54] [55] Second, each metal clearly contains different elements. Finally, each metal is already a group of any compound containing the particular element, encompassing a wide array of compound structures. In the absence of other suggested grouping criteria or information, the EPA does not consider total metals to be an appropriate group.

Comment: One commenter provided a numerical example of VOC contaminant levels in fuel oils to illustrate the importance of grouping. The commenter cited the traditional fuel tables provided on the EPA Web site, stating that toluene and xylenes are present in fuel oils at concentrations up to 380 ppm and 3,100 ppm, respectively. If a NHSM had the concentrations reversed, explained the commenter (380 ppm xylene and 3,100 ppm toluene), the ability to group VOCs would then allow the NHSM to meet the contaminant legitimacy criterion. The commenter reasoned that this is appropriate because both toluene and xylenes are beneficial components of fuel.

Response: The EPA disagrees with this interpretation of the grouping concept. Unless concentration data for a group of contaminants (e.g., VOCs) come from the same fuel source, adding together the concentrations of individual constituents (e.g., toluene and xylene) within that group may yield a total concentration beyond what would be considered a normal part of a legitimate fuel. Using the example cited by the commenters, some fuel oils have been found to have up to 380 ppm toluene and other fuel oils have been found to have up to 3,100 ppm xylene. Because the toluene and xylene concentrations were taken from different fuel oils, however, this does not prove that a single fuel oil in existence actually has VOC levels as high as 3,480 ppm (380 + 3,100).

The agency notes that VOC levels higher than 3,480 ppm, have been found in fuel oil—concentrations of one VOC alone (hexane) have been found as high as 10,000 ppm—and the point of this discussion is to clarify a methodology rather than a number for acceptable VOC levels in NHSMs.[56]

We would also note that while the agency considers VOCs to be an appropriate contaminant group to use when making contaminant comparisons, it does not base that decision on

[52] See 76 FR 80478, Tables 7 and 8.

[53] See 76 FR 80477.

[54] EPA. 2001. ''Risk Burn Guidance for Hazardous Waste Combustion Facilities.'' EPA530–R–01–001. July.

[55] Clarke, L.B. and L.L. Sloss, 1992. ''Trace Elements—Emissions from Coal Combustion and Gasification.'' IEACR/49. IEA Coal Research, London. July.

[56] *Contaminant Concentrations in Traditional Fuels: Tables for Comparison, November 29, 2011* can be found at *http://www.epa.gov/epawaste/nonhaz/define/index*. EPA intends to update this document as additional data becomes available, and if persons have data measuring traditional fuels for groups of VOCs, or for other contaminant groups, they are encouraged to provide the agency with such data.

whether or not toluene, xylenes and other VOCs are ''beneficial components of fuel.'' The decision that toluene, xylene and other VOCs, which the agency notes are pollutants listed in CAA section 112(b), are an appropriate group is based on the fact that they share similar physical and chemical properties that influence their behavior in the combustion unit prior to the point where emissions occur.

c. Meaning of Designed to Burn

The December 2011 proposed revision to the contaminant legitimacy criterion for NHSMs used as a fuel included the following statement: ''In determining which traditional fuel(s) a unit is designed to burn, persons can choose a traditional fuel that can be or is burned in the particular type of boiler, whether or not the combustion unit is permitted to burn that traditional fuel.'' The idea that ''designed to burn'' means ''can burn or does burn'' was included in preamble text to the March 2011 final rule. The December 2011 rule proposed to include this concept, which is only applied under the NHSM rule to aid in the selection of appropriate traditional fuel(s) for contaminant comparisons, in regulatory language.

The March 2011 final rule explained that in determining which traditional fuel(s) the owner or operator of the boiler unit would make a comparison to with respect to contaminant levels, the agency would allow any traditional fuel(s) that can be or is burned in the particular type of boiler. The agency reasoned that this approach was the most appropriate since the NHSM would be replacing the use of particular type(s) of fuel that could otherwise be burned.[57]

The December 2011 proposal further explained that contaminants are compared between NHSMs and traditional fuels to assist in making a determination whether or not the NHSM is being discarded when combusted, not to regulate which traditional fuel a combustor should choose to burn. For the purposes of making a discard determination, the proposal reasoned that differentiating between ''can burn'' and ''does burn'' was not relevant.

The agency did note in the proposed rule, however, that for a unit to be able to burn a traditional fuel, it would need an appropriate feed mechanism (e.g., a way to load solid fuel of a particular size into the unit) and the ability to adjust physical parameters to ensure spatial mixing and flame stability per unit specifications.

Because most combustion units can burn different—but related—traditional fuels, the agency discussed in the proposal that broad groups of similar traditional fuels may be used when comparing contaminants. The most common traditional fuel categories burned at major source boilers are coal, wood, oil and natural gas, as evidenced by data submitted to the EPA's OAQPS.[58] [59]

To further clarify the impact of the proposed ''designed to burn'' language on contaminant comparisons, potential categories for coal, wood and oil were further described in the proposal. A coal group was proposed that could include data on anthracite, lignite, bituminous and sub-bituminous coal. A wood or biomass group was proposed that could include data on unadulterated lumber, timber, bark, biomass and hogged fuel. An oil group was proposed that could include data on fuel oils 1–6, diesel fuel, kerosene and other petroleum based oils.[60] In cases where a unit can burn traditional fuels from several categories, such as a boiler that can burn coal or biomass, the proposal noted that contaminant comparisons could be made using data from either fuel category.

The ability to compare contaminants in a NHSM, under the NHSM rule, to contaminants in any traditional fuel that *could* be burned does not change the fact that once burning occurs, emissions standards are determined under the Boiler MACT or CISWI rule by the particular fuel (or fuel blend) that *is* burned. Whether each rule focuses on what 'could be burned' or on what 'is burned' is determined by the rule's purpose and the order in which decisions must be made. Together, these factors explain why the NHSM, Boiler MACT, and CISWI rules take different approaches to account for individual combustion units that burn multiple fuels.

Specifically, the NHSM rule must first determine which NHSMs can be burned in CAA section 112 units (*i.e.,* boilers) and which can only be burned in CAA section 129 units (*i.e.,* incinerators). When making such a waste or non-waste determination, the NHSM rule cannot always predict what fuel would otherwise be burned (multiple options may exist). Accordingly, the rule allows contaminant comparisons to be made to any traditional fuel the unit could burn. The Boiler MACT or CISWI rule must then determine how to regulate emissions from the unit, by which point it is clear what fuel is actually being burned. Accordingly, these rules can and do establish subcategories of units, each with different emissions standards.

The EPA has considered the comments received, as explained below, but has not changed the basis for its interpretation of the ''designed to burn'' concept. Thus, the EPA is adopting the language from the proposal and revising the contaminant legitimacy criterion for NHSMs used as a fuel to allow persons making contaminant comparisons to choose a traditional fuel that can be or is burned in the particular type of boiler, whether or not the combustion unit is permitted to burn that traditional fuel. Any additional reasoning for keeping the revision as proposed, without modification, is described in the responses to comments below.

Comment: Industry commenters generally supported the agency's proposal to codify the previously stated meaning of ''designed to burn'' within the contaminant legitimacy criterion for NSHMs used as fuels. These commenters welcomed the regulatory certainty provided by the revision and described it as a practical and appropriate recognition that some units can burn multiple traditional fuels.

Environmental groups, on the other hand, expressed concern that the proposed definition of designed to burn would allow contaminants in C&D wood to be compared to those in coal instead of virgin wood.

One state commenter also expressed concern that allowing comparisons to any fuel the unit could burn, including fuels they are not permitted to burn, would weaken the states' permitting authorities and create an incentive for combustors to burn dirtier traditional fuels so that they could compare NHSMs to fuels with higher contaminant levels. An industry commenter also mentioned that such an approach would reward facilities that burn dirtier fuel and suggested that the agency remove the entire ''designed to burn'' concept from the rule.

Response: Based on a review of the comments, the EPA has retained the proposed revision to the contaminant legitimacy criterion for NHSMs used as fuels clarifying that, for the purpose of determining traditional fuel(s) to which

[57] See 76 FR 15542.

[58] EPA, Office of Air Quality Planning and Standards (OAQPS), Emissions Database for Boilers and Process Heaters Containing Stack Test, CEM & Fuel Analysis Data Reported Under ICR No. 2286.01 and ICR No. 2286.03 (Version 7). December 2011. *http://www.epa.gov/ttn/atw/boiler/boilerpg.html#TECH.*

[59] The fuel analysis information in this OAQPS database is one example of a ''national survey'' of traditional fuel information, as referenced in the final contaminant legitimacy criterion issued today at § 241.3(d)(1)(iii).

[60] EPA has determined that an oil group should not include unrefined crude oil or gasoline, as neither is typically burned in combustion units subject to the CAA sections 112 or 129 standards.

a NHSM may be compared, the meaning of ''designed to burn'' may be broadly interpreted to include any traditional fuel that could be burned, regardless of facility permit status. The agency disagrees that this interpretation of ''designed to burn'' would incentivize the burning of dirtier fuels or weaken the states' permitting authorities.

The EPA finds that allowing combustors to compare NHSMs to any traditional fuel a unit can or does burn is both practical and appropriate under the statutory definition of solid waste. Although not all combustion units can burn multiple traditional fuels, some units can and, indeed, do rely on different fuel types at different times based on availability of fuel supplies, market conditions, power demands and other factors. Under these circumstances, it would be arbitrary to restrict the combustion for energy recovery of NHSMs with contaminant levels comparable to or lower than that of one traditional fuel the unit could choose to burn solely because contaminant levels are higher than that of a second traditional fuel the unit could also choose to burn if fuel supplies, market conditions, power demands, or other factors change. Such an approach would be impracticable and not consistent with the agency's intent. It would also be inconsistent with the concept of discard, since a facility burning a NHSM with the same contaminants as another fuel it could also be burning should not be considered to discard that NHSM based on its contaminant levels.

The agency has also determined that restricting comparisons to traditional fuels the unit is permitted to burn is unnecessary. The fact that a facility is not currently permitted to burn a particular traditional fuel does not mean it could not be permitted to burn that traditional fuel in the future. For this reason, we do not believe it is reasonable to limit the comparison to permitted traditional fuels. Furthermore, such a restriction could have the unintended consequence of combustion facilities across the country seeking permit modifications solely to facilitate contaminant comparisons for this rule. State permitting authorities must still approve permit changes and this final rule does not affect the discretion of the permitting authorities in acting on requests for permit modifications.

In addition, the EPA has determined that restricting contaminant comparisons to traditional fuels the unit currently burns could provide an incentive for the facility to burn traditional fuel with high contaminant levels. When facilities do not actually have to burn that traditional fuel to make comparisons, that incentive is effectively removed.

Comment: One commenter asked the agency to specifically acknowledge that certain categories of boilers are designed to burn a variety of fuels, noting that stoker boilers, fluidized bed combustors and boilers with suspension burners, in particular, should be on such a list.

Response: The agency has decided not to specifically list which combustion units are designed to burn which fuels for two reasons. First, the owner or operator of a combustion unit has a better understanding than the agency does of what that particular unit is designed to burn. Second, the agency is concerned that creating such a list will limit the flexibility of combustors with other types of units.

Comment: One commenter noted that if the EPA considers it inappropriate to compare liquid fuels to solid fuels, the agency offers no justification for its position. The commenter argued that liquid to solid comparisons should be allowed because most cement kilns and many other industrial furnaces have the capacity to burn either solid or liquid fuels. The commenter described the December 2011 proposed rule as ambiguous with regard to this issue and recommended that if a combustion unit is designed to burn both a liquid fuel and a solid fuel, then the liquid to solid comparison should be ''appropriate.''

Response: EPA agrees with the commenter that if a unit can burn both a liquid traditional fuel and a solid traditional fuel, then comparison of an NHSM to either fuel would be appropriate. The revised contaminant legitimacy criterion clarifies how the ''designed to burn'' concept may be interpreted for the purposes of determining traditional fuel(s) to which a NHSM may be compared, and the Agency has determined that this revision is sufficient to allow appropriate comparisons to be made between solid NHSMs and liquid traditional fuels, and vice versa. The agency does not expect these circumstances to hold true for all combustion units, however, and reiterates that this would only be appropriate when the unit can in fact burn multiple traditional fuels used to make such comparisons.

Comment: Several industry commenters addressed the topic of what it means to be able to burn a traditional fuel in a combustion unit. The preamble to the recent proposed rule noted that combustion units would need an appropriate feed mechanism, as well as the ability to ensure the fuel is well mixed and keep flame temperatures within unit specifications, to be able to burn a traditional fuel.[61] Two commenters opposed the agency's interpretation of what it means to be able to burn a traditional fuel in a combustion unit, stating that the agency provides no explanation of why feed mechanisms are relevant to whether or not a unit can burn a particular fuel. Both commenters also noted that when NHSMs are used as a fuel in combustion units, the focus on what a unit is ''designed to burn'' in the first place is irrelevant to whether discard is occurring. Another commenter explained that the same exact material could then be a solid waste in one case and a fuel in another case, depending on who is using the material.

A third commenter supported the agency's interpretation of what 'can burn' means, stating that the fate and emissions of a contaminant, whether it is contained in a traditional fuel or a material being considered for legitimacy, are as dependent on the design of the combustion unit as they are on the fuel matrix. The commenter explained further that units should be considered able to burn several types of fuels as long as each type is within the design criteria of the feed system, the combustion chamber and any downstream pollution control device.

Response: The EPA disagrees with those commenters questioning the relevance of what fuels combustion units are designed to burn in the context of the legitimacy criteria. If a NHSM does not contain contaminants at levels that are comparable to or lower than those found in any traditional fuel that a combustion unit could burn, then it follows that discard could be occurring if the NHSM were combusted. Whether contaminants in these cases would be destroyed or discarded through releases to the air, they could not be considered a normal part of a legitimate fuel and the NHSM would be considered a solid waste when used as a fuel in that combustion unit.[62]

The reason we analyze what a unit is designed to burn is to decide the traditional fuel(s) to which contaminants should be compared. This comparison is then used as an aid to decide whether the NHSM is being legitimately used as a fuel or whether excess contaminants show that the burning is waste treatment. If a facility compared contaminants to a traditional fuel it cannot burn and that fuel is highly contaminated, a facility would then be able to burn excessive levels of

[61] See 76 FR 80481.

[62] See 76 FR 15523.

waste components in NHSMs as a means of discard. Regardless of any fuel value in the material, it would be a waste.

Once this concept is established, certain factors are relevant to how we decide what a facility is designed to burn. The ability to burn a fuel in a combustion unit does have a basic set of requirements, the most basic of which is being able to get the material into the combustion unit. The agency reaffirms in today's final rule its interpretation from the proposal that to be able to burn NHSMs, a combustion unit should also be able to ensure the material is well mixed and maintain temperatures within unit specifications. Without these basic limits, there would be no point in distinguishing between fuels a unit is or is not ''designed to burn,'' and every combustion unit would be considered ''designed to burn'' any combustible material. Clearly, that is not the agency's intent. As illustrated by one of the commenters, when a unit cannot burn a fuel according to its own design specifications, excess air pollutants form and are likely to be discarded as emissions. Thus, the agency acknowledges that whether or not a NHSM is a waste may depend on the unit burning the material.

Comment: One commenter asked for clarification on the issue of unit modifications. If a boiler hypothetically could be modified in any way to combust a different traditional fuel, the commenter noted, then a comparison to that fuel should be permissible to demonstrate that the NHSM is not a waste.

Response: The EPA disagrees with this comment. As long as the modification remains hypothetical in nature, it stands to reason that the unit cannot yet burn the additional traditional fuel and the only reason it is comparing a NHSM to the dirtier fuel is to allow more waste input into the combustion unit. However, if the unit is actually modified to accept additional types of traditional fuels, then the owner or operator of the combustion unit can consider those traditional fuels in evaluating the NHSM for the contaminant legitimacy criterion. In this situation, such behavior shows that the combustor is serious about burning the other fuel and is willing to make the investment so that it can be burned properly instead of simply trying to gain comparison to a dirtier material.

Comment: In the proposed rule, EPA specifically addressed used oil stating: ''Used oil is a special case and does not need to undergo the contaminant comparison. If it meets the specifications in 40 CFR 279.11, it is a traditional fuel. If it does not meet the specifications (i.e., it is ''off-spec'' oil), it is a solid waste under the 2011 NHSM final rule.'' 76 FR 80481, fn. 44. Some commenters argued that off-spec used oil fuel, however, could satisfy all of EPA's legitimacy criteria, including a contaminant comparison with coal, a traditional fuel. Thus, if a combustion unit is ''designed to burn'' both coal and oil, the facility should be able to use coal as the traditional fuel for the purposes of determining whether the contaminants are comparable—even when the NHSM at issue is off-spec used oil, as defined in 40 CFR 279.11.

Response: The Agency agrees with the commenter that contaminants in off-spec used oil burned for energy recovery in facilities that are designed to burn coal may be compared to coal for purposes of determining whether the off-spec used oil is a waste or non-waste product fuel. Accordingly, for purposes of waste/non-waste determinations, coal or oil, including on-spec used oil can be used as the traditional fuel identified for comparison of contaminants to meet the legitimacy criterion for units designed to burn both fuels. Some combustion units are designed to burn multiple fuels, such as both coal and oil, including on-spec used oil. Under these circumstances, the Agency agrees that the rules allow the comparison of contaminant levels to either traditional fuel. That is, to be designated as a non-waste, the off-spec used oil contaminant levels must be comparable to or lower than coal when coal is the traditional fuel used for comparison.

EPA no longer finds, as stated in Footnote 44 of the proposed rule, that off-spec used oil is always a waste for facilities that are designed to burn coal. Off-spec used oil continues to be a waste, however, for facilities that are not designed to burn coal because off-spec used oil contains contaminant levels that are not comparable to on-spec used oil. EPA also notes that in the preamble to the March 2011 rule (p. 15506), the Agency specifically rejected the comparison of off-specification used oil contaminants to coal. That discussion, however, was in the context of a general contaminant comparison for units that burn only fuel oil. Coal may not be the comparison material for all off-specification used oil, but only for those facilities that are designed to burn coal as provided in the definition of this rule. Finally, we want to make clear that EPA has not modified the part 279 regulations for management of used oil, and thus, burning of off-spec used oil for energy recovery is still subject to those rules, including the requirement that off-spec used oil can only be burned in certain units (see 40 CFR 279.61(a)).[63]

Comment: Commenters argue that the EPA has not adequately addressed how units designed to burn only NHSMs are to comply with the contaminant legitimacy criterion. The commenters explained that, under the rule structure as proposed, a NHSM may be classified as a waste simply due to a lack of a traditional fuel for comparison purposes. Comments acknowledge that the agency discussed the issue in the preamble to the proposed rule but the commenters disagree that the discussion provided any solution. Finally, commenters specifically requested that the EPA acknowledge the fact that a combustor designed for a particular NHSM fuel is dispositive that the NHSM is being legitimately burned for energy recovery.

Response: The EPA disagrees with the assertion that the agency has failed to provide a solution for units designed only to burn NHSMs. The EPA also disagrees with the assertion made by commenters that the fact that a combustor has designed a combustion unit for a particular NHSM fuel is dispositive that the NHSM is being legitimately burned for energy recovery.

The EPA acknowledges and is aware of units built specifically to burn NHSMs. One example is facilities built to burn resinated wood. The EPA notes that units built to burn such NHSMs are likely to be able to burn similar traditional fuels. Using the example of units built to burn resinated wood, the EPA considers it reasonable to assume that these units could also burn clean wood and, therefore, could make comparisons to that traditional fuel. The agency also notes that it is not aware of any units—and commenters have not identified any such units—that can burn only NHSMs.

The EPA has nonetheless provided what it considers to be a reasonable solution. As explained in the preamble to the proposed rule, the EPA advises combustors faced with such a situation to compare solid NHSMs to solid traditional fuels, such as coal or biomass, liquid NHSMs to liquid

[63] Off-specification used oil can only be burned in the following types of units: (1) Industrial furnaces, as defined in 40 CFR 260.10; (2) the following boilers, as defined in 40 CFR 260.10—industrial boilers located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes, utility boilers used to produce electric power, steam, heated or cooled air, or other gases or fluids for sale, and used oil fired space heaters provided that the burner meets the provisions of 40 CFR 279.23; and (3) hazardous waste incinerators subject to regulation under subpart O of 40 CFR parts 264 or 265.

traditional fuels, such as oil, and gaseous NHSMs to gaseous traditional fuels, such as natural gas.[64] In light of the explanation of ''designed to burn'' codified in the final contaminant legitimacy criterion, as well as industry comments that many combustion units can burn multiple types of fuel, the agency believes that its suggested approach adequately addresses the issue.

Finally, the EPA acknowledges that combustion units can and have been designed specifically to burn NHSMs and that such units can recover energy. The agency notes, however, that persons can and have also designed incinerators to dispose of certain waste materials and that such units can also recover energy. The agency, therefore, does not consider it dispositive that if combustion units are designed to burn a specific material, that material must be a legitimate non-waste fuel.

d. Contaminant Comparisons Allowed

The proposed revision to the contaminant legitimacy criterion for NHSMs used as a fuel included the following statement: ''In comparing contaminants between traditional fuel(s) and a non-hazardous secondary material, persons can use ranges of traditional fuel contaminant levels compiled from national surveys, as well as contaminant level data from the specific traditional fuel being replaced.'' The March 2011 final rule did not discuss the use of ranges when evaluating contaminant data, nor did it discuss the use of traditional fuel data from national surveys.

The December 2011 proposed rule included these concepts to clarify that persons are not required to adhere to a single comparison methodology, nor are they required to compare contaminants in their NHSMs to contaminants in the specific traditional fuel source they burn (or would otherwise burn). In both instances, the additional language clarifies, but does not change the intent, of the March 2011 final rule.

Regardless of the specific methodology chosen, a comparison will have to be made for each contaminant or group of contaminants between the NHSM and a traditional fuel or traditional fuel group. Generators or combustors can use either traditional fuel data collected by the EPA or their own data for traditional fuel comparison values.[65] Generators or combustors are responsible, however, for providing NHSM comparison values in cases where testing is conducted. Examples of acceptable NHSM data could include both laboratory test results from a specific generator or combustor and industry-recognized values provided by a national trade organization.

Given data for a particular traditional fuel, the EPA noted in the proposal that many combustors would choose to base the traditional fuel comparison value on the upper end of its statistical range and that this approach was reasonable. Anything less could result in ''traditional fuel'' samples being considered solid waste if burned in the very combustion units designed to burn them. This was not the agency's intent in the March 2011 final rule.[66] Given that selection (i.e., the range for traditional fuel contaminant values), the agency noted that acceptable NHSM comparison values would include the upper end of a statistical range, a calculation involving the mean and standard deviation or perhaps a single data point in situations where data are limited. The proposal reasoned that it would not be appropriate to compare an average NHSM contaminant value to the high end of a traditional fuel range, as the existence of an average implies multiple data points from which a more suitable statistic (e.g., range or standard deviation) could have been calculated.

If each NHSM comparison value is comparable to or lower than its corresponding traditional fuel value, the material would be considered to meet the contaminant legitimacy criterion. An initial assessment would not need to be repeated, explained the proposal, provided the facility continues to operate in the same manner and use the same type of NHSMs as when the original assessment was made.

Despite presenting several approaches for calculating NHSM comparison values, such as the upper end of a statistical range or a calculation involving the mean and standard deviation, the proposal did not preclude other reasonable methodologies. In the context of an inspection or enforcement action, the agency will evaluate the appropriateness of alternative methodologies and data sources on a case-by-case basis when determining whether the contaminant legitimacy criterion has been met.

The EPA noted in the proposal that contaminant testing is not required and that process knowledge may be sufficient for particular contaminants in particular NHSMs. Even when analytical testing is not necessary, the EPA's regulations governing recordkeeping for units subject to emissions standards for boilers and process heaters issued pursuant to CAA section 112 require keeping a record to document the basis of non-waste determinations under the part 241 criteria (including the contaminant legitimacy criteria). See 40 CFR 40 CFR 63.11225(c)(2)(ii) for area source boilers and 40 CFR 40 CFR 63.7555(d)(2) for major source boilers.

The EPA believes that the comments have not changed the basis for its decision to allow the use of ranges and surveys of traditional fuel contaminant levels. Nor have comments changed the agency's position that similar traditional fuels may be grouped for comparison purposes and that testing is not required in all cases. Thus, the EPA is adopting the reasoning from the proposal and adjusting the contaminant legitimacy criterion accordingly for NHSM used as a fuel.

The EPA has decided, however, to make a modification to the regulatory language of the December 2011 proposed rule based on comments received. The final criterion issued today includes additional language clarifying the appropriate use of ranges when making contaminant comparisons between NHSMs and traditional fuels. Consistent with the rationale provided in the preamble to the proposed rule, additional language now states that in order to use the full range of contaminant values in traditional fuels, persons should also account for the variability in NHSM contaminant levels. Any additional reasoning for finalizing the revision with or without suggested modifications is described in the responses to comments below.

Comment: Industry comments supported the proposed changes expressly allowing the use of ranges and national surveys of traditional fuel data, as did one state comment. One commenter stated that these changes provide a more practical approach to meeting the contaminant legitimacy criterion that recognizes the inherent variation of contaminants in NHSMs and traditional fuels. Several commenters supported the use of ranges by repeating the EPA's rationale from the proposal that using anything lower would logically result in a determination that some traditional fuels should not be burned in combustion units designed to burn those fuels. Another commenter stated that these clarifications describe appropriate methods of handling data

[64] See 76 FR 80481.

[65] The EPA maintains an NHSM Web page with current information on contaminant levels in traditional fuels, examples of legitimacy determinations, and other information at *http://www.epa.gov/epawaste/nonhaz/define/index.*

[66] Traditional fuels, as defined in § 241.2, are not required to meet the legitimacy criteria, and this scenario is only used to explain the logic behind basing a traditional fuel comparison value on the upper end of a statistical range.

that are naturally variable and will result in fewer non-waste materials being arbitrarily identified as wastes.

Environmental groups opposed the use of ranges to evaluate contaminants, expressing concern that C&D wood contaminant levels would be compared to the highest contaminant levels for coal. These commenters suggested that averages or medians be used instead.

Response: Based on our review of the comments received, the EPA is retaining the approach outlined in the proposed rule to expressly allow the use of ranges and traditional fuel data from national surveys. As discussed in the proposed rule, the EPA considers it reasonable to allow combustors to use the range of contaminant levels present in traditional fuels because anything less could result in ''traditional fuel'' samples being considered solid waste if burned in the very combustion units designed to burn them. For this reason, the agency disagrees with comments stating that combustors should be limited to use of the average or median concentrations.

The EPA acknowledges that the revisions adopted as final in today's rule would allow C&D wood contaminant levels to be compared to the highest contaminant levels for coal. The commenters do not specify, however, what C&D wood contaminant levels (averages or ranges) they are concerned would be compared to the highest levels in coal. The agency points out that the proposed revisions were not intended to allow average C&D wood contaminant levels to be compared to the highest levels in coal. In light of the concerns expressed by these commenters, the EPA has modified the proposed language to provide additional assurance that such average-to-maximum comparisons, which the agency has already determined are inappropriate, will not be allowed under today's final rule. The EPA has decided that such comparisons are inappropriate because, following the logic stated in the March 2011 final rule, average-to-maximum comparisons do not demonstrate that contaminants in these cases could be considered a normal part of a legitimate fuel and are not being discarded.[67]

Today's final criterion makes clear that the full range of traditional fuel contaminant values can only be used if persons also consider some measure of variability in the NHSM contaminant data. This will help to ensure that average to maximum comparisons will not be used to justify the combustion of NHSMs as non-waste fuels.

Comment: Industry comments supported the concept discussed in the proposed rule that the contaminant legitimacy criterion does not require the testing of contaminant levels in NHSMs in all cases. The proposal noted that persons can instead use expert or process knowledge to justify decisions to rule out certain constituents. The proposal also noted that initial assessments would not need to be repeated, provided the facility continues to operate in the same manner and use the same type of NHSMs as when the original assessment was made. One commenter asked the EPA to confirm these statements, explaining that this policy will result in fewer NHSMs being arbitrarily identified as wastes. Another commenter stated that the flexibility provided by this policy will help ensure that regulated entities with varying levels of sophistication can better document that their NHSMs are non-waste fuels.

Environmental groups, on the other hand, commented that the EPA must require testing for contaminants, citing the extremely variable nature of C&D wood as a problem. Commenters expressed concern that a large amount of material is going to be generated as abandoned and foreclosed housing is torn down, and the potential for liberating vast amounts of lead and other urban toxics, to say nothing of arsenic and chromium from pressure-treated wood, has never been higher.

Response: Based on a review of the comments received, the EPA is maintaining its position that contaminant testing is not required in all situations. Requiring testing in some situations is unnecessary. Where a NHSM generator, processor or combustor knows a contaminant will either not be present or be present at a level below that in the appropriate traditional fuel or traditional product, the agency believes it is a reasonable and practical policy to allow persons to rely on either process knowledge or previous testing of the same material.

The agency notes that there will be instances where testing is conducted and comparisons will have to account for the variability of contaminant levels in NHSMs, including lead concentrations in C&D wood. The agency also notes that today's final rule does not change its previously stated position that chromated copper arsenate-treated wood (CCA wood) would likely have contaminant levels not comparable to traditional fuels.[68]

Comment: One commenter requested that the EPA clarify what it means by the upper end of the statistical range. Citing the EPA's statement in the proposal that ''it makes sense to base the traditional fuel comparison on the upper end of the statistical range,''[69] the commenter asked for confirmation that the maximum values in the traditional fuel data set can be used for comparison with a NHSM since all data corresponding to the traditional fuel are valid for comparison, not just values that are below some arbitrarily determined statistical parameter.

Response: The word 'ranges' in the proposed contaminant legitimacy criterion has been changed to 'the full range' in the final criterion issued today. This term more clearly indicates the agency's intent to include all true values in between the minimum and the maximum.

The agency has also separated the concepts of ranges and traditional fuel survey data in the regulatory language in order to make the criterion more transparent. The pertinent regulatory text in today's final rule reads as follows: ''In comparing contaminants between traditional fuel(s) and a non-hazardous secondary material, persons can use data for traditional fuel contaminant levels compiled from national surveys, as well as contaminant level data from the specific traditional fuel being replaced. To account for natural variability in contaminant levels, persons can use the full range of traditional fuel contaminant levels, provided such comparisons also consider variability in non-hazardous secondary material contaminant levels.''

Comment: Several commenters noted that the agency proposed to allow the use of ''national'' surveys of traditional fuel data in the proposed contaminant legitimacy criterion and included several international data sources in its ''Contaminant Concentrations in Traditional Fuels: Tables for Comparison'' document.[70] Several commenters asked that the word 'national' be removed from the contaminant legitimacy criterion. Other commenters asked that the EPA either remove the word 'national' or clarify that international data and surveys from other nations are also acceptable data sources.

Response: The EPA has retained the proposed language, including the word ''national,'' which expressly allows national surveys of traditional fuel data to be used in contaminant comparisons

[67] See 76 FR 15523.

[68] See 75 FR 31872.

[69] See 76 FR 80481.

[70] The EPA maintains a NHSM Web page with current information on contaminant levels in traditional fuels, examples of legitimacy determinations, and other information at *http://www.epa.gov/epawaste/nonhaz/define/index.*

for NHSMs used as a fuel in combustion units. A statement that national surveys can be used does not preclude the use of appropriate international data. In fact, as the commenters recognize, the EPA included several international sources in its analysis of traditional fuels. These international sources were limited, however, to situations where no data or minimal data could be found from national sources or the agency had no reason to believe that data from national sources would be significantly different. At issue is whether the data are representative of traditional fuels that are purchased and burned at operating boilers in the United States. The agency has decided that it is reasonable to assume that national surveys of traditional fuels contain information about fuels purchased and burned at operating boilers in the United States.

Comment: One commenter argued that the traditional fuel database compiled by the EPA should include the USGS coal data from not only the United States but also from around the world because those fuels are currently in use.

Response: The EPA has maintained its decision not to reference the USGS COALQUAL database in its traditional fuel contaminant tables. It is the agency's understanding that the COALQUAL database contains trace metal analyses for coal and associated rocks taken directly from coal beds throughout the United States and that not all of these coal beds are currently being mined. It is also the agency's understanding that as-mined coal typically undergoes a series of processing steps, including crushing, screening, washing and physical separation techniques to remove rock and other impurities prior to being blended into clean, graded and uniform coal products suitable for use in commercial boilers.[71]

In comparison, the EPA contaminant tables referenced by commenters are based largely on a comprehensive dataset that contains approximately 32,000 records of pre-combustion contaminant analyses performed on coal, wood, biomass and fuel oil samples that were actually used as fuel at boilers across the country. Thus, the agency has decided that the EPA dataset is more representative of contaminant levels in coal actually burned at operating boilers than the COALQUAL database. As a result, the EPA has decided not to use the COALQUAL database in developing the tables posted on the agency's Web site.

We would also note that the decision not to use USGS data is consistent with the agency's position that product fuel oils, as opposed to virgin crude oil, should be measured for purposes of contaminant comparisons. As stated in the proposed rule, neither unrefined crude oil nor gasoline is typically burned in combustion units regulated by CAA sections 112 and 129. Similarly, as-mined coal is not typically burned in combustion units regulated by CAA sections 112 and 129.

Comment: One commenter suggested that for each contaminant or group of contaminants, either the UCL of the mean at a 90 percent confidence level or the UPL at a 90 percent confidence level for NHSMs could be compared to the maximum value for the appropriate traditional fuel.

Response: First, we would note that in the preamble to the recent proposed rule, the EPA indicated that when compared to the full range of contaminants in traditional fuels, suitable measures of NHSM contaminants would include the upper end of a statistical range, a calculation involving the mean and standard deviation or perhaps a single data point in situations where data are limited. The agency also noted that the discussion in the preamble did not preclude ''other reasonable methodologies.'' [72]

With respect to the specific approaches suggested by the commenters, the EPA agrees with the approach of comparing the UPL at a 90 percent confidence level for each contaminant or group of contaminants in NHSMs to the maximum value for each contaminant or group of contaminants in the appropriate traditional fuel. Specifically, the UPL is an indicator of what a future measurement would be. In the context of NHSM contaminant levels, the UPL taken at a 90 percent confidence level would yield a number, and a combustor could be confident that 90 percent of the time, the next measured contaminant level would be at or below that number. The UPL considers both the variability of the contaminant distribution and the uncertainty surrounding what the true mean is. The comment suggested taking a maximum value for traditional fuel contaminant levels and comparing it to the UPL at a 90 percent confidence level. Because both metrics account for the variability present in contaminant distributions, the EPA would consider this approach to be a reasonable methodology.

The EPA does not agree, however, with an approach of using the UCL of the mean. That is, the UCL of the mean, regardless of the confidence level, is a measure of the mean and does not adequately factor in the variability present in both NHSMs and traditional fuel contaminant levels. The metric would be appropriate for a mean to mean comparison, but that is not what the commenter suggested. The comment suggested taking a maximum (which takes full advantage of the variability present in traditional fuel contaminant levels) and comparing it to a mean (which ignores the variability present in NHSM contaminant levels). The EPA does not consider this approach to be a reasonable methodology.

To be clear, the EPA does not object to the use of confidence limits, or to the use of the UCL of the mean, on their own grounds. However, the agency believes it is inappropriate to make a comparison of mean contaminant levels in NHSMs to maximum contaminant levels in traditional fuels.

Comment: One commenter suggested that the EPA allow entities to compare contaminants between NHSMs and traditional fuels on a pound of contaminants per Btu (lb/MMBtu) basis, as the agency said it would consider in the preamble discussion to the 2011 NHSM Final Rule.[73]

Response: The EPA maintains its position that a direct comparison of contaminant levels, as opposed to the lb/MMBtu approach, is the most appropriate means of comparing contaminant levels. As was noted in the 2011 NHSM Final Rule, however, the agency may still consider the lb/MMBtu approach as guidance is developed for implementation.

3. Categorical Non-Waste Determinations for Specific NHSM Used as Fuels

The new provisions at 40 CFR 241.4 were proposed to allow the EPA to list categorically certain NHSMs as non wastes—when used as a fuel in a combustion unit. Based on these categorical non-waste determinations, facilities burning NHSMs that qualify for the provision will not need to demonstrate that the NHSM meets the legitimacy criteria on a site-by-site basis. The EPA has determined that these NHSMs are categorical non-wastes as described and are not discarded when used as a fuel in a combustion unit.

Categorical non-waste determinations only apply, however, to NHSMs that are burned as a fuel in combustion units for the purpose of recovery energy. Burning

[71] Speight, J.G. Synthetic Fuels Handbook: Properties, Process, and Performance. McGraw-Hill, 2008. pg 141.

[72] See 76 FR 80481.

[73] See 76 FR 15525.

a NHSM fuel in a combustion unit for energy recovery assumes a set of basic design requirements that ensures excess air pollutants are not formed and emission requirements under the CAA are met. As discussed in section III.D.2.c of this preamble, such basic design requirements include abilities to load the material into the unit, ensure the material is well mixed and maintain temperatures within unit specifications. For example, burning a whole tire in a boiler that is only designed to burn tires that are chipped and/or dewired would not be considered a fuel burned in a combustion unit for the purpose of recovering energy. The agency is not including specific regulatory text regarding this point since we believe it is understood that to be burned for energy recovery, the combustion unit must be able to burn the NHSM as a fuel.

a. Scrap Tires

In the December 23, 2011, NHSM proposed rule, the EPA proposed the following regulatory language under 40 CFR 241.4 Non-Waste Determinations for Specific Non-Hazardous Secondary Materials When Used as a Fuel: ''Scrap tires that are not discarded and are managed under the oversight of established tire collection programs, including tires removed from vehicles and off-specification tires.'' Further, the addition of this provision (40 CFR 241.4(a)(1)) eliminated the need for the previous scrap tire provision at 40 CFR 241.3(b)(2)(i),[74] which has been removed and reserved in today's final rule. Today's rule finalizes the proposed provision without changes.

Comment: One commenter stated that, ''in its latest proposal, EPA eliminates the need for scrap tires to meet its legitimacy criteria and simply declares that scrap tires collected under an established tire collection program are not waste regardless of whether they meet the agency's legitimacy criteria.''

Response: The EPA disagrees with this comment. The EPA has not eliminated the legitimacy criteria for scrap tires. The categorical determination for scrap tires (as with all the categorical determinations in this rule) simply applies the agency's non-discard determination, made in the March 2011 rule and not reopened in this amendment, to the general category so that case-by-case determinations as to legitimacy would not need to be made by each facility. For the scrap tire category, scrap tires managed under established tire collection programs and used as a fuel need not make case-by-case legitimacy determinations. Moreover, the commenter has given us no information that the criteria are not met. In fact, the commenter simply repeats the argument made in previous rulemakings that the material is always a waste regardless of legitimacy criteria.

Comment: Several commenters suggested that scrap tires should not have more restrictions under 40 CFR 241.4(a) for the categorical non-waste status than does resinated wood. The non-waste determination for scrap tires, as proposed in 40 CFR 241.4(a)(1), read ''Scrap tires that are not discarded and are managed under the oversight of established tire collection programs, including tires removed from vehicles and off-specification tires.'' In comparison, the resinated wood description, as listed in 40 CFR 241.4(a)(2), is ''Resinated wood.'' The commenters reasoned that if all resinated wood can be non-waste, then all scrap tires should also qualify (regardless of the origin).

Response: Please see the EPA's response in the resinated wood section below (section III.D.3.b of this preamble) relating to the 241.4(a) criteria for resinated wood and the comparison to scrap tires. That response goes into detail explaining why the extra criteria are not needed for resinated wood and related discard issues. In addition, as noted previously in the NHSM rulemaking record (see docket EPA–HQ–RCRA–2008–0329), numerous tire piles have been created in the past whereas this is not the case for resinated wood used as fuel. The existence of these historic tire dumps demonstrates that some tires have not been treated as a valuable commodity therefore necessitating the additional discard qualification in regulatory text. The specific tires described in the categorical determination are handled as a valuable commodity and do not include discarded tires.

Comment: A commenter suggested that the EPA should add ''off-specification tire components'' to the regulatory language. This revision would be in addition to the proposed text at 40 CFR 241.4(a)(1) that adds ''off-specification tires.''

Response: Off-specification tire components are covered in the 40 CFR 241.4 categorical non-waste determinations for scrap tires. The term 'scrap tire' is a general term for tires and can include, for example, whole tires, chipped tires, off-specification tires or off-specification tire components (i.e., tread, sidewall or base) that are removed from vehicles or are generated by tire manufacturers, including retailers or other parties involved in the distribution and sale of new tires. This formulation was also stated in the December 2011 NHSM proposal[75] and is adopted for today's final rule. The EPA sees no difference between tires and their various components. Thus, the EPA does not believe it necessary to modify the rule to include ''off-specification tire components'' in the codified definition. They are understood to be included in the categorical non-waste provision.

Comment: Many commenters mentioned the difficulty in complying with the regulations since it is very difficult to distinguish between tires removed from vehicles (and off-specification tires) versus tires from other origins. In regard to this issue, one commenter stated, ''a combustor cannot know the origin of the tire-derived fuel it is buying. In its response to requests for reconsideration of the CISWI rule, the EPA responded to this issue by recognizing that it is not possible for a combustor to know the source of all NHSM fuel and declined to impose this requirement stating:

> ''Rather, it is sufficient that the ultimate user verify that it is obtaining tires from an established tire collection program, which program can provide the user with reasonable assurance that it manages tires carefully from point of collection to point of burning and which does not receive tires which have been abandoned in landfills or otherwise. 76 Fed. Reg. 28318, 28322 (May 17, 2011).''

Therefore, the commenter requests that the EPA codify this statement in the NHSM rule and expressly allow combustors to rely upon certifications of fuel suppliers that the fuel sold is not a solid waste.

Another commenter said that for the EPA to require a tire storage facility to maintain separate classifications of tires (i.e., separating discarded tires from tire dumps from other tires) is not reasonable, because inspectors and operators would not be able to tell the piles apart. The EPA's current definition of scrap tires would place undue financial hardship on contractors and storage facilities.

Response: The EPA has decided that a regulatory statement on this matter is

[74] The scrap tire provision in the 2011 NHSM final rule is now removed and the section reserved in today's final rule: ''(b) The following non-hazardous secondary materials are not solid wastes when combusted:

(2) The following non-hazardous secondary materials that have not been discarded and meet the legitimacy criteria specified in paragraph (d)(1) of this section when used in a combustion unit (by the generator or outside the control of the generator):

(i) Scrap tires used in a combustion unit that are removed from vehicles and managed under the oversight of established tire collection programs.''

[75] See 76 FR 80483.

not necessary since the actual requirement for the combustor to determine where its tires come from when they are coming from an established tire collection program (or a contractual agreement) is provided for under the CAA and interpretations provided for that regulation. For example, major source boilers have a recordkeeping requirement for a non-waste determination at 40 CFR 63.7555 ''What records must I keep?'' Within those regulations for major source boilers, it requires the combustor to demonstrate that NHSMs are a non-waste. To the extent that a combustor believes it appropriate, they may request haulers to verify that the tires would qualify as non-waste under 40 CFR 241.4 when combusted.

If there is question about the origin of the tires, the EPA inspectors will not assume that tires are from discarded sources. As we note in the **Federal Register** notice (76 FR 28318, 28322), ''It is EPA's position that ultimate users are not responsible for knowing the source of all tires obtained from an established tire collection program* * * EPA does not interpret this language as requiring knowledge of each individual tire as this is a practical impossibility* * * users also should not assume that tires from established programs which participate in occasional cleanup days are discarded—both because there is no information that the tires from the cleanup efforts were discarded (and these programs are designed to prevent discarding) and whether the kiln received tires from the sporadic cleanup days in any case.''

The **Federal Register** notice that the commenter cited (76 FR 28322) and a related letter to the docket (''Memorandum. Combustion in a Cement Kiln and Cement Kilns' Use of Tires as Fuel.'' April 25, 2011, Document ID: EPA–HQ–OAR–2002–0051–3582) provide sufficient guidance. The agency believes this issue does not merit additional regulation for the hauler.

b. Resinated Wood

In the December 23, 2011, proposed rule, the EPA proposed to designate in regulatory text that resinated wood is not a solid waste when used as a fuel. In making this determination, the agency analyzed these materials using the legitimacy criteria, concluding that resinated wood clearly is managed as a valuable commodity and has meaningful heating value and is used as fuel.[76] While stating that these materials may not always meet the regulatory contaminant legitimacy criterion in every situation, we proposed to list categorically resinated wood as a non-waste fuel because, after balancing the regulatory legitimacy criteria and other relevant factors, the EPA determined that resinated wood that is used as fuel represents an integral component of the wood manufacturing process and, as such, is not being discarded when burned as fuel.

Specifically, we noted the extent to which resinated wood is used as fuels throughout the wood manufacturing industry and that the use of resinated wood as fuel is essential to the wood manufacturing process. We also noted the prevalence of wood product plants that have been designed specifically to utilize these residuals for their fuel value; in fact many (if not most) wood products plants would not be able to operate as designed without the use of these materials. This determination was previously codified under 40 CFR 241.3 (b)(2)(ii) of the NHSM final rule, provided the resinated wood met the legitimacy criteria in 40 CFR 241.3(d)(1). However, based on the available information, as well as how this material is handled and used in the process, resinated wood is not being discarded when used as a fuel, and thus, should not be considered a solid waste when burned as a fuel. The EPA proposed to codify this determination by categorically listing resinated wood as a non-waste fuel in 40 CFR 241.4(a)(2).[77] By specifically listing it as a non-waste fuel, combustors of this material would not need to demonstrate that they meet the legitimacy criteria on a site-by-site basis.

The EPA finds that this reasoning is supported by the entire rulemaking record, as explained in the December 2011 proposal, which rationale is adopted for the final rule as further supported by responses to comments below. Thus, the agency has determined to list categorically resinated wood as a non-waste fuel. In addition, after considering comments received on the proposal, the agency is revising the definition of ''resinated wood,'' as codified in 40 CFR 241.2.

Comment: Most comments on this issue were supportive of a categorical determination that resinated wood is a non-waste fuel. One commenter maintained that the record for this rulemaking clearly establishes that resinated wood is highly valued within the wood products industry for its high fuel value, stating that ''Many facilities rely on mixing of these low moisture content wood materials with higher moisture content wood materials to manage and optimize combustion.'' This same commenter also stated that ''there exists within the wood products industry a developed market for purchase and sale of resinated wood between independent companies.'' In fact, many wood-fired boilers at wood products plants that do not generate sander dust have been retrofitted with sander dust injection burners so that sander dust can be properly combusted in those units, taking full advantage of the heat energy of sander dust.

Another commenter stated that ''resinated fuels have been an integral part of the composite wood product industry's production process since the industry was established decades ago. As such, facilities' combustion and energy systems were designed and constructed to utilize most if not all of their own wood and wood by-products, including resinated trim and sander dust. Excluding resinated wood fuels from our manufacturing processes would require significant re-engineering of our facilities and add insurmountable operating costs in order to substitute fossil fuels, as well as to transport and dispose of resinated wood fuels. Any other result would effectively make it nearly impossible for these manufacturing facilities to continue operations.'' This same commenter also noted that ''many of our facilities rely exclusively on resinated wood for its fuel and have limited access to substitutes.''

Another commenter provided two examples of mills that utilize nearly 100 percent of sander dust, either to create new product as part of the manufacturing process or as fuel. In addition, two state commenters supported the proposed categorical non-waste determination for resinated wood.

Response: Nearly all of the comments received regarding the proposed categorical non-waste determination were supportive of categorically listing resinated wood as a non-waste fuel when burned in combustion units for energy recovery. As noted above, the agency did receive a few additional examples of how the use of resinated wood as a fuel is an integral part of the wood manufacturing industry's production process (e.g., the facilities that would have to be significantly re-engineered if they could not use resinated wood for its fuel value and the mills that use 100 percent of the sander dust it generates, either by recycling it back into the process or burning it for fuel).

Although we received one comment critical of the EPA's proposed listing of resinated wood as a non-waste fuel (addressed below), we did not receive

[76] See 76 FR 80483.

[77] See 76 FR 80483–80484.

any comments that argued or suggested that the use of resinated wood as a fuel is not an integral component of the wood manufacturing process. Thus, we agree with commenters who encouraged the EPA to finalize resinated wood as a categorical non-waste fuel and will finalize this determination in today's rulemaking.

Information in the record for this rulemaking clearly establishes that resinated wood is managed as a valuable commodity (40 CFR 241.3(d)(1)(i)) and has meaningful heating value and is used as a fuel in combustion units that recover energy (40 CFR 241.3(d)(1)(ii)).[78] In addition, we generally have determined that most resinated wood meets the contaminant legitimacy criterion as well ((40 CFR 241.3(d)(1)(iii)), although we acknowledge that in some instances these materials may have levels of formaldehyde that are not comparable to traditional fuels.[79]

The EPA confirms the position discussed in the proposal and adopts it as its final rationale that there are instances where it is appropriate for the EPA to balance the regulatory legitimacy criteria with other relevant factors in order to determine whether a material is a legitimate fuel or is merely being discarded by being combusted. We have determined that resinated wood is one such example. Although resinated wood may not meet the regulatory contaminant legitimacy criteria in every situation, it is clear that resinated wood is still a ''legitimate'' product fuel after one considers how integrally tied the use of resinated wood as a fuel is within the wood manufacturing process and industry. Nearly all comments received on this point concurred with this assessment. Thus, in today's final rule, we are codifying the determination that resinated wood, based on all information and the totality of the circumstances, is a non-waste when used as a fuel.

Comment: One commenter, however, stated that the EPA's proposed categorical determination that resinated wood is a non-waste fuel is unlawful and arbitrary. The commenter stated that the EPA is now proposing to simply ''exempt'' resinated wood altogether, regardless of who burns it and whether it meets the legitimacy criteria. According to the comment, the EPA acknowledges that the formaldehyde levels in resinated wood would not always meet its contaminant legitimacy criterion—i.e., would not be comparable to the levels in any fuel that companies would otherwise burn. The commenter states that the EPA also acknowledges that burning resinated wood increases the emissions of formaldehyde, but nonetheless finds that, ''In general the motivation to use resinated wood as a fuel, even with the slightly higher formaldehyde levels, predominates over the motivation to dispose of the formaldehyde.'' The EPA's decision to remove the limits on the exemption for resinated wood and to ''categorically'' declare resinated wood to be a non-waste—regardless of who burns it, regardless of how contaminated it is, and regardless of the reality that some companies may be burning resinated wood as a cheap means of disposing of their toxic formaldehyde wastes—underscores this point.

The comment continues that the EPA nowhere claims that companies burning resinated wood that they have not generated pay for these materials. Indeed, the EPA does not deny that these companies are paid to take the resinated wood they burn. Thus, the EPA provides no reason to believe that the resinated wood that is burned by a company other than the one that generated it has not been discarded by the company that generated it. Even under the EPA's own view of the meaning of discard, resinated wood burned by companies other than the generator of the resinated wood would be waste but for the agency's declaration that it is not waste.

The commenter also states that the EPA admits that some companies may burn resinated wood because they want to dispose of the formaldehyde it contains (i.e., to dispose of the contaminated wood rather than to recover energy). Moreover, the levels of formaldehyde contamination in some resinated wood would exceed the EPA's legitimacy criteria, but for the EPA's declaration that these criteria do not apply. For these reasons as well, resinated wood is discarded even under the EPA's own view of what that term means.

Further, the comment states that sources' alleged ''motivation'' for burning a material is to recover energy rather than to destroy the wood and the contaminants it contains—assuming arguendo that a source's motivation can even be determined—does not show that material is not a waste. Rather, resinated wood is a waste because it is discarded within the meaning of RCRA. Notably, the EPA does not suggest that there is any use for resinated wood that has been discarded other than—assuming it is a ''use'' at all—burning it. Moreover, establishing a ''motivation''-based test for whether resinated wood is or is not a waste conflicts with and defeats the CAA. Thus, the agency's categorical declaration that resinated wood is not a waste is unlawful.

Response: The EPA strongly disagrees with the commenter's characterization of its categorical determinations. In making categorical determinations, the agency is not ''exempting'' these materials from regulation as a solid waste (i.e., if not for this ''exemption,'' these materials would otherwise be regulated as solid waste). Rather, the EPA has determined that the specified NHSMs are not solid waste when used as fuels. Further, in making categorical determinations, the EPA is not saying that the legitimacy criteria are not relevant. In proposing the categorical non-waste determination for resinated wood, the agency stated we were ''balancing the legitimacy criteria and other relevant factors based on the fact that resinated wood residuals that are used as fuels represents an integral component to the wood manufacturing process and, as such, resinated wood residuals are not being discarded when burned as fuels.''[80] This remains the agency's final finding in this rule.

Regarding the level of contaminants in resinated wood, the agency is not saying that resinated wood is a non-waste fuel ''regardless of how contaminated it is,'' as the commenter suggests. Based on all available information, the agency has concluded that resinated wood meets the legitimacy criteria for all contaminants with the possible exception in some situations of formaldehyde. In focusing specifically on formaldehyde, we also have stated that we have limited information regarding formaldehyde levels—that is, resins and adhesives containing formaldehyde react within the resin curing process leaving ''free formaldehyde at levels less than 0.02 percent (or 200 ppm), but noted that levels will be reduced further due to new national rules being developed by the CARB Composite Wood ATCM, per new Public Law 111–199. Thus, we have not said that contaminants do not matter. Rather, we have carefully analyzed contaminant levels in resinated wood and have determined, based both on contaminant levels, as well as how the use of these materials represents an integral part of the wood product manufacturing process, that resinated wood materials are a legitimate non-waste fuel.

[78] See, e.g., 76 FR 80483. See also background document developed in support of the December 23, 2011, proposed rulemaking titled, ''Resinated Wood, Scrap Tire, and Pulp/Paper Sludge Support Document'' (EPA–HQ–RCRA–2008–0329–1880).

[79] Id.

[80] See 76 FR 80483.

Further, we do not concede, as the commenter contends, that some companies burn resinated wood to destroy contaminants—in fact, we have determined just the opposite. We have determined that companies burning resinated wood do so because such an activity is integrally tied to their production process, not to dispose of the formaldehyde. This determination is based on that extent to which resinated wood is used as fuels throughout the wood manufacturing industry, as well as the fact that the use of resinated wood as fuel is essential to that industry (i.e., plants have been designed to use these materials as fuels and would be unable to operate if resinated wood was not available as a fuel source).

Regarding the comments that the EPA acknowledges that burning resinated wood increases emissions of formaldehyde, the agency needs to correct this characterization. First, in the 2011 NHSM final rule, we stated that the criterion or test in determining the contaminant legitimacy criterion is based on the level of contaminants in the secondary material itself and not by comparing the differences in emissions.[81] However, responding to comments we received regarding emission levels associated with burning resinated wood as a fuel, the agency determined that the amount of formaldehyde that is emitted from burning resinated wood residuals is in fact likely to decrease, given that Public Law 111–199 will reduce formaldehyde levels in these materials.[82]

Regarding the commenter's statement that companies that burn resinated wood that they have received from offsite do not pay for it, the EPA disagrees with the argument put forth by the commenter as the facts in this instance do not support such a premise.

As noted in the March 2011 final rule, inter-company transfers of resinated wood residuals are typically managed through buy-sell contracts and 6 percent of resinated wood residuals are sold into the fuel market and are used as either ''furnish'' (i.e., raw materials) or fuel at the receiving facilities.[83] In addition, the EPA received additional comments on the proposed rule stating, ''* * *there exists within the wood products industry a developed market for purchase and sale of resinated wood between independent companies.''

Moreover, while contractual arrangements can be used as evidence that the material is managed as a valuable commodity and that discard is not occurring when a material is transferred beyond the control of the generator, the price of an NHSM is not, by itself, dispositive of whether the material is or is not a waste. The main indication that resinated wood residuals are not solid waste is the fact that they are used as fuels in a way that represents an integral component to the wood products industry. As the EPA noted in the March 2011 final rule, ''resinated wood residuals transferred off-site are utilized in the same manner as self-generated resinated wood residuals (i.e., contained in the same bins as furnish materials used in the product, transferred via conveyors or ducts), which the plants are specifically designed to burn as a fuel, [and therefore] we agree that this does not constitute discard.''[84]

The comment that the agency has simply declared that resinated wood is a non-waste ''regardless of who burns it'' is a mischaracterization of this categorical non-waste determination. Based on all information provided to the agency, we have determined the use of resinated wood as a fuel is an integral part of the industry's production processes and that these materials are managed as valuable commodities (i.e., fuels), have meaningful heating value and are used in combustion units that recover energy regardless of whether these materials remain within the control of the generator or are transferred offsite to another facility. On the other hand, we have no information that facilities are burning these materials merely to get rid of them (i.e., discard).

The EPA finds irrelevant the commenter's statement that the EPA is looking to a source's motivation for using a material as a fuel conflicts with and defeats the CAA. The issue, rather, is whether motivation is relevant to a waste determination under RCRA. The D.C. Circuit confirmed the relevance of motivation in determining whether a recycled material is a waste. See, *API* v. *EPA,* 216 F.3d at 58 (court criticizes the EPA for not saying why it has concluded whether recycling motivation predominates over a disposal motivation). In this case, it is clear that the motivation for burning the resinated wood is to utilize its inherent value as a fuel and not for disposal. Commenters have provided the agency with information that facilities generating and managing resinated wood residuals consider these materials to be an integral part of their production process—both in the value these materials provide as being a critical source of energy as well as being recycled back into the manufacturing process to create more wood products. Thus, we are not convinced that a facility that considers the use of resinated wood as a fuel to be an integral part of its production processes, as has been established in the record, is motivated to discard these materials by burning to get rid of them.

Comment: A few commenters stated that the EPA is not consistent in how discarded materials are designated as solid waste. In particular, the commenter stated that the EPA was proposing to list as a categorical non-waste fuel in 40 CFR part 241.4 resinated wood regardless of whether it is previously discarded, while the agency would require processing for scrap tires that have been discarded in landfills.

Response: The agency disagrees that its treatment of resinated wood is inconsistent with its treatment of scrap tires. Nowhere does the agency state that resinated wood would be considered a non-waste fuel ''regardless of whether it is previously discarded.'' The EPA, based on all information available, has determined that resinated wood is not being discarded when used as fuel, given the fact that resinated wood residuals that are used as fuels represent an integral component of the wood manufacturing process. If a shipment of resinated wood residuals was disposed of in a landfill, it would be a waste. In addition, if a shipment of resinated wood residuals were disposed of and later recovered to be used as a fuel, as is the case with scrap tires that are extracted from landfills, this would be a different scenario and would not be included within the categorical listing in 241.4(a)(2).

As the record clearly shows, resinated wood is routinely handled and managed as a valuable fuel product within the wood products manufacturing industry. As noted in the rulemaking record (see docket EPA–HQ–RCRA–2008–0329), numerous scrap tire piles have been created in the past and it is a common practice to recover abandoned tires from tire piles and use them for fuel. This is not the case for resinated wood.

Comment: While supportive of the agency's proposed listing of resinated wood as a non-waste fuel in 40 CFR part 241.4, two commenters suggested that the agency revise the definition of ''resinated wood'' as codified in 241.2. Currently, ''resinated wood'' is defined as, ''wood products (containing resin adhesives) derived from primary and secondary wood products manufacturing and comprised of such items as board trim, sander dust, and

[81] See, e.g., 76 FR 15502.

[82] Id.

[83] See 76 FR 15500.

[84] Id.

panel trim.'' However, these commenters request the EPA to revise this definition in order to clarify that the ''spectrum of resinated materials currently used as fuels throughout the wood product manufacturing process are included in the definition.'' Thus, commenters urge the EPA to revise the definition of resinated wood as follows: ''Resinated wood means wood products (containing binders and adhesives) produced by primary and secondary wood products manufacturing. Resinated wood includes residues from the manufacture and use of resinated wood, including materials such as board trim, sander dust, panel trim, and off-specification resinated wood products.''

The suggested revised definition proposes two changes. First, the suggested definition replaces the phrase ''containing resin adhesives'' with the phrase, ''containing binders and adhesives.'' The second suggested revision to the definition is the specific inclusion of ''off-specification resinated wood products.'' Commenters have indicated that these materials include materials that do not meet manufacturing specifications or are otherwise physically marred or damaged and thus, are not sold in the marketplace. This class of materials would not be expected to be chemically different than the resinated wood products that meet the manufacturing ''on-spec'' requirements. For example, off-specification resinated wood products would not be expected to have higher amount of resins (and therefore contaminants) than their on-specification counterparts. Commenters have indicated that off-specification resinated wood products are identical to their on-specification counterparts chemically and only differ in that they are do not meet a manufacturing quality or standard.

Response: The agency recognizes that in order for a categorical non-waste determination to be meaningful and effective, it must be clear about the universe of materials that such a categorical non-waste determination encompasses. Thus, we agree with commenters who suggested specific revisions to the definition of ''resinated wood'' contained in part 241.2. Specifically, the EPA agrees that these revisions create a definition that more accurately captures the scope of resinated wood and is more representative of the resinated materials currently used as fuels throughout the wood product manufacturing process. First, by including the terms ''binders'' and ''adhesives,'' the universe of materials that we consider to be within this definition should be more clear, as these terms are widely used and accepted within the wood products manufacturing industry.

With respect to the inclusion of off-specification resinated wood products, the EPA finds it appropriate to include this class within the definition of resinated wood. We note, however, that to the extent that a facility has reason to expect that the off-specification wood products are off-spec for chemical reasons, such that the levels of contaminants are expected to be greater than their on-spec counterparts, the EPA would not consider such materials to be within the scope of this definition. The agency will make this point more clear by specifying in the definition that the term ''off-specification resinated wood products'' are off-spec due to the fact that they do not meet a manufacturing quality or standard. Thus, in today's final rule, we are codifying the definition of resinated wood as follows: ''Resinated wood means wood products (containing binders and adhesives) produced by primary and secondary wood products manufacturing. Resinated wood includes residues from the manufacture and use of resinated wood, including materials such as board trim, sander dust, panel trim and off-specification resinated wood products *that do not meet a manufacturing quality or standard''* (*emphasis* added).

Comment: One commenter noted that there are additional secondary materials produced by the wood manufacturing industry that are similar to resinated wood and, thus, should also be considered a non-waste fuel. The production of flooring and furniture creates final finishing trim, sander dust and process breakage that are both solid and resinated wood materials. In some cases, these materials are coated with finish materials used to color and protect the finished product. The commenter (a utility) indicated that their facilities receive these materials from furniture and flooring manufacturers and utilize them to offset the fuel load from fossil fuels due to their high heat capacity. Thus, the commenter requests that the EPA expand its definition of resinated wood materials to include these additional wood manufacturing secondary materials as non-waste fuels or otherwise describe the circumstances under which these additional materials would be considered a non-waste fuel.

Response: It is possible that these materials (or some of these materials) could be within the definition of ''resinated wood,'' as codified in 40 CFR part 241.2; however, commenters have not provided the agency with information regarding the factors involved in determining whether these additional types of coated materials are legitimately used as product fuels. That is, commenters have not provided information regarding whether these ''finishing materials'' could have contaminant concerns and whether they are routinely used as fuels. Subsequent to this rulemaking, the agency would welcome information regarding these materials in order to make an informed decision regarding whether these materials fit within the definition of ''resinated wood.'' Alternatively, the commenter may petition the agency to receive a non-waste determination per the petition process established in 40 CFR 241.3(c) if the commenter believes that this material may not be within the definition of ''resinated wood.''

4. Rulemaking Petition Process for Other Categorical Non-Waste Determinations (40 CFR 241.4(b))

The EPA recognizes that there may be other NHSMs that can also be considered non-wastes when used as fuels in combustion units when balancing the legitimacy criteria and other relevant factors. Thus, under today's rule, we are finalizing the process outlined in the proposed rule whereby persons can submit a rulemaking petition to the Administrator where they can identify and request that additional NHSMs be listed in section 241.4. The petition process is similar to 40 CFR 260.20, where any person may petition the Administrator to modify or revoke any provisions of the hazardous waste rules and where procedures governing the EPA's action on those petitions are established. The 40 CFR 260.20 standards reflect normal, informal rulemaking procedures under the APA and thus, serve as an appropriate model for the NHSM rulemaking petitions under this section.

In the context of a rulemaking petition under section 241.4(b), any person can petition the Administrator for a regulatory amendment to identify and request that additional NHSMs be included on the list of materials in section 241.4(a) that are not solid wastes when used as a fuel in a combustion unit. To be successful, the petitioner needs to demonstrate to the satisfaction of the Administrator that the proposed regulatory amendment involves a NHSM that has not been previously discarded (i.e., was not initially abandoned or thrown away), or if discarded, has been sufficiently processed into a legitimate fuel. The petitioner must also demonstrate that the material is used as a non-waste fuel in a combustion unit because it either

meets the legitimacy criteria, or, after balancing the legitimacy criteria with other relevant factors, such NHSM(s) is not a solid waste when used as a fuel in a combustion unit.

If the applicant believes that the NHSM is a legitimate product and not discarded despite not meeting the legitimacy criteria, additional information must be submitted to explain or describe why such NHSM should be considered a non-waste fuel. Possible factors to address include, but are not limited to:

- The extent that use of the NHSM has been integrally tied to the industrial production process. Information can include combustor design specifications, the extent that use of the material is integrated across the industry and the extent that use of the NHSM is essential to the industrial process,
- The extent that the NHSM is functionally the same as the comparable traditional fuel, and
- Other relevant factors.

The application is required to include: (1) The petitioner's name and address; (2) a statement of the petitioner's interest in the proposed action; (3) a description of the proposed action, including the specific NHSM, the industry (i.e., NAICS code) and functional use (i.e., industrial functional code listed in 40 CFR 710.52(c)(4)(i)(C)); and (4) a statement of the need and justification for the proposed action, including any supporting tests, studies or other information. Where such NHSM(s) do not meet the legitimacy criteria, the applicant must explain why such NHSM(s) should be considered a non-waste fuel, balancing the legitimacy criteria with other relevant factors.

Under this petition process, the Administrator makes a tentative decision to grant or deny a petition and then publish notice of such tentative decision, either in the form of an ANPRM, a proposed rule or a tentative determination to deny the petition, in the **Federal Register** for written public comment. The Administrator could, at its discretion, hold an informal public hearing to consider oral comments on the tentative decision. After evaluating all public comments, the Administrator makes a final decision by publishing in the **Federal Register** a regulatory amendment or a denial of the petition.

Comment: One commenter does not support use of the legitimacy criteria, as provided in the proposed section 241.4(b)(3) to make a determination. A material which has not been discarded is, by definition, not a solid waste. However, if the EPA believes that other factors still should be considered, then the only other factor which should be considered is whether the material is being used legitimately as a fuel. The remaining legitimacy criteria are (and should be) irrelevant.

Response: As discussed in the 2011 NHSM final rule, ''legitimacy'' is shorthand for referring to NHSM that are not abandoned or thrown away, are saved and are reused by being burned for their value as a fuel.[85] The legitimacy criteria are the factors needed to be examined to make this determination. For example, it is relevant how the NHSM is managed and its heating value since burning materials that have minimal or limited heating value shows the material is being burned for discard and not energy recovery. In addition, the extent to which contaminants are present in NHSMs may also indicate that the real reason for burning the secondary material is simply to destroy or discard them—referred to as ''sham'' recycling. Thus, the agency is not simply ''punting'' to its legitimacy criteria but believes they provide a valid basis for showing that a NHSM is more commodity-like than waste-like.

Comment: The current petition process is limited to NHSMs when used as fuels. Absent from this petition process are NHSMs used as ingredients and previously discarded materials that meet the fuel legitimacy criteria. We do not understand this distinction and urge the EPA to expand both the current and proposed petition processes to allow for non-waste determinations for a wider range of NHSMs.

Response: In general, the 40 CFR part 241 regulations establishes a self-implementing approach for NHSM that can consider site-specific information, if necessary (i.e., facilities will make a self-determination of whether the non-hazardous secondary fuel or ingredient in question meets the regulatory criteria). We note it is the EPA's intention to indicate in these rules, as clearly as possible, which non-hazardous materials used as fuels or ingredients in combustion units are or are not considered solid waste based on the criteria laid out in regulatory text. The agency expects this self-implementing approach will govern the majority of situations, including NHSMs used as ingredients and NHSMs processed from previously discarded materials.

We would also note that the regulated community prior to proposing the December 2011 proposed rule and commenters to that proposed rule did not provide any instances where ingredients are combusted or are processed from previously discarded material that would be a candidate for listing categorically. Therefore, we do not believe it necessary to modify the proposed rule to address this situation. However, to the extent that there are instances where such materials do exist, persons can always petition the EPA to modify the rules, including allowing ingredients that are combusted to be categorically listed to account for such materials.

Comment: In the NHSM Proposal, the EPA recognizes that a material can have levels of contaminants higher than traditional fuels, but still be combusted for a legitimate, energy-producing purpose (see 76 FR 80483 discussing resinated wood). The EPA also has proposed that this is true for hazardous secondary materials as well (see 76 FR 44094, 44122; July 22, 2011). Notwithstanding this admission, the EPA is not proposing to amend its legitimacy criterion for contaminants to make it a consideration, rather than a mandatory criterion. Thus, the EPA's NHSM Proposal is internally inconsistent. Under 40 CFR 241.3(d)(iii), any material that has contaminants in concentrations higher than those found in traditional fuels is automatically considered a waste, no matter how integral the use of the material is to the manufacturing process or how legitimate the combustion is to the purpose of energy recovery. In contrast, under proposed 40 CFR 241.4, EPA recognizes that materials can have high levels of contaminants and still be non-waste material being legitimately combusted for energy recovery. To justify this inconsistency, the EPA argues that it needs to make a case-by-case determination that a material with higher levels of contaminants is a non-waste to ''prevent sham recycling'' (see 76 FR 80482).

Response: The EPA disagrees with the comment that the mandatory nature of the self-implementing § 241.3 standards (including the contaminant legitimacy criterion) for individual facilities is inconsistent with the non-waste determinations outlined in § 241.4. In particular, the legitimacy criteria (including the contaminant legitimacy criterion) must be met under the self-implementing standards for individual facilities outlined in § 241.3, but the same criteria may be balanced by the EPA with other relevant factors under the categorical non-waste determinations outlined in § 241.4.

These differences are necessary and appropriate. Where a particular NHSM may not meet all the legitimacy criteria outlined in § 241.3(d)(1), but the

[85] See 76 FR 15471.

material is being used as a legitimate fuel, the agency has decided it is necessary to require a formal determination (*i.e.,* not a self-implementing decision) to prevent materials from being burned for discard under the guise of recycling. Furthermore, the agency has decided that such a determination should be subject to public notice and comment. In cases where the difference between recycling and waste treatment is difficult to distinguish, as is the case when elevated levels of contaminants are present, the potential for abuse is likely, and thus, regulatory oversight is appropriate when making a waste/non-waste determination. This approach is also consistent with what the EPA proposed for the hazardous secondary material rule cited by the comment—that is, the balancing test would be used by the EPA in a petition process, not as a self-implementing determination.

Comment: One commenter requested that the EPA should specifically recognize in the categorical petition that the existence of a supply contract between a generator of NSHMs and a combustor, with specifications that the NHSM must meet, should be considered dispositive evidence that the NHSM is not a waste and is combusted for energy recovery, not disposal.

Response: We disagree with the commenter that the mere existence of a contract between the generator and combustor is dispositive evidence of the material being a non-waste. However, existence of a contract is a factor to be considered in a categorical non-waste determination. For example, under 40 CFR 241.4(a)(1), scrap tires managed under established tire collection programs are a categorical non-waste and the definition of ''established tire collection program'' (40 CFR 241.2) explicitly recognizes contracts as evidence that the material has not been discarded. Specifically, ''Established tire collection program'' means ''a comprehensive collection system or *contractual arrangement* [emphasis added] that ensures scrap tires are not discarded and are handled as a valuable commodity through arrival at the combustion facility* * *''

Comment: The timeframe for which the EPA must grant or deny the request should be included as well as defining the length of time of 30 days that these notices will be open to public comment. What is the legal implication of an ''informal public hearing?'' How does this differ from a public information meeting? If it is ''informal,'' what is the purpose? What administrative procedures apply to comments made during the ''informal public hearing?''

Response: The agency is not imposing a deadline on its decision to grant or deny a petition, or a specific time period for public comment, due to the potentially wide range of issues involved in considering a categorical non-waste petition and because of the many factors beyond its control. Informal public hearings, similar to formal public hearings, provide an opportunity for the public to provide comments and oral testimony on proposed agency actions . All testimony received becomes part of the public record. Public meetings, on the other hand, are less formal; anyone can attend, there are no formal time limits on statement, and the agency and/or the facility usually answer questions. The purpose of the meeting is to share information and discuss issues, not to make decisions.

Comment: The final rule should make clear that the denial of a petition would not bar the filer of the denied petition from filing a subsequent petition for the same location and same materials.

Response: Where the information submitted to make a categorical non-waste determination has fundamentally changed, the EPA agrees that a petition to categorically list a NHSM can be resubmitted for review.

5. Materials for Which Additional Information Was Requested

a. Pulp and Paper Sludge

In the March 2011 NHSM final rule, the EPA concluded that pulp and paper sludges meet the legitimacy criteria and, thus, can be burned as a non-waste fuel provided such combustion units are within the control of the generator in accordance with section 241.3(b)(1).[86] The December 2011 proposed rule discussed the information we currently have on pulp and paper sludges, and the additional information that the agency would need in order to categorically list these materials in 40 CFR 241.4(a) as a non-waste fuel.[87] If such information were provided to the EPA, the agency would then consider the legitimacy criteria and other factors relevant to a determination that these sludges are not solid wastes when combusted.

This categorical listing would put pulp and paper sludges in the same general grouping as resinated wood residuals. For resinated wood residuals, the EPA considered that use of that material as a fuel has been integrally tied to the industrial production process and is consistent with that of a fuel product. The proposal discussed similar information that was needed by the agency to support adding pulp and paper sludges to 40 CFR 241.4(a) as a categorical non-waste.

Based on the comments received and information submitted, the EPA is listing as a categorical non-waste fuel under section 241.4 those dewatered pulp and paper sludges that are not discarded and are generated and burned on-site by pulp and paper mills that burn a significant portion of those residuals. Such residual must be dewatered and managed in a manner to preserve the meaningful heating value of those materials.

This determination for pulp and paper sludge as a categorical non-waste represents the agency's finding that, after balancing the regulatory[88] legitimacy criteria with other relevant factors, the burning of this material as described in the categorical listing is a commodity fuel for legitimate energy recovery and not discard. That is, the agency has concluded that, for pulp and paper mills that burn a significant portion, pulp and paper sludges are integral to the mills' operations and provide a critical source of energy. Such mills are not burning these dewatered pulp and paper sludges to discard them but are burning them as a legitimate commodity fuel. These facilities take the steps necessary to dewater the pulp and paper sludges and to manage the dewatered sludge to maintain its meaningful heating value and not to dispose of the sludge. In addition, the agency finds for facilities burning a significant portion of the dewatered sludge that:

(1) The sludges are managed in a manner that preserves meaningful heating value and, therefore, meets the managed as a valuable commodity (241.3(d)(1)(i)).

(2) Dewatered sludge (i.e., dewatered through appropriate water removal practices, including dewatering presses, rotary driers, etc.) meets the meaningful heating value and used in combustion

[86] Pulp and paper sludges almost entirely remain on-site and within the control of the generator when burned as fuels. To the extent that pulp and paper sludges do not remain within the control of the generator and are used as fuels, the petition process established in 40 CFR 241.3(c) could apply to these materials, as appropriate.

[87] Additional information needed to categorically list pulp and paper sludges is discussed at 76 FR 80485.

[88] As the EPA has previously stated (76 FR 15460), the Agency has established regulatory legitimacy criteria which may be used by companies on a case-by-case basis to show that they are not discarding material when used in a combustor. However, for the categorical determination, the Agency has determined that it is appropriate for the Agency, itself, to make the discard determination for material that does not meet the more strict regulatory criteria. Thus, the EPA has developed the categorical determination.

units that recovery energy criterion (241.3(d)(1)(ii)).

(3) The sludge meets the comparable contaminant criterion (241.3(d)(1)(iii)).

The fact that these sludges meet the contaminant legitimacy criterion, in the EPA's view, show that these sludges when burned on-site are not being discarded. While the agency is not defining a specific percentage of dewatered pulp and paper sludges that would need to be burned to qualify for the categorical listing in section 241.4, the agency would consider that the 42 mills that responded to an AFPA survey [89] and that use dewatered pulp and paper sludge as fuels at a significant rate (between 70–100 percent of these materials that are generated and burned) meet the listing description. We also find that other mills that burn a significant portion of their dewatered pulp and paper sludges on-site as fuel would qualify for the listing description.[90] For the pulp and paper mills that burn a relatively small percentage of their dewatered pulp and paper sludges on-site as a fuel (e.g., the five mills that responded to the AFPA survey that burn less than 20 percent), the agency has determined that those sludges are not viewed the same by the mill operator in that they do not need to rely on them for their energy value and are not included in the non-waste categorical listing in section 241.4.

However, there is likely little difference as to how pulp and paper sludge may be defined under NHSM rules, whether a categorical or a facility-specific non-waste determination. That is, such dewatered pulp and paper sludges may still be considered non-waste fuels when burned as a fuel for energy recovery at mills that burn a relatively small percentage of these materials, although the rules require those facilities to document on a facility-specific basis that such sludges are non-waste fuels. As discussed in the final NHSM rule (76 FR 15488), dewatered pulp and paper sludges that are burned within the control of the generator and meet the legitimacy criteria, likely are non-waste fuels and thus can be burned in units subject to CAA section 112 requirements.

The agency has restricted the categorical listing to those dewatered pulp and paper sludges that are burned on-site because the agency has minimal information on how these NHSMs are managed when shipped offsite.[91]

Outlined below are commenters' responses to the agency information requests regarding pulp and paper sludges and a categorical non-waste determination.

Comment: The EPA requested information on how pulp and paper mill sludge is used as a legitimate fuel and not discarded at pulp and paper mills and how the material is integrated into the industrial production process.

In responding to the agency's request, commenters first provided a summary of energy needs by the pulp and paper industry. The commenters indicated that the industry is somewhat unique in its energy profile and in how individual mills select appropriate fuels to support their energy needs. Most pulp and paper mill boilers are specifically designed to handle a variety of fuels; few boilers are designed to burn just traditional fuel. Even mills with boilers specifically permitted as pulp and paper sludge boilers also burn other fuels. Over the years, the industry has recognized the benefits of burning secondary materials, particularly those generated on-site. These secondary materials are derived from and have characteristics similar to traditional fuel, particularly the biomass used to produce pulp and paper products.

Mills do not usually burn just one type of fuel at any one time. Some mills rely heavily on coal, others on natural gas or biomass. According to the commenter, the choice of fuel depends on availability, cost and need. Hogged fuel or coal may be the underlying fuel but it is supplemented by other traditional and non-traditional fuels. This is done in order to meet the energy needs of the mill but also to address best management practices for the boiler and meet air quality requirements. If the hogged fuel is wet, coal or resinated wood may be added to boost heat value. If the boiler is burning too hot, the addition of pulp and paper sludge enables the mill to regulate temperature. Pulp and paper sludge also may be burned because it has the best fuel value for the price. All of these decisions are based on the boiler conditions, fuel availability, energy needs, air quality requirements, as well as costs, and all are considered when the energy manager determines the right mix of fuel in any given day.

As a result, the quantities of different types of fuels burned over the course of a year differ and the mill may not burn 100 percent of the available fuel generated during that year. Not all pulp and paper sludges are burned at a given mill over the course of a year nor are all recycled process residuals (old corrugated cardboard rejects) or all hogged fuel. The commenter emphasized that if only a percentage of a secondary material generated by the industry is used as a fuel, that it does not negate its value as a fuel. Rather, it reflects the realities of running a boiler for which the economic and operating conditions are interconnected and dynamic.

For example in one mill, the commenter indicated that combination boilers are designed to burn a wide variety of fuels efficiently and cleanly. Two mills' boilers currently burn tire-derived fuel,[92] while one burns waste paper generated at the mill. They all are capable of burning one or more fossil fuels: oil (including used oil), coal and gas. The four combination boilers burn large amounts of biomass, either generated on-site or purchased commercially. A portion of three of the mills' biomass consists of sludge generated on-site from their wastewater treatment processes.

One state commenter also indicated that most mills operate boilers that are specifically designed to handle a variety of fuels—few boilers are designed to burn just traditional fuel and mills do not usually burn just one type of fuel at any one time. Bark and biomass fuel may be the primary fuel but it is supplemented by other traditional or alternative fuels.

Secondary materials have been an important alternative fuel used safely by the mills in the commenter's state for many years. Most of that state's mills' have multi-fuel boilers. Their fuel handling equipment, mill wastewater treatment systems and other ancillary equipment were designed to combust alternative fuels, including pulp and paper sludge. Use of these fuels reduces reliance on purchased biomass and/or fossil fuels and provides a vehicle for beneficial reuse of the materials. In light of the greater stringency of the CISWI

[89] See April 2, 2012, letter from Timothy G. Hunt to James Berlow. A copy of this letter has been placed in the docket for today's rulemaking.

[90] While the Agency is not including a specific requirement for pulp and paper mills to document the amount of dewatered wastewater treatment residuals they burn on-site as a fuel, we would recommend that such pulp and paper mills include such documentation in case there are any questions as to whether the pulp and paper mills dewatered wastewater treatment residuals qualifies for the categorical listing in 241.4. As an alternative, the pulp and paper mill can request the Agency to confirm (via letter) that the facility generates and burns on-site a significant portion of pulp and paper sludges such that the facilities pulp and paper sludges are included within the categorical listing.

[91] We note that in the situation where pulp and paper sludges are transferred beyond the control of the generator, a facility can petition the Agency to receive a non-waste determination, as appropriate.

[92] Tire-derived fuel used in the paper industry must be dewired since the wires often clog the feed system. Thus, the industry does not utilize whole tires.

regulations, the state indicated that the mills are likely to landfill these materials instead of recovering their fuel value if these materials are considered solid waste under the CISWI standards.

Another industry commenter stated that four of their five U.S. pulp mills produce wastewater treatment residuals that are burned in biomass-fired combination fuel boilers. At one mill, the residual solids are harvested and sold under a purchase agreement to an Electric Utility Generating plant burning various sources of biomass because that mill does not have a biomass boiler designed to burn the residuals. The residuals are primary clarifier solids (mostly wood fibers too short for product use) which are harvested by dewatering through a screw press. The residuals are stockpiled in a specific managed area before being trucked to the power company. At that site, the materials are processed and conveyed with other forms of biomass for fuel in their biomass boiler. Use of the wastewater treatment residuals from the mill as a fuel at the purchasing site is permitted in their air permit.

One commenter indicates that the energy manager at a mill will determine the approximate amount of different types of fuels needed to obtain the most energy under the best operating conditions. As pulp and paper sludge is generated, it is directed toward the hogged fuel pile or towards other non-fuel uses. This decision is based on whether the mill's boiler is designed and permitted to burn pulp and paper sludge and the amount is determined by the energy demands on that particular day.

Another commenter believes that the fact that not all pulp and paper sludge is combusted at pulp and paper mills is evidence that the wood products industry only combusts pulp and paper sludge for legitimate energy recovery and not for disposal. According to the commenter, when the pulp and paper sludge is not needed as a fuel, it is used for non-fuel purposes or is discarded. When it is combusted, it is combusted for its energy value as a legitimate fuel.

One mill described by a commenter has elected to divert its own-make bark to beneficial use as mulch, rather than burning it, because it is of poorer quality than commercially available biomass. That same mill has recently invested in a new belt press which provides high quality sludge as fuel for its combination boiler. Since the press was installed in 2011, the percentage of mill sludge burned has increased to 80 percent from under 50 percent. Currently, the mill is burning more of the sludge from its process than the bark it also generates.

At another plant, the commenter indicates that sludge is a by-product of the AST process. Their mills employ primary clarifiers to separate out solids from wastewater, of which 50 percent is wood fiber, the primary component.[93] These solids are staged in holding or blend tanks prior to drying. In addition to primary clarifiers and aeration basins, AST systems employ secondary clarifiers (large, open, circular concrete tanks) in which biological solids exiting the aeration basin(s) are separated by gravity from wastewater. The process is carefully regulated to accomplish two objectives: making the water as clean and free of solids as possible while retaining activated sludge (active microbes) to re-inject into the biological treatment stage of the process. As part of this continuous loop, some activated sludge must be removed from the system to maintain the optimal population of active microbes for effective treatment.

After excess secondary sludge is removed from the treatment loop at three of the mills, it is mixed with primary sludge in blend tanks prior to being dried on belt presses to a suitable moisture level for burning or other uses. Sludge is introduced into the mills' solid fuel feed systems by means of conveyers where it becomes thoroughly mixed with other fuels in the conveyer systems before being introduced into the mills' combination boilers. At one mill, primary sludge is dried separately by means of screw presses while secondary sludge is dried using a belt press. The two fuels are fed separately by conveyers onto the mill's main solid fuel conveyer which transports the bark/sludge mixture to a surge bin. The fuel is passed through a ''waste heat dryer,'' where it is briefly exposed to boiler flue gas before being fed into the combination boiler. The process at all four mills is continuous. Operators monitor and manage the sludge on a 24 hour basis. Sludge drying takes place entirely within buildings where the tanks, pipes, mixers, pumps, polymer feed systems, conveyers, presses, diversion gates and valves, monitoring devices and other equipment necessary to produce suitable sludge are housed.

Sludge burned in the boilers is transported to the boilers on feed systems designed to ensure sludge, biomass and other solid fuels are homogeneous, thoroughly mixed and not exposed to the elements while being conveyed to the boilers. After its removal from wastewater treatment, no sludge touches the ground until it is burned, beneficially used (e.g., recycled feedstock to make newsprint) or landfilled.

The commenters indicate that the moisture content of biomass is highly variable. Operators control fuel use based on the mill's need for steam and electricity, fuel costs, fuel quality and fuel availability. All factors can change at a moment's notice since the production process is constantly changing. Pulp and paper production swings or curtailments are common. Energy demand, fuel cost or fuel quality may make it necessary or desirable to reduce biomass and sludge combustion, even to switch entirely to fossil fuels. Environmental emissions occasionally can be a factor in fuel use, particularly during boiler startup or shutdown, or when the mill is experiencing rapid fluctuations in steam demand.

Response: Based on the information submitted, and as discussed further in our responses below, the EPA is listing as a categorical non-waste fuel under section 241.4 dewatered pulp and paper sludges that are not discarded and are generated and burned on-site by pulp and paper mills that burn a significant portion of such materials where such dewatered residuals are managed in a manner that preserves the meaningful heating value of the materials.

This determination for pulp and paper sludge as a categorical non-waste fuel represents the agency's finding, after balancing the legitimacy criteria with other relevant factors, that those mills that burn a significant portion of these pulp and paper sludges are burning them as a commodity fuel for energy recovery and not discard. The discussion above indicates that these mills have been designed to utilize pulp and paper sludges and use of that material as a fuel is an integral part of facility operations. Decisions regarding use and the right mix of fuel in any given day are based on the boiler conditions, fuel availability, energy needs, air quality requirements and cost.

Comment: The EPA requested information on the amount of pulp and paper sludge burned as fuel.

In 2010, members of AF&PA burned 772,034 dry tons of pulp and paper sludge, which represents approximately 25 percent of the pulp and paper sludge generated by members of AFPA during the year.[94] However, approximately 90 percent of the AF&PA member facilities that responded to their survey (42 out of

[93] Washington State Department of Ecology Industrial Footprint Project *Waste Stream Reduction and Re-Use in the Pulp and Paper Sector,* June 2008.

[94] Docket EPA–HQ–OAR–2003–0119–2619.

47) that use dewatered pulp and paper sludge as fuels do so at a significant rate (between 70–100 percent of these materials that are generated are burned). In fact, one third of the AF&PA facilities that responded to their survey (16) that burn pulp and paper sludges, burn 100 percent of the materials generated.[95]

Response: As the commenter indicates, while 25 percent of pulp and paper sludges that are generated are used as fuels on an industry-wide basis, the vast majority of facilities that responded to the survey that use dewatered pulp and paper sludges as fuels do so at a significant rate. In light of the information on use of pulp and paper sludges, the agency finds that for those pulp and paper mills that burn a significant portion, that their use as a legitimate fuel is integral to the operation of the pulp and paper mill. The fact that these sludges meet the contaminant legitimacy criterion also, in the EPA's view, shows that these sludges when burned on-site are not being discarded.

As discussed above, while the agency is not defining a specific percentage of dewatered pulp and paper sludges that would need to be burned to qualify for the categorical listing in section 241.4, the agency would consider the 42 mills that responded to the AF&PA survey as meeting the listing description. Where a facility has burned or burns in the future a significant portion of the dewatered pulp and paper sludges that are generated, the facility is clearly dependent upon the use of these materials as fuels in much the same way that wood manufacturing facilities are dependent upon the stream of resinated wood residuals to meet their energy demands. Specifically, we note that the percentage of overall use of pulp and paper sludges as a fuel at facilities burning a significant portion of the material (70 percent in the AF&PA comment above) is similar to the use of resinated wood within the wood products industry—approximately 73 percent of resinated wood generated is either used as a fuel or is recycled back into the wood manufacturing process.[96] As noted above, mills that burn a significant portion of their dewatered pulp and paper sludges on-site as fuel in the future would also qualify for the listing description.[97]

On the other hand, when a pulp and paper mill burns a relatively small percentage of their dewatered pulp and paper sludges on-site as a fuel (e.g., the five mills that responded to the AF&PA survey that burn less than 20 percent), the agency has determined that such sludges are not viewed the same by the mill operator in that they do not rely on the sludges for their energy value. As noted by one commenter, some mills may not produce pulp and paper sludge with sufficient fiber, such that the sludge is a viable fuel. Therefore, the agency finds that such pulp and paper sludge should not be included in the categorical listing in section 241.4.[98] Those companies would need to make case-by-case determinations regarding legitimacy to support use as a fuel.

Comment: The EPA requested more data on contaminant levels—particularly chlorine and metals.

The NCASI undertook a thorough evaluation of data related to contaminant levels in pulp and paper sludge.[99] NCASI looked at the most robust information about pulp and paper sludge which is found in the EPA's Boiler MACT database. That database has pulp and paper sludge data comprised of nearly 5,280 records of individual data points corresponding to 46 AF&PA member pulp mills.

Table 8 of this preamble includes data from the EPA traditional fuels table as well as the EPA Boiler MACT database for pulp and paper sludge.

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[95] See April 4, 2012, letter from Timothy G. Hunt to James Berlow. A copy of this letter has been placed in the docket for today's rulemaking.

[96] See Materials Characterization Paper In Support of the Final Rulemaking: Identification of Nonhazardous Secondary Materials That Are Solid Waste—Resinated Wood Products. Docket EPA–HQ–RCRA–2008–0329–1820.

[97] While the Agency is not including a specific requirement for pulp and paper mills to document the amount of dewatered wastewater treatment residuals they burn on-site as a fuel, we would recommend that such pulp and paper mills include such documentation in case there are any questions as to whether the pulp and paper mills' dewatered wastewater treatment residuals qualifies for the categorical listing in 241.4.

[98] The Agency acknowledges that some portion of these pulp and paper sludges are land applied. While the Agency considers such uses as beneficial, such recycling is not integral to pulp and paper operations, and therefore, the Agency would not consider this form of recycling in determining whether a facility is recycling a significant portion of their pulp and paper sludges.

[99] Docket EPA–HQ–OAR–2003–0119–2619.

Table 8. Comparison of Traditional Fuel Contaminant Concentrations With Pulp Mill Sludge Data From the EPA's Boiler MACT Database

Lit. Source Range[1]	Compound	Units	Data from EPA OAQPS Databases									Data from Boiler MACT Database, v. 7[2] Industrial Sludge NAICS 322					
			Coal			Biomass			Fuel Oils								
			Min	Max	Avg.	Min	Max	Avg.	Min	Max	Avg.	No.	NDs	Min	Max	90% UPL[3]	K-M[4] Mean
ND - 26	Antimony (Sb)	ppm	ND	6.9	1.7	ND	6	0.9	ND	3.8	3.5	116	37	ND	3.14	2.0	0.45
ND - 80	Arsenic (As)	ppm	ND	174	8.2	ND	298	6.3	ND	13	1.3	376	94	ND	105.0	70.6	7.94
0.1 - 15	Beryllium (Be)	ppm	ND	206	1.9	ND	10	0.3	ND	19	2.3	358	102	ND	2.6	1.97	0.35
ND - 3	Cadmium (Cd)	ppm	ND	19	0.6	ND	17	0.6	ND	1.4	0.4	385	53	ND	19.0	8.2	1.55
ND - 130	Chromium (Cr)	ppm	ND	168	13.4	ND	340	5.9	ND	37	3.7	388	5	ND	170.0	77.3	17.14
ND - 30	Cobalt (Co)	ppm	ND	25.2	6.9	ND	213	6.5	ND	8.5	1.1	127	22	ND	14.4	16.7	3.78
ND - 340	Lead (Pb)	ppm	ND	148	8.7	ND	229	4.5	ND	52	4.3	347	19	ND	201.0	64.2	11.53
5 - 840	Manganese (Mn)	ppm	ND	512	26.2	ND	15,800	302	ND	3200	118	369	3	ND	3,310	2,650	559.8
ND - 1	Mercury (Hg)	ppm	ND	3.1	0.09	ND	1.1	0.03	ND	0.2	0.02	397	40	ND	1.40	0.72	0.114
ND - 540	Nickel (Ni)	ppm	ND	730	21.5	ND	175	2.8	ND	270	24.1	381	9	ND	180.0	67.7	14.990
ND -	Seleni	pp	ND	74	3.	ND	9	1	ND	4	0.	3	1	ND	6.	4.	0.9

10	um (Se)	m		.3	4			.1			8	16	97		0	5	0
	TSM			2,067	92.6		17,098	330.9		3,609	159.5					2,964	618.5
	TSM w/o Mn			1,555	66.4		1,298	28.9		409	41.5					314	58.7
	Chlorine (Cl)	ppm	ND	9,080	992	ND	5,400	259	ND	1,260	133	374	11	ND	4800	2,064	378
	Total Halogens	ppm		9,258	1,056		5,528	291		1,274	142					2,394	445
1	Nitrogen (N)	g/kg	13.6	54.0	15.1	2.2	4.6	3.46	2.0	3.0	2.25	26	0	0.8	17.7	26.4	7.7
2	Sulfur (S)	g/kg	0.74	61.3	13.6	ND	6.1	0.70	ND	57.0	8.28	118	0	ND	6.3	8.8	3.0

The grey shaded cells indicate an outlier test was performed and the outlier(s) identified was confirmed based on further graphical observation (see further explanation below).

[1]Total range determined from literature sources - coal - Clarke and Sloss (1992); biomass - Energy Research Centre for the Netherlands, Phyllis Biomass database. http://www.ecn.nl/phyllis; oil - U.S. EPA (1999), Appendix B;
[2]Boiler MACT Database sludge analysis data;
[3]Chebyshev UPL for non-normal data sets;
[4] Kaplan-Meier; Selenium (Se) - with the Rosner's test (n > 25), for 1% significance level, one potential outlier was 560 ppm, which was rejected after graphical observation of the data. The next highest detect was 6 ppm.

Footnotes on Other Literature Data

[1] Literature contains a value of 39.5 g/kg for nitrogen in biomass and 8.95 g/kg for nitrogen in fuel oils;

[2] Literature contains a value of 8.7 g/kg for sulfur in biomass.

The commenter indicates, as shown in the table, that contaminant levels in pulp and paper sludge are well within the ranges of metals found in traditional fuels. For all 11 HAP metals, except Mn, the 90 percent UPL value for sludges is less than the corresponding maximum for coal. For Mn, which is principally derived from biomass, the 90 percent UPL value for sludges is well below the maximum for biomass. This is also reflected in the TSM comparisons with and without Mn between coal, biomass and pulp and paper mill sludges. Chlorine and total halogens (Cl + Fl) in sludge compare favorably with both biomass and coal. Nitrogen and sulfur in sludge also compare favorably with coal, although the commenter also points out that the nitrogen and sulfur contents are generally not indicative of HAP formation potential for any fuel, and in the case of pulp and paper mill sludges in particular, the sulfur content of these sludges is typically in the inorganic sulfate form that predominantly ends up in the combustion ashes.

NCASI found a paucity of data on organics in pulp and paper sludge. Except for Ds/Fs, which had been evaluated extensively in the 1990s, organics are not expected to be found in pulp and paper sludges. Due to the changes in bleaching techniques which demonstrated significant reductions in

the existence of Ds/Fs in sludge, testing for even dioxins has not been undertaken recently. NCASI notes that of the data that do exist, organics are rarely found and those that are identified are frequently below the detection limit.

Overall, the commenter states that contaminant levels in pulp and paper wastewater treatment residuals compare well to those found in traditional fuels.

Response: Based on the information provided, the agency finds that pulp and paper sludges, meet the comparable contaminant criterion (241.3(d)(1)(iii)). The data confirms the conclusions in the NHSM final rule regarding chlorine and metals are comparable to the levels found in coal, which is a traditional fuel that may be burned in these facilities.

Comment: The EPA requested information on what steps the industry has taken to ensure the quality of pulp and paper mill sludge when used as a fuel at pulp and paper mills is consistent with that of a fuel product.

*Comment*ers state that pulp and paper mills that generate pulp and paper sludge do so as part of their compliance with the CWA requirements, as well as part of an effort to return as much wood fiber to use as possible, either as an input to the manufacturing process or as a fuel. The strategies that each mill uses to meet those requirements differ depending upon the type of product, the location of the mill and the specific standards established by the EPA and the respective states. However, mills clean wastewaters prior to discharge, thus creating primary and a variety of secondary pulp and paper sludges, all of which capture wood fibers. Furthermore, the question of whether the quality of the pulp and paper sludge is appropriate for a particular mill is based on the boiler design. As such, there are some boilers well suited to burn it; others cannot burn the material.

At one commenter's mill, for example, the company has invested over $7 million upgrading sludge drying and management equipment. The object of these large investments was not to remove all of the moisture in the sludge. Rather, it was to make sludge quality consistent with that of the wet biomass burned in its combination boilers. Either too much or too little moisture can have a deleterious effect on the boilers' combustion. One mill recently installed a belt press to improve the reliability of its sludge management system and increase the average solids content of its sludge. Since then, the sludge has occasionally caused combustion problems in the boiler because it was too dry, necessitating additional quality control to optimize the sludge's moisture content.

Another commenter stated they invested over $3 million to prevent unwanted materials from reaching the treatment process and being discharged in mill effluent or being incorporated into the pulp and paper sludge. Their mills make coated paper products, the coatings consisting largely of clay and other minerals. Improved equipment and operating procedures have significantly lowered sewer losses of these materials, improving the quality of wastewater and reducing the ash content of these pulp and paper sludges. To further pollution prevention, their mills set stringent specifications for raw materials, such as sulfuric acid and caustic soda, which minimizes the introduction of trace amounts of heavy metals into the process.

From the standpoint of process control, the commenter stated that sludge management processes are continuous, enclosed and carefully controlled. In contrast, bark and wood chips may be exposed to the elements for extended periods before being burned. Depending on the season, hardwood bark can get ''stringy'' and become very difficult to process as fuel. Frozen bark or chips can jam or disable equipment. Purchased fuel can have excessive rocks or grit. It is difficult to control the quality of biomass burned in the commenter's boilers. Sludge frequently exhibits less variability in quality than other types of biomass.

Response: Based on the information provided, the agency finds that, for facilities burning a significant portion of the dewatered sludge, use of the material is integral to the facility's operations, particularly in the value these materials provide as a critical source of energy. At such facilities, sludge management processes are carefully controlled and the industry has taken the necessary steps to ensure the quality of pulp and paper mill sludge when used as a fuel at pulp and paper mills. On the other hand, for those pulp and paper mills that do not burn a significant portion of their dewatered wastewater treatment sludges, the agency does not believe that the same steps have been taken to ensure the quality of the pulp and paper mill sludge that is used as a fuel and thus, is not an integral part of the pulp and paper mill operations.

Comment: The EPA requested information on what are the standard practices used to ensure pulp and paper sludge has meaningful heating value.

As noted in the October 2011 pulp and paper sludge paper the AF&PA submitted prior to the December 2011 proposal, the overwhelming majority of pulp and paper mills remove water from pulp and paper sludge prior to managing it in any way. Belt and screw presses are most commonly used in the industry. Some mills use steam heated filter presses. Some pulp and paper sludge is also further dried in steam heated rotary driers. As indicated previously, sludge drying takes place entirely within buildings where equipment necessary to produce suitable sludge is housed. Sludge burned in the boilers is transported to the boilers on feed systems designed to ensure sludge, biomass and other solid fuels are homogeneous, thoroughly mixed and not exposed to the elements while being conveyed to the boilers. In all instances, the goal is to raise the solids content—and thus, Btu value.

Response: Based on these comments and other information in the record, the agency finds that facilities that burn a significant portion of these materials take the steps necessary to dewater the pulp and paper sludge and to manage such dewatered sludge to maintain its meaningful heating value and burn the sludge for energy recovery.

Comment: The EPA requested information on how pulp and paper mill sludge is managed when shipped offsite.

There are several mills within the industry that have agreements with other facilities, primarily electric utilities that purchase pulp and paper sludges for use as biomass-based fuel. For the most part, these arrangements occur when there is a utility close to the pulp and paper mill because the cost of shipping such sludges long distances may be prohibitive. Pulp and paper sludges may be sent offsite when it is being used by other entities to produce another product, (including fuel pellets [100]), used for other purposes (land application, use as landfill cover), or for final disposal. Pulp and paper sludges are shipped by containers, truck or rail.

Response: The agency recognizes that, as described above, some pulp and paper sludges are sent offsite for use as a fuel. However, the agency has restricted the categorical listing to those pulp and paper sludges that are burned on-site because the agency has minimal information on offsite use of these materials. In fact, the pulp and paper industry indicates that the great majority of these sludges, when burned as a fuel, are burned on-site. Also, in the few instances that the pulp and paper

[100] When pulp and paper sludges are sufficiently processed, and such processed material meets the legitimacy criteria, the processed materials are non-waste fuels whether burned within or outside the control of the generator.

industry discussed in their comments that these materials were shipped offsite, they seem to be sent to other industries. The fact that these sludges are sent to other industries would not necessarily disqualify those dewatered pulp and paper sludges from being considered for listing categorically. However, the agency does not have sufficient information to make any determination.[101]

Comment: For reasons stated previously in comments on the June 2010 proposed rule, one commenter argues that pulp and paper sludges are waste when burned regardless of whether it is burned by the company that generated it and regardless of whether it meets the EPA's legitimacy criteria. Paper mill sludge is a waste because it is discarded within the meaning of RCRA.

The EPA's description of pulp and paper sludge shows that it remains a waste even under the agency's own definition of discard. First, the EPA acknowledges that pulp and paper mills have no use for pulp and paper sludge; the fibers it contains are ''too short to be suitable for papermaking and it contains microorganisms that feed on organic material in the wastewater stream.'' [102] Second, the fact that paper mill sludge comes from ''the wastewater stream,'' [103] in itself confirms that it is a waste.

Third, the EPA's discussion of the contaminant levels in paper mill sludge shows substantial variation in chlorine levels. Where the EPA encounters such variability in the course of setting floors for CISWI units in the very same **Federal Register** notice, the agency uses a 99th percent UPL to assure that the level it chooses will not be exceeded. Yet, where the EPA encounters variability in the chlorine levels in pulp and paper sludge—variability that could lead to significantly higher emissions of chlorinated pollutants, such as HCl and dioxins—the agency simply dismisses it without further ado. The EPA's disparate treatment of the variability of emissions for floor setting and of the chlorine levels in pulp and paper sludge for the purposes of considering a categorical declaration that such sludge is not a waste is unexplained and arbitrary.

If the agency believes that such variability exists, it should be concerned about the possibility that some sludges may have far higher chlorine levels than it assumes—as, indeed, the record shows some sludge does—and should take steps to ensure that this is not the case before it even considers an exemption. Indeed, the agency's failure to examine this possibility renders the existing rule, which allows generators to burn their own sludge, arbitrary and capricious.

Fourth, the EPA admits that sludge contains extremely low heating values, so low in some instances as to flunk the agency's legitimacy criteria. That sources typically dewater their sludges does not make these sludges any less a waste, even under the agency's own definition of discard. The EPA does not say what the heating value of the sludges is after dewatering, nor does it make any difference what the ''dry weight'' heating value of sludges might be, as they are not at ''dry weight'' when burned. The reality is that paper mills find it cheaper to burn their sludges than to dispose of them safely and that because these sludges are largely ''wastewater'' and contain high levels of chlorine and other contaminants, burning them requires large quantities of other fuel and generates high levels of pollution.

Response: The agency disagrees with the commenter that all pulp and paper sludges are waste fuels when combusted. To the extent comments were submitted in response to the March 2011 final rule, the agency need not respond. Below, the EPA responds to the new points raised in the comments.

With respect to the particular arguments on the categorical listing, the agency disagrees that the sludge remains a waste even under the agency's own definition of discard. The comment is incorrect when it states that the EPA has acknowledged pulp and paper mills have no use for pulp and paper sludge because the fibers it contains are ''too short to be suitable for papermaking and it contains microorganisms that feed on organic material in the wastewater stream.'' [104] In the proposed rule, we stated that fibers that end up being too short can be detrimental to paper quality. Although this would not be suitable for papermaking, these sludges are a valuable resource as energy-containing secondary materials as discussed in detail in the comments above. As much as 50 percent of the sludge is composed of wood fibers which are similar in content to other types of biomass fuel combusted.

Further, the agency disagrees that pulp and paper mill sludges are wastes because they are contained in a ''wastewater'' stream. The D.C. Circuit in, *API* v. *EPA,* 216 F.3d at 58, rejected the proposition that the mere presence in a wastewater stream makes a material a waste. In API, the D.C. Circuit criticized the EPA for not saying why it concluded that the disposal motivation, compliance with water quality standards, predominated over the recycling motivation, recovery of oil from primary wastewater treatment. Plainly, the mere presence of oily material in wastewater did not make the oil a waste. In this case, the EPA has found in its categorical listing that the motivation for burning the pulp and paper sludge is to use its inherent value as a fuel and not for disposal. Comments have provided the agency with information that facilities that burn a significant portion of these sludges consider them to be an integral part of their production process, particularly in the value these materials provide as a critical source of energy. We disagree that the disposal motivation predominates over the true value of these sludges as an important fuel, integral to the production processes.

The EPA also disagrees that the treatment of the variability of emissions for floor setting and of the chlorine levels in pulp and paper sludge for the purposes of considering a categorical declaration that such sludge is not a waste, is unexplained and arbitrary. The agency notes that, rather than dismissing the variability of chlorine levels in pulp and paper sludges, it has considered all available data—including data on variability—and reached the conclusion that contaminant levels in pulp and paper sludges are comparable to or lower than those in the appropriate traditional fuel(s). The EPA acknowledges that, based on data submitted to the agency since promulgation of the March 2011 final rule and presented in the December 2011 proposed rule, chlorine levels in paper mill sludge show substantial variation. This is an important factor to consider when making a categorical non-waste determination and the agency has considered mean concentrations, the range of concentrations, and variability when analyzing pulp and paper sludges.

As stated in the proposed rule and information in the rulemaking record, data for pulp and paper sludges show mean chlorine concentrations of 361 ppm, well below the mean of 992 ppm observed in coal. Data for pulp and paper sludges also show maximum chlorine concentrations of 4,800 ppm, well below the maximum of 9,080 ppm observed in coal and below the maximum of 5,400 ppm observed in

[101] We note that in the situation where pulp and paper sludges are transferred beyond the control of the generator, a facility may also petition the Agency to receive a non-waste determination, as appropriate.

[102] See 76 FR 80485.

[103] Id.

[104] See 76 FR 80485.

untreated wood and biomass materials. The variability of chlorine levels in pulp and paper sludge is demonstrated by a standard deviation of the mean of 661 ppm.[105] [106] This variation in chlorine levels, although high, does not discount the fact that both average and maximum chlorine concentrations in pulp and paper sludge are lower than those in coal which is defined as a traditional fuel.

The comment also implied that the EPA should use the 99 percent UPL, as is used to set the CISWI floors, to ensure that these pulp and paper sludges do not contain excessive contaminant levels. The agency disagrees that any one statistical tool or comparison methodology will fit every situation given the variety of NHSMs, traditional fuels, contaminants and combustion units that exist. Nevertheless, the agency has calculated the 99 percent UPL for chlorine levels in pulp and paper sludge in response to the comment and come to the same conclusion. The 99 percent UPL for the same dataset of 93 samples analyzed in the proposed rule would be 6,970 ppm, a value below chlorine concentrations observed in coal.[107]

Finally, we disagree that pulp and paper sludge contains extremely low heating values that would fail the agency's legitimacy criteria. In terms of meeting the legitimacy criteria for a meaningful heating value, the agency indicated in the NHSM final rule that pulp and paper sludges have a heating value of between 3,300–9,500 Btu/lb, on a dry basis—no specific information having been submitted on the ''as fired'' heating value of these materials. The final rule concluded that pulp and paper sludges meet the legitimacy criterion for being managed as a valuable commodity as they are dewatered to increase their energy value, collected on a continual or frequent basis (as produced), and further processed and consolidated, including the removal of biosolids. Further, as discussed in detail above, where a facility is burning a significant portion of the dewatered pulp and paper sludges that are generated as fuel rather than other purchased biomass or fossil fuels, pulp and paper sludges are integral to the facility's operations and the facility is clearly dependent upon the heating value of these materials.[108] Thus, we find, as discussed in the final rule, that pulp and paper sludges are not discarded and generally meet the meaningful heating value legitimacy criterion (46 FR 15488).

b. Coal Refuse [109]

In the 2011 NHSM final rule, the EPA included currently generated coal refuse within the definition of traditional fuel codified in 40 CFR 241.2. In discussing its determination that currently generated coal refuse is a traditional fuel, the agency said, ''the fact that coal refuse has been used and managed as a fuel for thirty years when coupled with the fact that coal refuse is unique from other non-hazardous secondary materials in that it is a byproduct of fuel production processes and is itself a raw material that can be used as a fuel leads us to determine that coal refuse that is currently generated and used as a fuel should be considered a traditional 'alternative fuel.' '' [110]

The 2011 NHSM final rule also determined that coal refuse that has been placed in legacy piles would not meet the definition of traditional fuels, as they clearly have been discarded in the first instance.[111] Since coal refuse recovered from legacy piles is subjected to the same operations that are used to process virgin coal, which serve to both increase energy values, as well as reduce contaminants, the EPA determined that such processes were sufficient to meet the definition of ''processing,'' as codified in 40 CFR 241.2, and such recovered coal refuse would not be considered a solid waste when used as a fuel in a combustion unit provided those materials satisfy the legitimacy criteria.[112]

The 2011 NHSM final rule also stated our belief that coal refuse recovered from legacy piles contains contaminants at levels that are comparable to or lower than coal refuse that is currently generated, as the recovered coal refuse is subject to the same processes as currently-generated coal refuse in order to meet the same fuel specifications. Since promulgation of the 2011 NHSM final rule, the agency has further clarified that it believes that coal refuse recovered from legacy piles that is processed and managed in the same manner as currently generated coal refuse satisfies the legitimacy criteria.[113]

Having determined that coal refuse recovered from legacy piles that is processed and managed in the same manner as currently generated coal refuse satisfies the legitimacy criteria, the 2011 proposed rule solicited comment on whether to categorically list post-processed coal refuse from legacy piles as a non-waste fuel in 40 CFR 241.4(a). However, the EPA made it clear that it was not reopening any other issues regarding coal refuse. Other comments regarding coal refuse are responded to in the record for the final rule. In this part of the preamble, we are only responding to the issue of whether coal refuse processed from legacy piles should be considered a non-waste fuel on a categorical basis. Accordingly, the EPA is not responding in this preamble or the Response to Comment document on issues regarding whether coal in legacy piles are traditional fuels.

Comment: One commenter states that not every material that is discarded is treated as solid waste under the rule. For example, the EPA includes numerous materials within its definition of ''traditional fuels'' and ''clean cellulosic biomass'' that are commonly understood as used, discarded, and abandoned, listing, for example, corn stover, peanut shells and certain types of demolition materials. The commenter argues that each of these materials is either discarded or has filled its original purpose and may be collected by a different party for a different purpose (i.e., use as a fuel).

The commenter continues that although the agency has ample authority to exempt certain articles from classification as solid wastes, it did not consistently apply the term ''discarded'' in the context of legacy coal refuse. For example, the EPA recognized that on-specification used oil and clean C&D materials should be treated as traditional fuels when combusted for energy generation. Thus, the commenter urges the agency to revisit its application of the ''discard'' principle and treat all coal refuse, regardless of when they were generated and regardless of processing to be fuels and not wastes.

Response: The EPA disagrees with the comment, which seems to misunderstand the purpose of this

[105] See 76 FR 80485.

[106] *Contaminant Concentrations in Traditional Fuels: Tables for Comparison, November 29, 2011,* can be found at *http://www.epa.gov/epawaste/nonhaz/define/index.*

[107] The 99 percent Chebyshev UPL for non-normal datasets was calculated using EPA's ProUCL 4.0 Software available at *http://www.epa.gov/nerlesd1/tsc/software.htm.*

[108] The final rule notes that meaningful heating value is derived from an NHSM with energy content lower than 5000Btu/lb if the ERU can cost-effectively recover meaningful energy from the NHSM used as fuel (76 FR 15541).

[109] Coal refuse refers to any by-product of coal mining or coal cleaning operations, consisting primarily of non-combustible rock with attached coal. Due to advances in technology over the past century, the processing of coal has evolved, such that materials that are now generated in the coal mining process, which would have been considered coal mining rejects in the past and discarded in waste piles, are now handled and processed as coal.

[110] See 76 FR 15507.

[111] Id.

[112] See 76 FR 15509.

[113] See August 15, 2011, letter to Jeff A. McNelly, ARIPPA (cited in the proposed rule: 76 FR 80486).

rulemaking action. If the agency determines in this rulemaking that a material is a solid waste when combusted, the unit combusting that material would be subject to emissions standards issued under CAA section 129 even if burned as a fuel. A material is not discarded simply because it is no longer used for its original purpose. It may be used as a fuel product by another party, providing the conditions the EPA has explained in the rule apply. In such a case, the reused material is not a waste. Further, the agency is not exempting any materials from the definition of solid waste. The EPA is only describing the kinds of materials that are wastes when burned in combustion units, even if they are burned for energy recovery. The EPA consistently applies the concept of ''discard.''

Materials listed as examples of clean cellulosic biomass cited by the commenter have not been discarded in the first instance, as is clearly the case for coal refuse abandoned in legacy piles. While some materials have filled their original purpose, that fact, in and of itself, does not equate to discard. Clean cellulosic biomass is considered to be a type of ''alternative fuel'' within the definition of ''traditional fuel.'' Such alternative fuels are developed from virgin materials that can now be used as fuel products.[114] This applies to the examples mentioned by the commenter, including corn stover, peanut shells and clean construction and demolition wood. Further, coal refuse mined today that would have previously been abandoned in piles are also alternative fuels that are now grouped in the traditional fuel category because of new technology. This is separate from coal in legacy piles that have been traditionally wastes.

Further, there is a clear difference between the management of the listed examples of clean cellulosic biomass and coal refuse abandoned in legacy piles. For example, the commenter characterizes corn stover as ''typically left in the field to decay'' and thus discarded. The EPA assumes this statement is based on the historic use of leaving corn stover in the field as a cover to reduce erosion and for nutrient content.[115] As noted by the agency previously, over the course of this rulemaking, an emerging market for corn stover and other primary and secondary agricultural residues is for use as a heat and power source for the production of corn and cellulosic ethanol.''[116] When the determination is made to use corn stover for its fuel value, the materials are managed differently than merely ''left in the field to decay.'' If there were legacy piles of such materials, they too would have to be treated as wastes while in the legacy piles. We would also note that it is not unreasonable to expect that agricultural materials, such as corn stover, may be left on the field until there are sufficient amounts of those materials to be collected, baled and transported. This is clearly a different scenario from coal refuse left in place in piles with no purpose other than abandonment and clearly managed as a waste for decades.

With respect to used oil, the agency has already explained in the final March 2011 rule the difference between on-specification and off-specification used oil as applied to the definition of solid waste. The on-specification used oil is considered an alternative fuel that has not been abandoned and, by regulation, may be burned with no more restrictions than refined product oil. Off-specification used oil is specifically described in the EPA's regulations as a material that may only be burned in certain combustors because it exceeds contaminant levels established under part 279, rendering it off-specification and, accordingly, evaluated under part 241 to determine its waste/non-waste status.[117]

Comment: One commenter argues that off-specification tires are analogous to legacy coal refuse to the extent they are set aside and not used immediately by the factory. Since the agency proposes to include off-specification tires within the definition of ''established tire collection program'' and not consider these materials to be a solid waste when used a fuel, the agency should treat legacy coal refuse similarly.

Response: We disagree with the commenter that coal refuse abandoned in legacy piles is analogous to the handling and management of off-specification used tires. Coal refuse that has been placed in legacy piles decades ago has clearly been abandoned, thrown away and thus, discarded and historically managed as a waste. On the other hand, the agency has information that tire manufacturers that have produced off-specification tires (including factory scrap) have contractual agreements in place to ensure these materials are collected, managed and transported to the combustor. In fact, it is the requirement that scrap tires (including off-specification tires) be managed pursuant to established tire collection programs that ensures these materials are managed as a valuable commodity in order to meet the categorical non-waste determination codified in 40 CFR part 241.4(a).

Further, as we have noted elsewhere in today's preamble, to the extent that these off-specification tires are discarded, such as in tire piles, they would be considered solid waste in that they have been discarded, and would not be included within the categorical listing of ''scrap tires that are not discarded and are managed under the oversight of established tire collection programs, including tires removed from vehicles and off-specification tires.''

Comment: One commenter states that the EPA, consistent with the intent of RCRA, should be encouraging the use of legacy coal refuse, not hampering them. The commenter argues that characterizing coal refuse in legacy piles as a solid waste could subject legacy coal refuse piles to additional federal and state requirements and potentially result in the piles being classified as open dumps or solid waste management units. Further, combustors of legacy coal refuse and their suppliers would also be more likely to be subject to citizen suits under RCRA 40 CFR 7002. This commenter argues that the determination that unprocessed legacy piles are different—and should be regulated differently—than coal refuse generated from current mining operations is illogical because the characteristics of the materials are the same. Thus, although the EPA takes the position that subjecting legacy coal to the types of operations that are used to process virgin coal is sufficient to convert the legacy coal refuse from solid waste into a non-waste fuel, the initial designation as solid waste risks regulatory confusion regarding the status of the numerous piles of legacy coal refuse.

Response: This comment is clearly beyond the scope of this rulemaking proceeding. In the first place, legacy coal piles are, indeed, wastes. How they may be treated when they are in the piles is clearly beyond the scope of this rule. This rule deals with how the

[114] See definition of traditional fuels, as codified in 40 CFR 241.2. We note that the December 2011 proposal did not solicit comment on the definition of traditional fuels.

[115] See Petrolia, Dr. Daniel R., ''Economics of Crop Residues: Corn Stover.'' June 2009. A copy of this document has been placed in the docket to today's rulemaking.

[116] See Materials Characterization Paper in Support of the Final Rulemaking: Identification of Nonhazardous Secondary Materials That are Solid Waste, Biomass—Agricultural Residues and Food Scraps.'' February 3, 2011. A copy of this document can be found in the docket for today's rulemaking.

[117] Note that Section III.D.2.c of today's preamble discusses circumstances under which off-specification used oil may use coal data when making contaminant comparisons.

legacy coal is to be treated when it is taken from the piles and burned for fuel.

Comment: While supporting the concept of a categorical listing for legacy coal refuse, a few commenters argued that the agency should not require that legacy coal refuse be ''processed'' in order to be considered a non-waste fuel. One commenter noted that the EPA does not require traditional fuels or resinated wood to undergo processing to be treated as a fuel, even though many of those materials would be understood to be discarded.

Another commenter noted that the term ''post-processing,'' which was used in the proposal as a shorthand description of legacy coal refuse that has undergone processing, is too vague and should be eliminated so the use of extracted coal refuse undergoing further processing at the generating facility is not discouraged. If applied too literally, the commenter continued, any ''post-processing'' provision being imposed on treating legacy coal piles as fuel would not benefit the CFB community and could hinder the usage of these piles as fuels. The commenter argues that the term ''post-processing'' could be interpreted as requiring processing at the coal refuse excavation site which would not be determinative of any relevant characterization of the coal refuse or its intended use as fuel.

Response: In the 2011 NHSM final rule, the EPA discussed how a NHSM, once discarded, can be processed into a non-waste fuel.[118] The proposed rule did not solicit comment on either the concept of processing a discarded NHSM into a non-waste fuel or the definition of ''processing'' itself, as codified in section 241.2. Therefore, the agency does not address the concept or definition of processing in this final rulemaking.

Again, however, the comment suggests a need to clarify the nature of the rulemaking exercise that the EPA is currently engaged in. First, we disagree with the commenter's characterization that many of the traditional fuels and resinated wood should be understood to be discarded. Traditional fuels, by definition, are not discarded.[119] If clearly discarded (e.g., a barrel of fuel oil dumped), even a traditional fuel would have to be processed per the part 241 regulations in order to be a non-waste fuel. However, it is precisely because of their fuel value that makes it unlikely that traditional fuels will be discarded. We also disagree that resinated wood is discarded prior to being or when used as a fuel in a combustion unit. For a discussion of why we believe resinated wood is a non-waste fuel, please see section III.E.3.b of this preamble.[120]

As noted above, coal refuse abandoned in legacy piles has clearly been discarded in the first instance because the coal preparation technology did not yet exist that could utilize these materials for their fuel value. Thus, legacy coal refuse would have to be processed into a non-waste fuel. However, the agency has previously recognized the uniqueness of coal refuse in that it is a byproduct of fuel production processes and is itself a raw material that can be used as a fuel.[121] In the 2011 NHSM final rule, the agency determined that coal refuse that is recovered from legacy piles and used as fuel that is subjected to the types of operations that are used to process virgin coal or currently generated coal refuse would meet our definition of processing as codified in 40 CFR 241.2.[122]

As the processing that is required is no different than what currently-generated coal refuse is subject to, we do not believe the processing requirement would hinder the usage of coal refuse piles. The agency believes the only additional ''processing'' step is the actual extraction or recovery of the coal refuse from the legacy piles. To the extent that the term ''post-processing'' could be misconstrued as requiring an additional processing step at the extraction site or otherwise as compared to currently generated coal refuse, this was not the agency's intent. Rather, we have included the concept of ''processing'' in the categorical non-waste determination for legacy coal refuse, as legacy coal refuse was clearly discarded and, prior to processing, is a solid waste. That said, we clarify again today that coal refuse recovered/removed from legacy piles that is processed in the same manner as currently generated coal refuse would meet the definition of processing as codified in section 241.2. No additional processing is required given the uniqueness of coal refuse. For commenters suggestions regarding the explicit wording of the categorical listing for legacy coal refuse, see additional response to comments below.

Comment: In support of the agency's soliciting comment on whether to add legacy coal refuse to the list of categorical non-waste fuels proposed in 40 CFR part 241.4, one commenter states that once removed from the physical mining location, legacy coal refuse and currently-generated coal refuse are indistinguishable. Thus, coal refuse from legacy piles will be managed in the same manner as coal refuse, will have similar heating value as coal refuse and be used as a fuel in a combustion unit that recovers energy and can be expected to have similar contaminant levels as coal refuse because it is ostensibly the same material.

Response: We agree that coal refuse recovered/removed from legacy piles and processed in the same manner as currently generated coal refuse would meet both the definition of processing and the legitimacy criteria. Thus, we have determined to list ''coal refuse that has been recovered from legacy piles and processed in the same manner as currently-generated coal refuse'' to the list of categorical non-waste fuels codified in part 241.4(a) of today's rulemaking. The rationale for adding this NHSM to the list of non-waste fuels follows the reasoning finalized in part 241.4(b) in today's rulemaking. We agree with the reasoning of the comment and have, in fact, arrived at the very same reasoning in support of the categorical listing.

Comment: One commenter argued that the EPA should treat legacy coal refuse as fuels, since they are chemically identical, if not superior fuels, to currently generated coal refuse that the agency considers to be a traditional fuel, per the definition codified in 40 CFR 241.2.

Response: Again, the EPA must explain a misunderstanding expressed by the commenter. The comment seems to consider that material is either a ''fuel'' or a ''waste'' and misses the point that the distinction in this rulemaking is between a ''product'' and a ''waste'' fuel. Fuels may be wastes. The point is that the coal that has been abandoned in piles is a waste. However, the EPA has

[118] See 76 FR 15474–15477.

[119] See last sentence of ''traditional fuels'' definition, as codified in 241.2: ''[Traditional] fuels are not secondary materials or solid wastes *unless discarded''* (emphasis added).

[120] See also discussion included in the 2011 NHSM final rule (76 FR 15499–15502).

[121] See 76 FR 15507, which states, ''Coal refuse is unique, however, from other non-hazardous secondary materials addressed in this rulemaking, as it is generated in the process of producing fuels (i.e., the mining of coal for use as fuel) and its subsequent use and value as a secondary material is also as a fuel. Since the primary product of a coal mining operation is itself a fuel, we consider coal refuse to be more akin to a raw material that is subsequently processed and utilized to produce a fuel. In other words, coal refuse is different from other non-hazardous secondary materials, such as used tires or resinated wood residuals, in that it is generated in the production of fuel and can be used itself as a fuel (and in fact has never been used for anything else).''

[122] See 76 FR 15509. In addition, subsequent to the 2011 NHSM final rule, the EPA has reiterated this determination. See August 15, 2011, letter to Jeff A. McNelly, ARIPPA (cited in the proposed rule: 76 FR 80486).

determined that once processed that coal is either identical (or maybe even superior) to currently mined materials that would have become refuse in the past.

The EPA agrees with, and has adopted, the same reasoning expressed by the commenter that the processed material is a product fuel. The disagreement between the EPA and the comment is the status of the legacy piles and the nomenclature of the coal finally burned. The coal is a processed fuel product, not a traditional fuel.

Comment: One commenter stated that there are ''other relevant factors'' that the EPA should consider when determining whether coal refuse from legacy piles should be categorically listed as a non-waste fuel. Specifically, the commenter believes that the EPA should consider the ''overwhelming resultant environmental improvements'' associated with the cleanup of abandoned coal refuse piles, including the reduction of fire hazards and contaminant, siltation, and solids releases into the environment, as an ''other relevant factor'' as it considers listing legacy coal refuse as a non-waste fuel in § 241.4.

Response: The EPA's decision to include processed legacy coal refuse to the list of non-waste fuels in § 241.4(a) was based on the fact that such materials meet the definition of processing and the legitimacy criteria. We do not need to balance ''other relevant factors'' in making this determination, as would be appropriate under an analysis conducted under § 241.4(b)(5)(ii).

Comment: The EPA received a few comments regarding the specific wording of how coal refuse recovered from legacy piles should be identified and described in § 241.4(a) should the agency determine to categorically list this NHSM pursuant to § 241.4(a). One commenter suggested inserting the following text as a subsection within § 241.4(a): ''Coal refuse that does not constitute currently-generated coal refuse, but that is processed in the same manner as currently-generated coal refuse.'' As previously discussed, another commenter stated that the term ''post-processed'' was vague and could be interpreted to require additional processing that would hinder the usage of legacy coal refuse piles. Still another commenter suggested referencing the SMCRA in a categorical non-waste determination for coal refuse, which would ensure that the coal refuse is a fuel and minimize overlapping regulatory jurisdiction that could evolve.

Response: As discussed above, we have determined to list ''coal refuse that has been recovered from legacy piles and processed in the same manner as currently-generated coal refuse'' to the list of categorical non-waste fuels, as codified in § 241.4(a) of today's rulemaking. We believe this language accurately captures the scope of materials at issue and what must occur for the material to be categorically characterized as a non-waste fuel. That is, this categorical listing only applies to coal refuse that has been discarded in the first instance in legacy piles, subsequently recovered or removed from the discard environment and subjected to the same processes and operations as currently generated coal refuse.[123] Further, this language should alleviate any concerns that the term ''post-processed'' is vague since that term is not being used within this provision as finalized today.

We do not agree with the comments that a categorical listing for legacy refuse should specifically reference SMCRA. As we noted in the preamble to the 2011 NHSM final rule, while the EPA recognizes that SMCRA is concerned with the management and removal of coal refuse piles at mining sites, SMCRA does not address the issue of ''discard,'' which is critical to the definition of solid waste under RCRA.[124] Thus, a specific reference to SMCRA would be inappropriate as well as confusing. Further, we believe that a specific reference to SMCRA would be in fact more burdensome than the language of the categorical listing being codified today, which simply states that legacy coal refuse must be processed in the same manner as currently-generated coal refuse, regardless of whether such processing is done pursuant to SMCRA.

c. Manure

In the 2011 NHSM final rule, the EPA stated that based on the information provided, we could not make a blanket determination that all manure is a traditional fuel or that it is a solid waste. However, upon reviewing the few comments and data received, we concluded that animal manure that is used as a fuel ''as generated'' does not satisfy the legitimacy criteria, and thus, if combusted ''as generated,'' would be a solid waste.[125] However, the agency also noted that there were circumstances where manure would not be considered a solid waste when burned as a fuel for energy recovery, specifically: (1) When the manure remained within the control of the generator and met the legitimacy criteria; (2) when the manure was sufficiently processed (e.g., via anaerobic digestion or gasification processes) and the resulting material met the legitimacy criteria; and (3) when a facility received a determination from the agency pursuant to 241.3(c) stating that its manure was a non-waste when used as a fuel. For further discussion regarding our characterization of manure, see the preamble to the 2011 NHSM final rule (76 FR 15479–15482).

In the December 2011 proposed rule, the agency noted that some parties have identified the potential of manure to not be considered a solid waste. We, therefore, invited parties to present information, including data demonstrating that manure is not discarded either through the existing non-waste petition process or the proposed categorical determination process.[126] The agency received no information or data that would allow it to consider proposing to list manure categorically as a non-waste fuel.[127] Therefore, we are not taking any action in the rulemaking with respect to manure. However, the agency did receive several comments from one commenter which we will respond to below.

Comment: The commenter states that dried animal manure should be included as a non-waste with the other fuels in 40 CFR 241.4(a). The commenter contends that there is no evidence that any animal manure is discarded, let alone sent to landfills. Manure is generally used as fertilizer on fields, although an important secondary purpose is for energy recovery/generation. In addition, the commenter states there are several known instances of additional plans for animal manure energy projects that are designed specifically to recover energy, including government funded projects.

The commenter notes that after drying, animal manure has a meaningful Btu value equal to or above that of other

[123] We note that it would not be appropriate to include currently generated coal refuse within this categorical non-waste determination, as we have previously determined and continue to believe that currently generated coal refuse is a traditional fuel.

[124] See 76 FR 15510.

[125] See 76 FR 15480.

[126] See 76 FR 80472.

[127] In the preamble to the proposed rule, the agency indicated the type of information and data that should be submitted to categorically list manure as a non-waste fuel. Specifically: (1) The extent that use of the NHSM has been integrally tied to the industrial production process—information can include combustor design specifications, the extent that the use of the material is integrated across the industry and the extent that use of the NHSM is essential to the industrial process and/or (2) the extent that the NHSM is functionally the same as the comparable traditional fuel and (3) other relevant factors.

biomass that the EPA has determined to be a non-waste fuel (e.g., bagasse). The commenter also notes that there are contracts in place for livestock and poultry producers to supply manure to the combustor.

Regarding contaminants in manure, the commenter states that the amount of contaminants is limited because the vast majority of applicable contaminants are directly related to the contaminants contained in the biomass consumed by the animals. The EPA has not presented any evidence that facilities are combusting manure in order to discard chlorine or nitrogen, the two contaminants identified by the EPA. These concentrated contaminants are no different than what occurs in the production of ''byproducts of ethanol natural fermentation processes,'' which the EPA is now proposing to include in the definition of ''clean cellulosic biomass.'' Based on a ''balancing of the legitimacy criteria and other such relevant factors,'' the EPA's new standard, animal manure should be included in the 40 CFR 241.4(a) fuels list, along with resinated woods and scrap tires.

Response: We disagree with the commenter on several points and do not believe that the case has been made to include animal manure as a categorical non-waste fuel in 40 CFR 241.4(a). First, in the 2011 NHSM final rule, we previously determined that animal manure that is used as fuel, ''as generated,'' would not satisfy the legitimacy criteria. This conclusion was based on the fact that such material likely would not satisfy the meaningful heating value and contaminant legitimacy criterion.[128] Thus, we believe that the burning of such materials (as generated) would not be legitimate and would be seen as burning for discard. Further, the agency has never stated that a NHSM, including animal manure, has to be landfilled in order to be discarded, as the commenter implies. Regarding the use of manure as fertilizer, we have been clear that this rulemaking does not address that secondary use. The 2011 NHSM final rule states, ''We recognize that manure may also be beneficially used in other end uses, such as a fertilizer * * * EPA is not making any determination whether non-hazardous secondary materials are or are not solid wastes for other possible beneficial end uses. Such beneficial use determinations are generally made by the states for these other beneficial uses, and EPA will continue to look to the states to make such determinations.'' [129]

The commenter notes additional plans for animal manure energy projects; however the fact that there are plans for future projects does not support a categorical non-waste determination today. As the EPA has acknowledged, facilities may be able to demonstrate that they satisfy the legitimacy criteria, either through a self-determination if the manure remains within the control of the generator or through the § 241.3(c) non-waste determination petition process. Thus, any future energy project using animal manure as fuel could utilize either of these options for determining that the manure is a non-waste fuel, as appropriate.

Regarding the commenter's points related to meaningful heating value of dried manure, the fact that dried manure may have a greater Btu value than bagasse is not directly on point. To demonstrate that a NHSM has meaningful heating value when used as a fuel, a facility does not compare relative Btu/lb of the NHSM against other traditional fuels, which themselves have a wide range of heating values. Rather, consistent with other EPA rulemakings, we have established 5,000 Btu/lb as a benchmark for demonstrating that a NHSM has meaningful heating value. Thus, to meet the meaningful heating value legitimacy criterion, the material would need to meet an ''as fired'' heating value of 5,000 Btu/lb, or if lower than 5,000 Btu/lb, as fired, a person would need to demonstrate that the ERU can cost-effectively recover meaningful energy from the NHSM used as a fuel.[130] We also note that the EPA did not reopen the meaningful heating value for fuels, as codified in 40 CFR 241.3(d)(1)(ii), in the December 23, 2011, proposed rule. Thus, in order to meet this criterion, the dried manure would need to meet an ''as fired'' heating value of 5,000 Btu/lb, or if lower than 5,000 Btu/lb, the facility would need to demonstrate that the ERU can cost-effectively recover meaningful energy from use of manure as a fuel.

Regarding the commenter's statement regarding contracts between livestock and poultry producers and combustors, first we would note that no information has been provided to indicate who has entered such contracts or how many such contracts there are to consider this factor. However, as we have stated elsewhere in this preamble, contractual arrangements can be used as evidence that the material is managed as a valuable commodity and that discard is not occurring when a material is transferred beyond the control of the generator. However, the fact that there is a contractual relationship by itself is not dispositive that a material is not a waste, as there are contracts between parties to remove and dispose of wastes.

We also believe that the commenter's statements that the concentrated levels of contaminants are no different than what occurs in the production of ''byproducts of ethanol natural fermentation processes'' is not supported by any information or data. That is, other than the general statement, the commenter has not provided contaminant data, for either animal manure or byproducts of ethanol natural fermentation processes, for the agency to analyze and compare.

Thus, we have determined based on the lack of any information or data that animal manure should not be listed as a categorical non-waste fuel in § 241.4(a).

Comment: In the event that the agency does not list animal manure as a categorical non-waste fuel, the EPA could alternatively decide that processing of animal manure by drying, constitutes ''sufficient processing,'' such that previously discarded manure could be considered recovered for energy recovery, just like scrap tires could be processed and burned as a non-waste.

Response: In the December 23, 2011 proposal, the agency did not solicit comment on the definition of ''processing,'' as codified in 40 CFR 241.2. Thus, this comment is beyond the scope of the rulemaking and will not be addressed in today's final action.

d. Other Materials for Which Additional Information Was Not Requested

In the December 2011 proposal, the agency solicited comment on a focused list of NHSMs and, in particular, whether these NHSMs would be appropriately included in the categorical list of non-waste fuels that the agency was proposing in 40 CFR 241.4(a). Specifically, the agency proposed and/or invited comment and additional information regarding potential categorical non-waste determinations for resinated wood, scrap tires managed pursuant to established tire collection programs, pulp and paper sludges, and coal refuse recovered from legacy piles.

Although comment was requested only for these specific materials, the agency received comments that many other NHSMs be listed as categorical non-wastes for which it did not request additional information as a part of this rulemaking. As we have discussed elsewhere in today's preamble, we will not be responding to such comments and issues that are beyond the scope of

[128] See 76 FR 15480–15481.

[129] 76 FR 15482.

[130] See 76 FR 15541.

today's narrow rulemaking. We would also note that since the agency did not specifically solicit comments on these additional materials or propose that these NHSMs should be categorically listed in 40 CFR 241.4(a), the Agency will be going through notice and comment rulemaking before making a final decision. However, we would like to note two additional NHSMs—paper recycling residuals and construction and demolition wood processed pursuant to best practices that, based on information provided to the agency,[131] we now believe are good candidates and expect to propose categorical listings in 40 CFR 241.4(a) in the near future for these two materials. With respect to a third NHSM—creosote-treated railroad ties, the Agency has recently received a draft petition from The American Forest & Paper Association and the American Wood Council seeking a categorical listing for these materials. As noted below, the Agency has requested additional information from the petitioners with regard to their request. If the additional information supports the representations made in the petitioners' draft December 6, 2012 petition, the EPA expects to propose a categorical listing for this material as well.[132]

Paper Recycling Residuals

The first of these is paper recycling residuals (including old corrugated cardboard (OCC) rejects). In the 2011 NHSM final rule, EPA determined that paper recycling residuals, referred to as OCC rejects, are not discarded when used under the control of the generator, such as at pulp and paper mills, since these non-hazardous secondary materials are part of the industrial process.[133] Regarding the legitimacy criteria, the Agency found that these materials meet the criteria with respect to management as a valuable commodity and used as a fuel when burned on-site. In addition, the Agency found that the contaminant levels in these materials are comparable to those in traditional fuels. With respect to the meaningful heating value criterion, the Agency determined that OCC rejects meet this criterion if it can be demonstrated that the combustion unit can cost-effectively recover energy from these materials.[134]

Since publication of the March 2011 rule, the Agency has received additional information regarding the cost effectiveness of paper recycling residuals use as a fuel, including amounts of paper recycling residuals replacing traditional fuels at paper mills and percentages of residuals generated that are combusted as fuel. In general, this information also indicates that this material is primarily combusted as a fuel on-site or within the control of the generator.[135] We have asked the industry for information to confirm this.

EPA believes the information received to date would tend to support a categorical determination of these residuals as non-waste fuels. For residuals that are transferred offsite, the Agency would like additional information about residuals that are also burned as a fuel at facilities that are not under the control of the generator, including information as to how and where they are burned and whether they are managed as a valuable commodity. If the Agency receives information confirming treatment of these materials offsite, the Agency would expect to include these residuals in a subsequent rulemaking.

Construction and Demolition Wood Processed Pursuant to Best Practices

The second of these NHSMs is construction and demolition (C&D) wood processed pursuant to best practices and produced and managed under the oversight of a comprehensive collection system or contractual arrangement. In the March 2011 final rule, we determined that C&D wood that is sufficiently processed can be a non-waste fuel.[136] The Agency has received additional information since the issuance of that rule on specific best management practices used by suppliers/processors of C&D wood. Such practices include processing to remove contaminants. EPA believes the information received to date would tend to support a listing of these materials as a categorical non-waste fuel and expects to propose that listing in a subsequent rulemaking.

Other Materials Under Consideration

The American Forest & Paper Association and the American Wood Council submitted a draft petition to EPA on December 6, 2012 seeking a categorical listing for creosote-treated railroad ties.[137] This draft petition lists their bases for the determination, with supporting information.

The information included amounts of railroad ties combusted each year and value of the ties as fuel. Overall, the petitioners believe the information demonstrates that these materials are non-waste fuels and would allow EPA to categorically list this material, balancing the legitimacy criteria with other relevant factors. The draft petition provides information representing a determination that the material has high Btu value, and that the material satisfies the legitimacy criteria. The Agency is still in the process of reviewing the petition. However, in order to inform the scope of the non-waste category, we have also asked the petitioners to provide additional information, including:

1. A list of industry sectors, in addition to forest product mills, that burn railroad ties for energy recovery
2. The types of boilers (e.g., kilns, stoker boilers, circulating fluidized bed, etc.) that burn railroad ties for energy recovery
3. The traditional fuels and relative amounts (e.g., startup, 30%, 100%) of these traditional fuels that could otherwise generally be burned in these types of boilers
4. The extent to which non-industrial boilers (e.g., commercial or residential boilers) burn railroad ties for energy recovery
5. Laboratory analyses for contaminants known to be present in creosote-treated railroad ties or known to be significant components of creosote, specifically polycyclic aromatic hydrocarbons (i.e., PAH–16), dioxins, dibenzofurans, hexachlorobenzene, biphenyl, quinoline, cresols, and 2,4-dinitrotoluene.

[131] Comments on December 23, 2011 proposed rule supporting a categorical non-waste for paper recycling residuals: American Forest & Paper Association, et al. EPA–HQ–RCRA–2008–0329–1946–A1; Georgia-Pacific LLC (GP) EPA–HQ–RCRA–2008–0329–1902–A1; National Alliance of Forest Owners (NAFO) EPA–HQ–RCRA–2008–0329–1950–A2; Packaging Corporation of America (PCA) EPA–HQ–RCRA–2008–0329–1966–A1; and United Steelworkers (USW) EPA–HQ–RCRA–2008–0329–1910–A1. Comments supporting a categorical non-waste for paper recycling residuals and C&D wood: American Forest & Paper Association, et al. EPA–HQ–RCRA–2008–0329–1946–A1; Construction Materials Recycling Association (CMRA) EPA–HQ–RCRA–2008–0329–1928–A1; Covanta Energy Corporation (Covanta) EPA–HQ–RCRA–2008–0329–1893–A; Energy Recovery Council (ERC) EPA–HQ–RCRA–2008–0329–1927–A1; Georgia-Pacific LLC (GP) EPA–HQ–RCRA–2008–0329–1902–A1; Michigan Biomass EPA–HQ–RCRA–2008–0329–1905–A1; National Alliance of Forest Owners (NAFO) EPA–HQ–RCRA–2008–0329–1950–A2; United Steelworkers (USW) EPA–HQ–RCRA–2008–0329–1910–A1; Waste Management (WM) EPA–HQ–RCRA–2008–0329–1957–A2; and Weyerhaeuser EPA–HQ–RCRA–2008–0329–1930–A1.

[132] See draft letter from Paul Noe to Adminstrator Lisa Jackson, December 6, 2012, (item to be placed in the docket for today's rule).

[133] [76 FR 15487]

[134] For a discussion of OCC rejects, see 76 FR 15486–7.

[135] See ''Generation, Management, and Processing of Paper Processing Residuals'' (Industrial Economics, October 26, 2012) (these items will be placed in the docket.)

[136] See 76FR 15485

[137] Letter from American Forest & Paper Association and American Wood Council to Lisa Jackson, dated December 6, 2012 (a copy of this letter can be found in the docket for today's rule)

Assuming that the additional information supports and supplements the representations made in the petitioner's December 6, 2012 draft petition, the EPA also expects to propose a categorical listing for this material. To the extent that petitioners would like to provide additional information, the Agency will consider such information as well.

EPA has also received a related letter from the Treated Wood Council asking that nonhazardous treated wood be determined as a categorical non-waste, a broader category that would include creosote-treated ties.[138] EPA is in the process of reviewing this letter, and may also propose a categorical listing for this broader set of treated wood material. Finally, we would note that if any person provides sufficient information to EPA regarding any other NHSM, EPA would also consider listing such material(s) categorically, pursuant to 40 CFR 241.4(b).

6. Streamlining of the 40 CFR 241.3(c) Non-Waste Determination Petition Process

In the proposed rule, the EPA asked for comments on streamlining or other improvements to the existing provision for non-waste determinations codified at 40 CFR 241.3(c).

The agency requested comment on whether the EPA's grant of the petition should apply as of the date that the petition was submitted to the agency.[139] The agency also requested additional comment on whether any other changes could be made to the non-waste determination petition in order to streamline the process, while at the same time provide the EPA with the opportunity to ensure that such NHSMs are not being discarded. For example, the EPA requested comment on whether public comment should be sought on each individual petition.[140]

Comment: Concerning the request for comment regarding when a petition determination would apply, the agency received several comments. Specifically, the agency requested comment on whether the EPA's grant of the petition should apply as of the date that the petition was submitted to the agency. Commenters agreed that a non-waste determination under 40 CFR 241.3(c) should be retroactively applied to the date the petition was submitted.

Commenters were concerned about the timeliness of the EPA's decision on these determinations and on the uncertainty surrounding the usage of the NHSMs while a non-waste determination petition is pending. The commenters argue that if a NHSM is determined to be non-waste, the combusted NHSM in question was also non-waste prior to the determination.

Response: The agency understands the interests of petitioners awaiting an agency decision on the status of materials, while a 40 CFR 241.3(c) petition is being considered. In order to lessen the uncertainty surrounding the regulatory status of a particular material, the agency will utilize the date the petition was submitted as the date that the combusted materials will be considered a non-waste if the agency grants the petition.

Comment: Many commenters indicated concern that the petition process could take excessive time for the agency to reach a decision. They requested self-imposed timeframes for the EPA's granting/denying requests and a shorter length of time for the notices to be open for public comment (or omit it altogether). The combustors stated they need quick decisions in order to comply with the CAA regulations and to make efficient business decisions.

Response: The agency considered the commenters' suggestion, but decided not to impose a deadline on its decision because there are many factors beyond its control, including how long it takes for the petitioner to submit a complete petition to EPA for evaluation. We would note, however, that even though the NHSM rule will become effective on April 8, 2013, for all practical purposes, existing facilities that currently burn NHSMs from off-site sources will have a substantial amount of time to submit and have the EPA process a non-waste determination petition before having to comply with the CAA emission standards, as the compliance date for existing CISWI sources subject to CAA 129 standards is 5 years after the date of publication of the CISWI final rule or 3 years after the state plan is approved, whichever happens earlier and February 7, 2016, to comply with the Boiler MACT rule.[141] [142] Thus, we believe that there will be more than adequate time for persons to determine whether or not a NHSM sent to a combustion unit not under the control of the generator has not been discarded and meets the legitimacy criteria, prepare and submit a non-waste determination petition to the EPA, have the EPA process the petition, including soliciting comment on the EPA's proposed determination, and make a final decision.

In regard to the comment on reducing the time the petition application is open for public comment, the agency decided that the comment period shall remain at 30 days but the regulatory text is changed from ''at least 30 days'' to ''30 days'' in order to promote clarity, while affording an opportunity for public comment.

Comment: One commenter strongly encouraged the agency to develop and deploy an on-line form to identify materials for non-waste determinations. Commenters also noted that the EPA should provide more detailed information about how the determinations are made (particularly for the comparable contaminant determinations).

Response: The agency will consider the development of a form to identify the specific information needed to determine whether a NHSM meets the legitimacy criteria and other provisions. If the agency develops such a form, it would be made available on the NHSM Web site. Please note that traditional fuel data (including tables for traditional contaminants) are available to the public, which they may find useful in assessing the contaminant legitimacy criteria. Refer to those tables in ''Contaminant Concentrations in Traditional Fuels: Tables for Comparison'' currently posted on the NHSM web site at *http://www.epa.gov/osw/nonhaz/define/index.htm*. That document will aid in comparing the concentration of contaminants in their NHSMs to concentration of contaminants in traditional fuels. In addition, rule clarification letters and petition findings are also posted on the Web site when finalized.

Comment: A commenter suggested that the non-waste petition process should allow for ''balancing'' of legitimacy criteria similar to that included for categorical determinations in 40 CFR 241.4.

Response: Under 40 CFR 241.4 of the proposed regulation, the EPA can balance the legitimacy criteria with other relevant factors in making categorical non-waste determinations. As the commenter points out, we have not discussed the applicability for similar balancing under 40 CFR 241.3 non-waste determination petitions. The EPA distinguished between 40 CFR 241.3 and 40 CFR 241.4 because in the

[138] Letter from Jeffrey Miller, Treated Wood Council to Lisa Feldt, December 17, 2012. (a copy of this letter can be found in the docket to today's rule) Additional supporting information is found in the Comments of Treated Wood Council, dated Feb. 20, 2012)(EPA–HQ–RCRA–2008–0329–1897.

[139] See 76 FR 80473.

[140] See 76 FR 80474.

[141] We recognize that new sources that are coming online that will have to comply with these rules much sooner than do existing sources. As such, the Agency will consider prioritizing the processing of non-waste petitions it has received from new sources as appropriate.

[142] Note that the compliance date for the Area Source Boiler Rule is March 21, 2014.

latter, the EPA makes the determination based on its review and analysis of industry-wide data and other factors, as opposed to a specific site. However, the EPA recognizes the points the commenter raises and will consider whether such modifications may be appropriate.

Comment: Several commenters were interested in features that streamline and add flexibility to the administrative petition process, particularly in the situation where a petition can apply to multiple combustors.

One commenter noted that any interested person—including forest owners—should be able to initiate the petition process, not just combustors. The petitions should be allowed for entire classes of a NHSM rather than requiring a case-by-case analysis. These clarifications will encourage all members in the biomass supply chain to promote their products and co-products as clean, renewable fuels and promote the development of new markets for biomass materials. Other commenters also stressed the need for the EPA to clarify that the petition can apply to more than one combustor so that redundant petitions do not need to be filed in every region.

A commenter also stated that the benefits from petitions could be achieved more efficiently if the regulatory language was changed to allow for nation-wide petitions under 40 CFR 241.3(c) for classes of combustion units rather than requiring separate petitions for each EPA region.

Response: The agency agrees with the commenters that the process should accommodate for petition applications from third party producers of a NHSM that can be used as a non-waste NHSM fuel at many combustion units instead of just accepting petitions from individual combustors or combustors within the control of one EPA region. This can make for a more streamlined and efficient process. Therefore, the regulatory provision at 40 CFR 241.3(c) has been modified to allow for the petition to be sent to the Assistant Administrator for the OSWER instead of each Regional Administrator if the petition covers more than one EPA Region. This is at the option of the petitioner. The Assistant Administrator for the OSWER would be responsible for the EPA's administrative process in order to finalize the petition decision under 40 CFR 241.3(c) and the regulatory language has been modified accordingly.

Finally, as noted in the 2011 NHSM final rulemaking, states, or private entities, can submit non-waste determination petitions to the EPA on behalf of petitioners. They can petition for a single combustor or a class of combustors (e.g., a specific usage of a non-hazardous secondary material in a particular state). Therefore, in regard to the comment on nationwide petitions for classes of combustion units, the petition process accommodates for these classes of combustion units. This assumes that the petition identifies all of the specific NHSMs that the classes of combustion units use as fuel (that are applicable to a 40 CFR 241.3(c) petition) and gives the information necessary to meet the legitimacy criteria and other requirements.

Note that if a petition covers multiple facilities in a single region, the petition should be sent to the Regional Administrator for that Region, not to the Assistant Administrator for the OSWER.

Comment: Several commenters argued that the 40 CFR 241.3(c) petitions should not require public comment for each individual petition.

One commenter stated that ''the administrative petition process could be further streamlined by not seeking public comment on every individual petition. By filing an administrative petition, a petitioner is not seeking to change the EPA's regulatory program or create new legal rights or obligations. Instead, the administrative petition process provides an opportunity for a petitioner to obtain in advance [A]gency concurrence, based on sound science, with respect to the classification of a particular feedstock under existing regulations. In this respect, the administrative petition process differs from the categorical non-waste determination * * * where EPA makes changes to the regulatory status of certain non-hazardous secondary materials that are reflected in the Code of Federal Regulations. Because the public—through this rulemaking process—has an opportunity to provide input on EPA's regulations, there is no need to provide a second opportunity for public comment when those regulations are applied by the EPA in specific contexts through the administrative petition process.''

In addition, other commenters indicated that public notice and comment is not necessary, since the NHSM rulemaking process has already taken comment on the methodology, in addition to other rationale. In particular, one commenter stated, ''Streamlining could be further facilitated by recognizing that solicitation of public comment on each individual application would be redundant and unnecessary given the public's ample opportunity during this rulemaking to comment on the evaluation criteria that will govern non-waste determination petitions.'' Another commenter stated, ''The reason for public participation in the hazardous waste petition process is that the materials subject to the petition are to be removed from the hazardous waste regulatory program. In the NHSM world, the secondary materials subject to the petition are merely obtaining clarity about regulatory status—they are not seeking a change in regulatory status. Therefore, the need for the full public participation process is not necessary or warranted.''

Response: Although industry commenters argued that public participation is unnecessary, the EPA still believes that public participation is an important part of a transparent decision making process and values how it increases transparency. In the final rule, we will retain the public participation requirement in order to promote public awareness.

7. Revised Introductory Text for 40 CFR 241.3(a)

As part of its discussion clarifying the non-waste determination petition processes, the EPA noted that it had examined a number of specific NHSMs and decided which were to be considered solid wastes based on the record available at the time the March 2011 final rule was issued.[143] The rule itself had stated at 40 CFR 241.3(a) that secondary materials were solid wastes except for those described in section 241.3(b). Essentially, section 241.3(b) is the operative section that states what materials are not wastes. The purpose of the non-waste determination petition process in section 241.3(c) and the new proposed petition process in section 241.4 is to allow various parties the opportunity to provide information and data so that the EPA could decide what other NHSMs are not solid wastes. The preamble stated that the agency proposed to amend section 241.3(a) to state that such secondary materials are ''presumed to be'' solid wastes except for those described in section 241.3(b) in order to better reflect the rulemaking record.

Comment: No commenters supported inclusion of the ''presumed to be'' language in the rule.

Most of the commenters on the language argue that it means that the EPA continues to improperly determine that certain NHSMs are presumptively wastes. Commenters generally argue that the ''presumed to be'' language shows that the EPA, in spite of statements to the contrary, is continuing to make an inappropriate determination

[143] See 76 FR 80473.

that NHSMs transferred to other parties are presumptively wastes until a combustor proves otherwise. According to comments, the use of the ''presumed to be'' language is a clear statement that the EPA is making the presumption. The addition of these words does not change the fact that, under the EPA's regulatory framework, NHSMs are wastes until proven otherwise.

Several commenters, in fact, argued that to address the legal flaws in the proposal, the EPA should reverse the presumption and presume that NHSMs burned for energy recovery or used as an ingredient is not for the purpose of disposal and, therefore, is not a waste.

Response: The EPA is not addressing in this rulemaking the comment that the agency has inappropriately made presumptions about whether materials are wastes. This issue has not been reopened. Instead, the agency has only opened very specific issues on particular wastes.

In the December 2011, proposal at 76 FR 80473, the EPA referred to the March 2011 preamble in which the agency stated that it has not ''arbitrarily determined that secondary materials transferred between companies are wastes. Instead, the EPA has evaluated whether certain categories of materials are discarded or not. The Agency has not adopted the extremes of saying that all burning of secondary material, regardless of ultimate use, is waste treatment or that any secondary material that is recycled for legitimate fuel value is a commodity and not a waste. Wastes may have value, but are still wastes.'' 76 FR 15471. Further, the agency stated that it ''has examined a number of specific materials, recycled within the control of the generator and transferred to a third party for recycling, and determined whether they would be appropriately placed within the waste or non-waste categories.'' Id. The EPA went on to examine a number of different categories of NHSMs used as fuels and ingredients that was summarized in the **Federal Register** (76 FR 15477–15520). The EPA cannot ''reverse'' a presumption that it never made to declare that materials burned for energy recovery are presumptively non-wastes. Further, it would be entirely improper for the agency to do so. The EPA has evaluated specific groups of materials as to their waste status, while the comments regarding reversal of a purported presumption have only presented arguments ''in broad abstraction, providing little detail about the many processes throughout the industry that generate residual material'' that could be subject to this rule. *Association of Battery Recyclers* v. *EPA,* 208 F.3d 1047, 1056.[144] Accordingly, the agency stands on its March 2011 rulemaking record for the issues discussed in these comments.

Comment: Comments objected that the change in word choice that materials are ''presumed to be'' solid wastes from the statement that that materials ''are'' solid wastes (except as otherwise provided in the regulation) still puts the burden to prove material is not a waste on persons who use NHSMs in combustion units. One comment, in particular, noted that there would be no practical effect of the new language even though it is viewed by the EPA as an ''optically less drastic stance.'' That is, there would be no real leeway for a party in an enforcement proceeding to counter the EPA's prosecution based on the fact that the secondary material in question is only ''presumed to be'' a waste, rather than the material ''is'' a waste.

Response: The EPA has decided not to retain the ''presumed to be'' language, since it is unnecessary and does not actually reflect the rulemaking record. No comment argued in favor of it. In addition, there is no need to temper the existing language stating that a material is a solid waste if it does not fall within the § 241.3(b) categories or the non-waste determination processes. As noted in the previous response to comments regarding the agency's ''presumption'' of the waste status of materials, the agency stands on its March 2011 rulemaking record.

E. Cost and Benefits of the Final Rule

The RCRA aspects of this rule do not directly invoke any costs (excluding minor administrative burden/cost), or benefits. Any RCRA related costs to the regulated community, and corresponding benefits to human health and the environment, have been considered as part of the CISWI action, and the corresponding CISWI and Boiler MACT (area source and major source) final rules. As such, the agency has not prepared a separate cost-benefit assessment in support of this part of the final rule. Consequently, any potential costs or benefits, including impacts to small entities, indirectly associated with the RCRA aspects of this rule are addressed in the corresponding impact assessment prepared in support of the CISWI part of this action.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it may raise novel legal or policy issues. Accordingly, the EPA submitted this action to OMB for review under Executive Order 12866 and 13563 (76 FR 3821, January 21, 2011). Any changes made in response to OMB recommendations have been documented in the docket for this action.

In addition, the EPA prepared an update to the RIA of the potential costs and benefits associated with this action. The RIA available in the docket describes in detail the empirical basis for the EPA's assumptions and characterizes the various sources of uncertainties affecting the estimates below and a memo documents the updates since the RIA was prepared. Table 9 of this preamble shows the results of the cost and benefits analysis for these final rules.

TABLE 9—SUMMARY OF THE MONETIZED BENEFITS, SOCIAL COSTS AND NET BENEFITS FOR THE FINAL CISWI NSPS AND EG IN 2015

[Millions of 2008$] [1]

	3 Percent discount rate	7 Percent discount rate
Total Monetized Benefits [2]	$420 to $1,000	$380 to $930
Total Social Costs [3]	$258	$258
Net Benefits	$160 to $770	$120 to $670
	Health effects from exposure to HAP 780 tons of HCl, 2.5 tons of lead, 1.8 tons of Cd, 680 pounds of Hg, and 58 grams of dioxins/furans).	

[144] Note how the April 4, 2012, letter from Timothy G. Hunt to James Berlow (a copy of which is in the docket for today's rule), provided specific information on pulp and paper sludge where the EPA added a categorical determination based on specific information provided by industry.

TABLE 9—SUMMARY OF THE MONETIZED BENEFITS, SOCIAL COSTS AND NET BENEFITS FOR THE FINAL CISWI NSPS AND EG IN 2015—Continued

[Millions of 2008$] [1]

	3 Percent discount rate	7 Percent discount rate
Non-monetized Benefits	Health effects from exposure to criteria pollutants (20,000 tons of CO, 6,300 tons of SO_2, 5,400 tons of NO_2, and secondary formation of ozone). Ecosystem effects. Visibility impairment.	

[1] All estimates are for the implementation year (2015) and are rounded to two significant figures. These results reflect the lowest cost disposal assumption.

[2] The total monetized benefits reflect the human health benefits associated with reducing exposure to $PM_{2.5}$ through reductions of $PM_{2.5}$ precursors such as directly emitted particles, SO_2, and NO_X. It is important to note that the monetized benefits include many but not all health effects associated with $PM_{2.5}$ exposure. Monetized benefits are shown as a range from Pope, et al. (2002) to Laden, et al. (2006). These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because the scientific evidence is not yet sufficient to allow differentiation of effect estimates by particle type.

[3] The methodology used to estimate social costs for 1 year in the multimarket model using surplus changes results in the same social costs for both discount rates.

B. Paperwork Reduction Act

This action does not require any new information collection. This action is believed to result in no additional impact on the aggregate information collection estimate of project cost and hour burden made and approved by OMB. Due to changes in the CISWI inventory and monitoring requirements of the CISWI rule, the information collection estimate of project cost and hour burden have been revised. Therefore, only the CISWI ICR has been revised. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

However, OMB has previously approved the information collection requirements contained in the existing CISWI and NHSM [145] regulations (40 CFR part 60, subparts CCCC and DDDD, and 40 CFR part 241) under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501, *et seq.,* and has been assigned EPA ICR number 2384.05 for subpart CCCC, 40 CFR part 60, EPA ICR number 2385.05 for subpart DDDD, 40 CFR part 60, and EPA ICR number 2382.03 for 40 CFR part 241.

C. Regulatory Flexibility Act

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the APA or any other statute unless the agency certifies that the rule will not have a SISNOSE. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the SBA's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a SISNOSE. This final rule will not impose any new requirements on any entities because it does not impose any additional regulatory requirements relative to those specified in the March 2011 final CISWI and NHSM rules. The March 2011 final CISWI and NHSM rules were both certified as not having a SISNOSE. In this final action, there are four fewer small entities in the CISWI than in the March 2011 final CISWI rule, as discussed in the ''Regulatory Impact Results for the Reconsideration Final for Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units'' memorandum in the CISWI docket.

D. Unfunded Mandates Reform Act

This action does not contain a federal mandate that may result in expenditures of $100 million or more for state, local and tribal governments, in the aggregate or the private sector in any one year. This rule finalizes amendments to the final CISWI rule provisions and technical clarifications to the final NHSM rule. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA. However, the March 2011 final CISWI rule contains a federal mandate that may result in expenditures of $100 million or more for state, local and tribal governments, in the aggregate, or the private sector in any 1 year. Accordingly, we have prepared under section 202 of the UMRA a written statement, which is summarized in the preamble to the final CISWI rule (76 FR 15747).

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

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This final rule will not impose direct compliance costs on state or local governments and will not preempt state law. Thus, Executive Order 13132 does not apply to this action.

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

This action does not have tribal implications, as specified in Executive Order 13175, (65 FR 67249, November 9, 2000). The EPA is not aware of any CISWI in Indian country or owned or operated by Indian tribal governments. The CISWI aspects of this rule may, however, invoke minor indirect tribal implications to the extent that entities generating solid wastes on tribal lands could be affected. However, any indirect NHSM impacts that may occur as a result of the CISWI action are expected to be negligible due to the very limited focus of the CISWI part or this rule.

[145] Identification of Non-Hazardous Secondary Materials That Are Solid Waste, Final Rule. March 11, 2011.

Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is based solely on technology performance and technical corrections.

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

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

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

This action does not involve any revisions to the technical standards or test methods required in the final CISWI rule. Therefore, the EPA did not reconsider the use of any VCS.

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

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

The EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. The amendments do not relax the control measures on sources regulated by the CISWI rule, and, therefore, will not cause emissions increases from these sources. The March 2011 final CISWI rule will reduce emissions of all the listed HAP emitted from this source. Furthermore, the targeted revisions finalized in the NHSM section of this rule are designed to improve the management of these materials, thereby helping to further ensure against any disproportionately high and adverse human health or environmental effects on minority or low-income populations.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the SBREFA 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 rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective February 7, 2013.

List of Subjects

40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Incorporation by reference.

40 CFR Part 241

Environmental protection, air pollution control, waste treatment and disposal.

Dated: December 20, 2012.

Lisa P. Jackson,

Administrator.

For the reasons cited in the preamble, Title 40, chapter I, parts 60 and 241 of the Code of Federal Regulations are amended as follows:

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

■ 1. The authority for part 60 continues to read as follows:

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

■ 2. Effective February 7, 2013, the May 18, 2011 (76 FR 28662), delay of the effective date amending subparts CCCC and DDDD, at 76 FR 15703 (March 21, 2011), is lifted.

Subpart CCCC—[Amended]

■ 3. Section 60.2005 is revised to read as follows:

§ 60.2005 When does this subpart become effective?

This subpart takes effect on August 7, 2013. Some of the requirements in this subpart apply to planning the CISWI unit (i.e., the preconstruction requirements in §§ 60.2045 and 60.2050). Other requirements such as the emission limitations and operating limits apply after the CISWI unit begins operation.

■ 4. Section 60.2015 is amended by revising paragraphs (a)(1) and (2) and (b) to read as follows:

§ 60.2015 What is a new incineration unit?

(a) * * *

(1) A CISWI unit that commenced construction after June 4, 2010.

(2) A CISWI unit that commenced reconstruction or modification after August 7, 2013.

(b) This subpart does not affect your CISWI unit if you make physical or operational changes to your incineration unit primarily to comply with subpart DDDD of this part (Emission Guidelines and Compliance Times for Commercial and Industrial Solid Waste Incineration Units). Such changes do not qualify as reconstruction or modification under this subpart.

■ 5. Section 60.2020 is amended by:
■ a. Revising paragraph (c).
■ b. Revising paragraph (e)(3).
■ c. Adding paragraph (e)(4).
■ d. Revising paragraph (f)(3).
■ e. Adding paragraph (f)(4).
■ f. Revising paragraph (n).
■ g. Adding paragraph (o).

The revisions and additions read as follows:

§ 60.2020 What combustion units are exempt from this subpart?

* * * * *

(c) *Municipal waste combustion units.* Incineration units that are subject to

subpart Ea of this part (Standards of Performance for Municipal Waste Combustors); subpart Eb of this part (Standards of Performance for Large Municipal Waste Combustors); subpart Cb of this part (Emission Guidelines and Compliance Time for Large Municipal Combustors); subpart AAAA of this part (Standards of Performance for Small Municipal Waste Combustion Units); or subpart BBBB of this part (Emission Guidelines for Small Municipal Waste Combustion Units).

* * * * *

(e) * * *

(3) You submit documentation to the Administrator notifying the EPA that the qualifying small power production facility is combusting homogenous waste.

(4) You maintain the records specified in § 60.2175(w).

(f) * * *

(3) You submit documentation to the Administrator notifying the Agency that the qualifying cogeneration facility is combusting homogenous waste.

(4) You maintain the records specified in § 60.2175(x).

* * * * *

(n) *Sewage sludge incineration units.* Incineration units combusting sewage sludge for the purpose of reducing the volume of the sewage sludge by removing combustible matter that are subject to subpart LLLL of this part (Standards of Performance for Sewage Sludge Incineration Units) or subpart MMMM of this part (Emission Guidelines for Sewage Sludge Incineration Units).

(o) *Other solid waste incineration units.* Incineration units that are subject to subpart EEEE of this part (Standards of Performance for Other Solid Waste Incineration Units) or subpart FFFF of this part (Emission Guidelines and Compliance Times for Other Solid Waste Incineration Units).

■ 6. Section 60.2030 is amended by revising paragraph (c)(10) to read as follows:

§ 60.2030 Who implements and enforces this subpart?

* * * * *

(c) * * *

(10) Determination of whether a qualifying small power production facility or cogeneration facility under § 60.2020(e) or (f) is combusting homogenous waste.

■ 7. Section 60.2045 is amended by revising paragraph (b) to read as follows:

§ 60.2045 Who must prepare a siting analysis?

* * * * *

(b) You must prepare a siting analysis for CISWI units that commenced construction after June 4, 2010, or that commenced reconstruction or modification after August 7, 2013.

* * * * *

■ 8. Section 60.2105 is amended by revising paragraph (b) to read as follows:

§ 60.2105 What emission limitations must I meet and by when?

* * * * *

(b) An incinerator unit that commenced construction after November 30, 1999, but no later than June 4, 2010, or that commenced reconstruction or modification on or after June 1, 2001 but no later than August 7, 2013, must meet the more stringent emission limit for the respective pollutant in table 1 of this subpart or table 6 of subpart DDDD.

■ 9. Section 60.2110 is amended by:

■ a. Revising paragraphs (a)(2), (e), and (f).

■ b. Redesignating paragraph (g) as paragraph (h) and revising newly designated paragraph (h).

■ c. Adding paragraphs (g) and (i).

The revisions and additions read as follows:

§ 60.2110 What operating limits must I meet and by when?

(a) * * *

(2) Minimum pressure drop across the wet particulate matter scrubber, which is calculated as the lowest 1-hour average pressure drop across the wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations; or minimum amperage to the wet scrubber, which is calculated as the lowest 1-hour average amperage to the wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations.

* * * * *

(e) If you use activated carbon sorbent injection to comply with the emission limitations, you must measure the sorbent flow rate during the performance testing. The operating limit for the carbon sorbent injection is calculated as the lowest 1-hour average sorbent flow rate measured during the most recent performance test demonstrating compliance with the mercury emission limitations. For energy recovery units, when your unit operates at lower loads, multiply your sorbent injection rate by the load fraction, as defined in this subpart, to determine the required injection rate (e.g., for 50 percent load, multiply the injection rate operating limit by 0.5).

(f) If you use selective noncatalytic reduction to comply with the emission limitations, you must measure the charge rate, the secondary chamber temperature (if applicable to your CISWI unit), and the reagent flow rate during the nitrogen oxides performance testing. The operating limits for the selective noncatalytic reduction are calculated as the highest 1-hour average charge rate, lower secondary chamber temperature, and lowest reagent flow rate measured during the most recent performance test demonstrating compliance with the nitrogen oxides emission limitations.

(g) If you use a dry scrubber to comply with the emission limitations, you must measure the injection rate of each sorbent during the performance testing. The operating limit for the injection rate of each sorbent is calculated as the lowest 1-hour average injection rate or each sorbent measured during the most recent performance test demonstrating compliance with the hydrogen chloride emission limitations. For energy recovery units, when your unit operates at lower loads, multiply your sorbent injection rate by the load fraction, as defined in this subpart, to determine the required injection rate (e.g., for 50 percent load, multiply the injection rate operating limit by 0.5).

(h) If you do not use a wet scrubber, electrostatic precipitator, or fabric filter to comply with the emission limitations, and if you do not determine compliance with your particulate matter emission limitation with a particulate matter CEMS, you must maintain opacity to less than or equal to 10 percent opacity (1-hour block average).

(i) If you use a PM CPMS to demonstrate compliance, you must establish your PM CPMS operating limit and determine compliance with it according to paragraphs (i)(1) through (5) of this section.

(1) Determine your operating limit as the average PM CPMS output value recorded during the performance test or at a PM CPMS output value corresponding to 75% of the emission limit if your PM performance test demonstrates compliance below 75% of the emission limit. You must verify an existing or establish a new operating limit after each repeated performance test. You must repeat the performance test annually and reassess and adjust the site-specific operating limit in accordance with the results of the performance test.

(A) Your PM CPMS must provide a 4–20 milliamp output and the establishment of its relationship to manual reference method measurements must be determined in units of milliamps.

(B) Your PM CPMS operating range must be capable of reading PM concentrations from zero to a level equivalent to at least two times your allowable emission limit. If your PM CPMS is an auto-ranging instrument capable of multiple scales, the primary range of the instrument must be capable of reading PM concentration from zero to a level equivalent to two times your allowable emission limit.

(C) During the initial performance test or any such subsequent performance test that demonstrates compliance with the PM limit, record and average all milliamp output values from the PM CPMS for the periods corresponding to the compliance test runs (e.g., average all your PM CPMS output values for three corresponding 2-hour Method 5I test runs).

(2) If the average of your three PM performance test runs are below 75% of your PM emission limit, you must calculate an operating limit by establishing a relationship of PM CPMS signal to PM concentration using the PM CPMS instrument zero, the average PM CPMS values corresponding to the three compliance test runs, and the average PM concentration from the Method 5 or performance test with the procedures in (i)(1)through (5) of this section.

(i) Determine your instrument zero output with one of the following procedures:

(A) Zero point data for *in-situ* instruments should be obtained by removing the instrument from the stack and monitoring ambient air on a test bench.

(B) Zero point data for extractive instruments should be obtained by removing the extractive probe from the stack and drawing in clean ambient air.

(C) The zero point can also can be established obtained by performing manual reference method measurements when the flue gas is free of PM emissions or contains very low PM concentrations (*e.g.,* when your process is not operating, but the fans are operating or your source is combusting only natural gas) and plotting these with the compliance data to find the zero intercept.

(D) If none of the steps in paragraphs (i)(2)(i) through (iv) of this section are possible, you must use a zero output value provided by the manufacturer.

(ii) Determine your PM CPMS instrument average in milliamps, and the average of your corresponding three PM compliance test runs, using equation 1.

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} X_1 , \bar{y} = \frac{1}{n}\sum_{i=1}^{n} Y_1 \qquad \text{(Eq. 1)}$$

Where:

X_1 = the PM CPMS data points for the three runs constituting the performance test,

Y_1 = the PM concentration value for the three runs constituting the performance test, and

n = the number of data points.

(iii) With your instrument zero expressed in milliamps, your three run average PM CPMS milliamp value, and your three run average PM concentration from your three compliance tests, determine a relationship of lb/Mmbtu per milliamp with equation 2.

$$\mathbf{R} = \frac{Y_1}{(X_1 - z)} \qquad \text{(Eq. 2)}$$

Where:

R = the relative mg/dscm per milliamp for your PM CPMS,

Y_1 = the three run average mg/dscm PM concentration,

X_1 = the three run average milliamp output from you PM CPMS, and

z = the milliamp equivalent of your instrument zero determined from (2)(i).

(iv) Determine your source specific 30-day rolling average operating limit using the mg/dscm per milliamp value from Equation 2 in equation 3, below. This sets your operating limit at the PM CPMS output value corresponding to 75% of your emission limit.

$$O_l = z + \frac{0.75(L)}{R} \qquad \text{(Eq. 3)}$$

Where:

O_l = the operating limit for your PM CPMS on a 30-day rolling average, in milliamps.

L = your source emission limit expressed in lb/Mmbtu,

z = your instrument zero in milliamps, determined from (2)(a), and

R = the relative mg/dscm per milliamp for your PM CPMS, from Equation 3.

(3) If the average of your three PM compliance test runs is at or above 75% of your PM emission limit you must determine your operating limit by averaging the PM CPMS milliamp output corresponding to your three PM performance test runs that demonstrate compliance with the emission limit using equation 4 and you must submit all compliance test and PM CPMS data according to the reporting requirements in paragraph (i)(5) of this section.

$$O_h = \frac{1}{n}\sum_{i=1}^{n} X_1 \qquad \text{(Eq. 4)}$$

Where:

X_1 = the PM CPMS data points for all runs i,

n = the number of data points, and

O_h = your site specific operating limit, in milliamps.

(4) To determine continuous compliance, you must record the PM CPMS output data for all periods when the process is operating and the PM CPMS is not out-of-control. You must demonstrate continuous compliance by using all quality-assured hourly average data collected by the PM CPMS for all operating hours to calculate the arithmetic average operating parameter in units of the operating limit (e.g., milliamps, PM concentration, raw data signal) on a 30-day rolling average basis.

(5) For PM performance test reports used to set a PM CPMS operating limit, the electronic submission of the test report must also include the make and model of the PM CPMS instrument, serial number of the instrument, analytical principle of the instrument (e.g., beta attenuation), span of the instruments primary analytical range, milliamp value equivalent to the instrument zero output, technique by which this zero value was determined, and the average milliamp signals corresponding to each PM compliance test run.

■ 10. Section 60.2115 is amended by revising the section heading and the introductory text to read as follows:

§ 60.2115 What if I do not use a wet scrubber, fabric filter, activated carbon injection, selective noncatalytic reduction, an electrostatic precipitator, or a dry scrubber to comply with the emission limitations?

If you use an air pollution control device other than a wet scrubber, activated carbon injection, selective noncatalytic reduction, fabric filter, an electrostatic precipitator, or a dry scrubber or limit emissions in some other manner, including material balances, to comply with the emission limitations under § 60.2105, you must petition the EPA Administrator for specific operating limits to be

established during the initial performance test and continuously monitored thereafter. You must submit the petition at least sixty days before the performance test is scheduled to begin. Your petition must include the five items listed in paragraphs (a) through (e) of this section.

* * * * *

■ 11. Section 60.2120 is revised to read as follows:

§ 60.2120 Affirmative defense for violation of emission standards during malfunction.

In response to an action to enforce the standards set forth in paragraph § 60.2105 you may assert an affirmative defense to a claim for civil penalties for violations of such standards that are caused by malfunction, as defined at 40 CFR 60.2. Appropriate penalties may be assessed if you fail to meet your burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(a) *Assertion of affirmative defense.* To establish the affirmative defense in any action to enforce such a standard, you must timely meet the reporting requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:

(1) The violation:

(i) Was caused by a sudden, infrequent, and unavoidable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner; and

(ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and (iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(iv) Was not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(2) Repairs were made as expeditiously as possible when a violation occurred; and

(3) The frequency, amount, and duration of the violation (including any bypass) were minimized to the maximum extent practicable; and

(4) If the violation resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(5) All possible steps were taken to minimize the impact of the violation on ambient air quality, the environment, and human health; and

(6) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and

(7) All of the actions in response to the violation were documented by properly signed, contemporaneous operating logs; and

(8) At all times, the affected source was operated in a manner consistent with good practices for minimizing emissions; and

(9) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the violation resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of any emissions that were the result of the malfunction.

(b) *Report.* The owner or operator seeking to assert an affirmative defense shall submit a written report to the Administrator with all necessary supporting documentation, that it has met the requirements set forth in paragraph (a) of this section. This affirmative defense report shall be included in the first periodic compliance, deviation report or excess emission report otherwise required after the initial occurrence of the violation of the relevant standard (which may be the end of any applicable averaging period). If such compliance, deviation report or excess emission report is due less than 45 days after the initial occurrence of the violation, the affirmative defense report may be included in the second compliance, deviation report or excess emission report due after the initial occurrence of the violation of the relevant standard.

■ 12. Section 60.2125 is amended by:

■ a. Revising paragraph (g) introductory text.

■ b. Redesignating paragraphs (g)(2) and (3) as paragraphs (g)(3) and (4), respectively.

■ c. Revising newly designated paragraphs (g)(3) and (4).

■ d. Adding new paragraph (g)(2).

■ e. Revising paragraph (i).

■ f. Adding paragraph (j).

The revisions and additions read as follows:

§ 60.2125 How do I conduct the initial and annual performance test?

* * * * *

(g) You must determine dioxins/furans toxic equivalency by following the procedures in paragraphs (g)(1) through (4) of this section.

* * * * *

(2) Quantify isomers meeting identification criteria 2, 3, 4, and 5 in Section 5.3.2.5 of Method 23, regardless of whether the isomers meet identification criteria 1 and 7. You must quantify the isomers per Section 9.0 of Method 23. (Note: You may reanalyze the sample aliquot or split to reduce the number of isomers not meeting identification criteria 1 or 7 of Section 5.3.2.5.)

(3) For each dioxin/furan (tetra- through octa-chlorinated) isomer measured in accordance with paragraph (g)(1) and (2) of this section, multiply the isomer concentration by its corresponding toxic equivalency factor specified in table 3 of this subpart.

(4) Sum the products calculated in accordance with paragraph (g)(3) of this section to obtain the total concentration of dioxins/furans emitted in terms of toxic equivalency.

* * * * *

(i) If you have an applicable opacity operating limit, you must determine compliance with the opacity limit using Method 9 at 40 CFR part 60, appendix A–4 of this part, based on three 1-hour blocks consisting of ten 6-minute average opacity values, unless you are required to install a continuous opacity monitoring system, consistent with §§ 60.2145 and 60.2165.

(j) You must determine dioxins/furans total mass basis by following the procedures in paragraphs (j)(1) through (3) of this section.

(1) Measure the concentration of each dioxin/furan tetra-through octa-chlorinated isomer emitted using EPA Method 23 at 40 CFR part 60, appendix A–7.

(2) Quantify isomers meeting identification criteria 2, 3, 4, and 5 in Section 5.3.2.5 of Method 23, regardless of whether the isomers meet identification criteria 1 and 7. You must quantify the isomers per Section 9.0 of Method 23. (Note: You may reanalyze the sample aliquot or split to reduce the number of isomers not meeting identification criteria 1 or 7 of Section 5.3.2.5.)

(3) Sum the quantities measured in accordance with paragraphs (j)(1) and (2) of this section to obtain the total concentration of dioxins/furans emitted in terms of total mass basis.

■ 13. Section 60.2140 is amended by revising paragraph (c) to read as follows:

§ 60.2140 By what date must I conduct the initial performance test?

* * * * *

(c) If you commence combusting or recommence combusting a solid waste at an existing combustion unit at any commercial or industrial facility and you have not conducted a performance test consistent with the provisions of this subpart while combusting the solid waste within the 6 months preceding

the reintroduction of that solid waste in the combustion chamber, you must conduct a performance test within 60 days commencing or recommencing solid waste combustion.

■ 14. Section 60.2145 is amended by:
■ a. Revising paragraph (a)(6).
■ b. Revising paragraphs (b) through (d).
■ c. Revising paragraphs (f) through (j).
■ d. Revising paragraph (m)(2).
■ e. Revising paragraph (n)(4).
■ f. Revising paragraphs (s) introductory text, (s)(1) introductory text, and (s)(2).
■ g. Revising paragraph (t) introductory text and (t)(1) introductory text.
■ h. Revising paragraph (u).
■ i. Adding paragraphs (w) and (x).

The revisions and additions read as follows:

§ 60.2145 How do I demonstrate continuous compliance with the emission limitations and the operating limits?

(a) * * *

(6) All monitoring systems necessary for compliance with any newly applicable monitoring requirements which apply as a result of the cessation or commencement or recommencement of combusting solid waste must be installed and operational as of the effective date of the waste-to-fuel, or fuel-to-waste switch. All calibration and drift checks must be performed as of the effective date of the waste-to-fuel, or fuel-to-waste switch. Relative accuracy tests must be performed as of the performance test deadline for PM CEMS (if PM CEMS are elected to demonstrate continuous compliance with the particulate matter emission limits). Relative accuracy testing for other CEMS need not be repeated if that testing was previously performed consistent with Clean Air Act section 112 monitoring requirements or monitoring requirements under this subpart.

(b) You must conduct an annual performance test for the pollutants listed in table 1 of this subpart or tables 5 through 8 of this subpart and opacity for each CISWI unit as required under § 60.2125. The annual performance test must be conducted using the test methods listed in table 1 of this subpart or tables 5 through 8 of this subpart and the procedures in § 60.2125. Annual performance tests are not required if you use CEMS or continuous opacity monitoring systems to determine compliance.

(c) You must continuously monitor the operating parameters specified in § 60.2110 or established under § 60.2115 and as specified in § 60.2170. Use 3-hour block average values to determine compliance (except for baghouse leak detection system alarms) unless a different averaging period is established under § 60.2115 or, for energy recovery units, where the averaging time for each operating parameter is a 30-day rolling, calculated each hour as the average of the previous 720 operating hours. Operation above the established maximum, below the established minimum, or outside the allowable range of operating limits specified in paragraph (a) of this section constitutes a deviation from your operating limits established under this subpart, except during performance tests conducted to determine compliance with the emission and operating limits or to establish new operating limits. Operating limits are confirmed or reestablished during performance tests.

(d) You must burn only the same types of waste and fuels used to establish subcategory applicability (for energy recovery units) and operating limits during the performance test.

* * * * *

(f) For energy recovery units, you must conduct an annual performance test for opacity (except where particulate matter CEMS or continuous opacity monitoring systems are used are used) and the pollutants listed in table 6 of this subpart.

(g) You may elect to demonstrate continuous compliance with the carbon monoxide emission limit using a carbon monoxide CEMS according to the following requirements:

(1) You must measure emissions according to § 60.13 to calculate 1-hour arithmetic averages, corrected to 7 percent oxygen. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. You must demonstrate initial compliance with the carbon monoxide emissions limit using a 30-day rolling average of these 1-hour arithmetic average emission concentrations, including CEMS data during startup and shutdown as defined in this subpart, calculated using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7 of this part.

(2) Operate the carbon monoxide CEMS in accordance with the requirements of performance specification 4A of appendix B of this part and quality assurance procedure 1 of appendix F of this part.

(h) Coal and liquid/gas energy recovery units with average annual heat input rates greater than or equal to 250 MMBtu/hr may elect to demonstrate continuous compliance with the particulate matter emissions limit using a particulate matter CEMS according to the procedures in § 60.2165(n) instead of the particulate matter continuous parameter monitoring system (CPMS) specified in § 60.2145. Coal and liquid/gas energy recovery units with annual average heat input rates less than 250 MMBtu/hr, incinerators, and small remote incinerators may also elect to demonstrate compliance using a particulate matter CEMS according to the procedures in § 60.2165(n) instead of particulate matter testing with EPA Method 5 at 40 CFR part 60, appendix A–3 and, if applicable, the continuous opacity monitoring requirements in paragraph (i) of this section.

(i) For energy recovery units with annual average heat input rates greater than or equal to 10 MMBtu/hour and less than 250 MMBtu/hr, you must install, operate, certify and maintain a continuous opacity monitoring system (COMS) according to the procedures in § 60.2165.

(j) For waste-burning kilns, you must conduct an annual performance test for cadmium, lead, dioxins/furans and hydrogen chloride as listed in table 7 of this subpart. You must determine compliance with hydrogen chloride using a hydrogen chloride CEMS if you do not use an acid gas wet scrubber or dry scrubber. You must determine compliance with nitrogen oxides, sulfur dioxide, and carbon monoxide using CEMS. You must determine compliance with particulate matter using CPMS. You must determine compliance with the mercury emissions limit using a mercury CEMS according to the following requirements:

(1) Operate a CEMS system in accordance with performance specification 12A of 40 CFR part 60, appendix B or a sorbent trap based integrated monitor in accordance with performance specification 12B of 40 CFR part 60, appendix B. The duration of the performance test must be a calendar month. For each calendar month in which the waste-burning kiln operates, hourly mercury concentration data, and stack gas volumetric flow rate data must be obtained. You must demonstrate compliance with the mercury emissions limit using a 30-day rolling average of these 1-hour mercury concentrations, including CEMS data during startup and shutdown as defined in this subpart, calculated using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7 of this part. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content.

(2) Owners or operators using a mercury CEMS must install, operate,

calibrate, and maintain an instrument for continuously measuring and recording the mercury mass emissions rate to the atmosphere according to the requirements of performance specifications 6 and 12A of 40 CFR part 60, appendix B, and quality assurance procedure 6 of 40 CFR part 60, appendix F.

(3) The owner or operator of a waste-burning kiln must demonstrate initial compliance by operating a mercury CEMS while the raw mill of the in-line kiln/raw mill is operating under normal conditions and including at least one period when the raw mill is off.

* * * * *

(m) * * *

(2) Use a flow sensor with a measurement sensitivity at full scale of no greater than 2 percent.

* * * * *

(n) * * *

(4) Perform checks at the frequency outlined in your site-specific monitoring plan to ensure pressure measurements are not obstructed (e.g., check for pressure tap pluggage daily).

* * * * *

(s) For facilities using a CEMS to demonstrate compliance with the sulfur dioxide emission limit, compliance with the sulfur dioxide emission limit may be demonstrated by using the CEMS specified in § 60.2165 to measure sulfur dioxide. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. You must calculate a 30-day rolling average of the 1-hour arithmetic average emission concentrations, including CEMS data during startup and shutdown as defined in this subpart, calculated using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, Appendix A–7 of this part. The sulfur dioxide CEMS must be operated according to performance specification 2 in appendix B of this part and must follow the procedures and methods specified in this paragraph (s). For sources that have actual inlet emissions less than 100 parts per million dry volume, the relative accuracy criterion for inlet sulfur dioxide CEMS should be no greater than 20 percent of the mean value of the reference method test data in terms of the units of the emission standard, or 5 parts per million dry volume absolute value of the mean difference between the reference method and the CEMS, whichever is greater.

(1) During each relative accuracy test run of the CEMS required by performance specification 2 in appendix B of this part, collect sulfur dioxide and oxygen (or carbon dioxide) data concurrently (or within a 30- to 60-minute period) with both the CEMS and the test methods specified in paragraphs (s)(1)(i) and (ii) of this section.

* * * * *

(2) The span value of the CEMS at the inlet to the sulfur dioxide control device must be 125 percent of the maximum estimated hourly potential sulfur dioxide emissions of the unit subject to this rule. The span value of the CEMS at the outlet of the sulfur dioxide control device must be 50 percent of the maximum estimated hourly potential sulfur dioxide emissions of the unit subject to this rule.

* * * * *

(t) For facilities using a CEMS to demonstrate continuous compliance with the nitrogen oxides emission limit, compliance with the nitrogen oxides emission limit may be demonstrated by using the CEMS specified in § 60.2165 to measure nitrogen oxides. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. You must calculate a 30-day rolling average of the 1-hour arithmetic average emission concentrations, including CEMS data during startup and shutdown as defined in this subpart, using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7 of this part. The nitrogen oxides CEMS must be operated according to performance specification 2 in appendix B of this part and must follow the procedures and methods specified in paragraphs (t)(1) through (5) of this section.

(1) During each relative accuracy test run of the CEMS required by performance specification 2 of appendix B of this part, collect nitrogen oxides and oxygen (or carbon dioxide) data concurrently (or within a 30- to 60-minute period) with both the CEMS and the test methods specified in paragraphs (t)(1)(i) and (ii) of this section.

* * * * *

(u) For facilities using a CEMS to demonstrate continuous compliance with any of the emission limits of this subpart, you must complete the following:

(1) Demonstrate compliance with the appropriate emission limit(s) using a 30-day rolling average of 1-hour arithmetic average emission concentrations, including CEMS data during startup and shutdown as defined in this subpart, calculated using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7 of this part. CEMS data during startup and shutdown, as defined in the subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content.

(2) Operate all CEMS in accordance with the applicable procedures under appendices B and F of this part.

* * * * *

(w) For energy recovery units with a design heat input capacity of 100 MMBtu per hour or greater that do not use a carbon monoxide CEMS, you must install, operate, and maintain a oxygen analyzer system as defined in § 60.2265 according to the procedures in paragraphs (w)(1) through (4) of this section.

(1) The oxygen analyzer system must be installed by the initial performance test date specified in § 60.2675.

(2) You must operate the oxygen trim system within compliance with paragraph (w)(3) of this section at all times.

(3) You must maintain the oxygen level such that the 30-day rolling average that is established as the operating limit for oxygen is not below the lowest hourly average oxygen concentration measured during the most recent CO performance test.

(4) You must calculate and record a 30-day rolling average oxygen concentration using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 of Appendix A–7 of this part.

(x) For energy recovery units with annual average heat input rates greater than or equal to 250 MMBtu/hour and waste-burning kilns, you must install, calibrate, maintain, and operate a PM CPMS and record the output of the system as specified in paragraphs (x)(1) through (8) of this section. For other energy recovery units, you may elect to use PM CPMS operated in accordance with this section. PM CPMS are suitable in lieu of using other CMS for monitoring PM compliance (e.g., bag leak detectors, ESP secondary power, PM scrubber pressure).

(1) Install, calibrate, operate, and maintain your PM CPMS according to the procedures in your approved site-specific monitoring plan developed in accordance with § 60.2145(l) and (x)(1)(i) through (iii) of this section.

(i) The operating principle of the PM CPMS must be based on in-stack or extractive light scatter, light scintillation, beta attenuation, or mass accumulation detection of the exhaust gas or representative sample. The reportable measurement output from the PM CPMS must be expressed as milliamps.

(ii) The PM CPMS must have a cycle time (i.e., period required to complete sampling, measurement, and reporting

for each measurement) no longer than 60 minutes.

(iii) The PM CPMS must be capable of detecting and responding to particulate matter concentrations of no greater than 0.5 mg/actual cubic meter.

(2) During the initial performance test or any such subsequent performance test that demonstrates compliance with the PM limit, you must adjust the site-specific operating limit in accordance with the results of the performance test according to the procedures specified in § 60.2110.

(3) Collect PM CPMS hourly average output data for all energy recovery unit or waste-burning kiln operating hours. Express the PM CPMS output as milliamps.

(4) Calculate the arithmetic 30-day rolling average of all of the hourly average PM CPMS output collected during all energy recovery unit or waste-burning kiln operating hours data (milliamps).

(5) You must collect data using the PM CPMS at all times the energy recovery unit or waste-burning kiln is operating and at the intervals specified in paragraph (x)(1)(ii) of this section, except for periods of monitoring system malfunctions, repairs associated with monitoring system malfunctions, required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments), and any scheduled maintenance as defined in your site-specific monitoring plan.

(6) You must use all the data collected during all energy recovery unit or waste-burning kiln operating hours in assessing the compliance with your operating limit except:

(i) Any data collected during monitoring system malfunctions, repairs associated with monitoring system malfunctions, or required monitoring system quality assurance or quality control activities conducted during monitoring system malfunctions are not used in calculations (report any such periods in your annual deviation report);

(ii) Any data collected during periods when the monitoring system is out of control as specified in your site-specific monitoring plan, repairs associated with periods when the monitoring system is out of control, or required monitoring system quality assurance or quality control activities conducted during out-of-control periods are not used in calculations (report emissions or operating levels and report any such periods in your annual deviation report);

(iii) Any PM CPMS data recorded during periods of CEMS data during startup and shutdown, as defined in this subpart.

(7) You must record and make available upon request results of PM CPMS system performance audits, as well as the dates and duration of periods from when the PM CPMS is out of control until completion of the corrective actions necessary to return the PM CPMS to operation consistent with your site-specific monitoring plan.

(8) For any deviation of the 30-day rolling average PM CPMS average value from the established operating parameter limit, you must:

(i) Within 48 hours of the deviation, visually inspect the air pollution control device;

(ii) If inspection of the air pollution control device identifies the cause of the deviation, take corrective action as soon as possible and return the PM CPMS measurement to within the established value; and

(iii) Within 30 days of the deviation or at the time of the annual compliance test, whichever comes first, conduct a PM emissions compliance test to determine compliance with the PM emissions limit and to verify. Within 45 days of the deviation, you must re-establish the CPMS operating limit. You are not required to conduct additional testing for any deviations that occur between the time of the original deviation and the PM emissions compliance test required under this paragraph.

(iv) PM CPMS deviations leading to more than four required performance tests in a 12-month process operating period (rolling monthly) constitute a violation of this subpart.

■ 15. Section 60.2165 is amended by:
■ a. Revising paragraph (c).
■ b. Revising paragraphs (g) through (k).
■ c. Revising paragraphs (l)(1) and (2).
■ d. Revising paragraph (m) introductory text.
■ e. Revising paragraph (n) introductory text.
■ f. Removing paragraph (n)(14).
■ g. Revising paragraphs (n)(6), (n)(7), (n)(9) through (n)(11), (n)(12) introductory text, and (n)(12)(ii).
■ h. Revising paragraphs (o)(1) and (2).
■ i. Adding paragraphs (q), (r), and (s).

The revisions and additions read as follows:

§ 60.2165 What monitoring equipment must I install and what parameters must I monitor?

* * * * *

(c) If you are using something other than a wet scrubber, activated carbon, selective non-catalytic reduction, an electrostatic precipitator, or a dry scrubber to comply with the emission limitations under § 60.2105, you must install, calibrate (to the manufacturers' specifications), maintain, and operate the equipment necessary to monitor compliance with the site-specific operating limits established using the procedures in § 60.2115.

* * * * *

(g) For waste-burning kilns not equipped with a wet scrubber or dry scrubber, in place of hydrogen chloride testing with EPA Method 321 at 40 CFR part 63, appendix A, an owner or operator must install, calibrate, maintain, and operate a CEMS for monitoring hydrogen chloride emissions discharged to the atmosphere and record the output of the system. To demonstrate continuous compliance with the hydrogen chloride emissions limit for units other than waste-burning kilns not equipped with a wet scrubber or dry scrubber, a facility may substitute use of a hydrogen chloride CEMS for conducting the hydrogen chloride annual performance test, monitoring the minimum hydrogen chloride sorbent flow rate, monitoring the minimum scrubber liquor pH, and monitoring minimum injection rate.

(h) To demonstrate continuous compliance with the particulate matter emissions limit, a facility may substitute use of a particulate matter CEMS for conducting the PM annual performance test and using other CMS for monitoring PM compliance (e.g., bag leak detectors, ESP secondary power, PM scrubber pressure).

(i) To demonstrate continuous compliance with the dioxin/furan emissions limit, a facility may substitute use of a continuous automated sampling system for the dioxin/furan annual performance test. You must record the output of the system and analyze the sample according to EPA Method 23 at 40 CFR part 60, appendix A–7 of this part. This option to use a continuous automated sampling system takes effect on the date a final performance specification applicable to dioxin/furan from continuous monitors is published in the **Federal Register**. The owner or operator who elects to continuously sample dioxin/furan emissions instead of sampling and testing using EPA Method 23 at 40 CFR part 60, appendix A–7 must install, calibrate, maintain, and operate a continuous automated sampling system and must comply with the requirements specified in § 60.58b(p) and (q). A facility may substitute continuous dioxin/furan monitoring for the minimum sorbent flow rate, if activated carbon sorbent

injection is used solely for compliance with the dioxin/furan emission limit.

(j) To demonstrate continuous compliance with the mercury emissions limit, a facility may substitute use of a continuous automated sampling system for the mercury annual performance test. You must record the output of the system and analyze the sample at set intervals using any suitable determinative technique that can meet performance specification 12B. The owner or operator who elects to continuously sample mercury emissions instead of sampling and testing using EPA Reference Method 29 or 30B at 40 CFR part 60, appendix A–8 of this part, ASTM D6784–02 (Reapproved 2008) (incorporated by reference, see § 60.17), or an approved alternative method for measuring mercury emissions, must install, calibrate, maintain, and operate a continuous automated sampling system and must comply with performance specification 12A and quality assurance procedure 5, as well as the requirements specified in § 60.58b(p) and (q). A facility may substitute continuous mercury monitoring for the minimum sorbent flow rate, if activated carbon sorbent injection is used solely for compliance with the mercury emission limit.

(k) To demonstrate continuous compliance with the nitrogen oxides emissions limit, a facility may substitute use of a CEMS for the nitrogen oxides annual performance test to demonstrate compliance with the nitrogen oxides emissions limits and monitoring the charge rate, secondary chamber temperature, and reagent flow for selective noncatalytic reduction, if applicable.

(1) Install, calibrate, maintain, and operate a CEMS for measuring nitrogen oxides emissions discharged to the atmosphere and record the output of the system. The requirements under performance specification 2 of appendix B of this part, the quality assurance procedure one of appendix F of this part and the procedures under § 60.13 must be followed for installation, evaluation, and operation of the CEMS.

(2) Following the date that the initial performance test for nitrogen oxides is completed or is required to be completed under § 60.2125, compliance with the emission limit for nitrogen oxides required under § 60.52b(d) must be determined based on the 30-day rolling average of the hourly emission concentrations using CEMS outlet data. The 1-hour arithmetic averages must be expressed in parts per million by volume corrected to 7 percent oxygen (dry basis) and used to calculate the 30-day rolling average concentrations. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

(l) * * *

(1) Install, calibrate, maintain, and operate a CEMS for measuring sulfur dioxide emissions discharged to the atmosphere and record the output of the system. The requirements under performance specification 2 of appendix B of this part, the quality assurance requirements of procedure one of appendix F of this part and procedures under § 60.13 must be followed for installation, evaluation, and operation of the CEMS.

(2) Following the date that the initial performance test for sulfur dioxide is completed or is required to be completed under § 60.2125, compliance with the sulfur dioxide emission limit may be determined based on the 30-day rolling average of the hourly arithmetic average emission concentrations using CEMS outlet data. The 1-hour arithmetic averages must be expressed in parts per million corrected to 7 percent oxygen (dry basis) and used to calculate the 30-day rolling average emission concentrations. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

(m) For energy recovery units over 10 MMBtu/hr but less than 250 MMBtu/hr annual average heat input rates that do not use a wet scrubber, fabric filter with bag leak detection system, or particulate matter CEMS, you must install, operate, certify, and maintain a continuous opacity monitoring system according to the procedures in paragraphs (m)(1) through (5) of this section by the compliance date specified in § 60.2105. Energy recovery units that use a CEMS to demonstrate initial and continuing compliance according to the procedures in § 60.2165(n) are not required to install a continuous opacity monitoring system and must perform the annual performance tests for the opacity consistent with § 60.2145(f).

* * * * *

(n) For coal and liquid/gas energy recovery units, incinerators, and small remote incinerators, an owner or operator may elect to install, calibrate, maintain, and operate a CEMS for monitoring particulate matter emissions discharged to the atmosphere and record the output of the system. The owner or operator of an affected facility who continuously monitors particulate matter emissions instead of conducting performance testing using EPA Method 5 at 40 CFR part 60, appendix A–3 or, as applicable, monitor with a particulate matter CPMS according to paragraph (r) of this section, must install, calibrate, maintain, and operate a CEMS and must comply with the requirements specified in paragraphs (n)(1) through (13) of this section.

* * * * *

(6) The owner or operator of an affected facility must conduct an initial performance test for particulate matter emissions as required under § 60.2125. Compliance with the particulate matter emission limit, if PM CEMS are elected for demonstrating compliance, must be determined by using the CEMS specified in this paragraph (n) to measure particulate matter. You must calculate a 30-day rolling average of 1-hour arithmetic average emission concentrations, including CEMS data during startup and shutdown, as defined in this subpart, using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7.

(7) Compliance with the particulate matter emission limit must be determined based on the 30-day rolling average calculated using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7 from the 1-hour arithmetic average CEMS outlet data.

* * * * *

(9) The 1-hour arithmetic averages required under paragraph (n)(7) of this section must be expressed in milligrams per dry standard cubic meter corrected to 7 percent oxygen (dry basis) and must be used to calculate the 30-day rolling average emission concentrations. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

(10) All valid CEMS data must be used in calculating average emission concentrations even if the minimum CEMS data requirements of paragraph (n)(8) of this section are not met.

(11) The CEMS must be operated according to performance specification 11 in appendix B of this part.

(12) During each relative accuracy test run of the CEMS required by performance specification 11 in appendix B of this part, particulate matter and oxygen (or carbon dioxide) data must be collected concurrently (or

within a 30- to 60-minute period) by both the CEMS and the following test methods.

* * * * *

(ii) For oxygen (or carbon dioxide), EPA Reference Method 3A or 3B, as applicable, must be used.

* * * * *

(o) * * *

(1) Install, calibrate, maintain, and operate a CEMS for measuring carbon monoxide emissions discharged to the atmosphere and record the output of the system. The requirements under performance specification 4B of appendix B of this part, the quality assurance procedure 1 of appendix F of this part and the procedures under § 60.13 must be followed for installation, evaluation, and operation of the CEMS.

(2) Following the date that the initial performance test for carbon monoxide is completed or is required to be completed under § 60.2140, compliance with the carbon monoxide emission limit may be determined based on the 30-day rolling average of the hourly arithmetic average emission concentrations, including CEMS data during startup and shutdown as defined in this subpart, using CEMS outlet data. Except for CEMS data during startup and shutdown, as defined in this subpart, the 1-hour arithmetic averages must be expressed in parts per million corrected to 7 percent oxygen (dry basis) and used to calculate the 30-day rolling average emission concentrations. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

* * * * *

(q) For energy recovery units with a design heat input capacity of 100 MMBtu per hour or greater that do not use a carbon monoxide CEMS, you must install, operate, and maintain a oxygen analyzer system as defined in § 60.2265 according to the procedures in paragraphs (q)(1) through (4) of this section.

(1) The oxygen analyzer system must be installed by the initial performance test date specified in § 60.2675.

(2) You must operate the oxygen trim system within compliance with paragraph (q)(3) of this section at all times.

(3) You must maintain the oxygen level such that the 30-day rolling average that is established as the operating limit for oxygen according to paragraph (q)(4) or this section is not below the lowest hourly average oxygen concentration measured during the most recent CO performance test.

(4) You must calculate and record a 30-day rolling average oxygen concentration using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 of Appendix A–7 of this part.

(r) For energy recovery units with annual average heat input rates greater than or equal to 250 MMBtu/hour and waste-burning kilns, you must install, calibrate, maintain, and operate a PM CPMS and record the output of the system as specified in paragraphs (r)(1) through (8) of this section. If you elect to use a particulate matter CEMS as specified in paragraph (n) of this section, you are not required to use a PM CPMS to monitor particulate matter emissions. For other energy recovery units, you may elect to use PM CPMS operated in accordance with this section. PM CPMS are suitable in lieu of using other CMS for monitoring PM compliance (e.g., bag leak detectors, ESP secondary power, PM scrubber pressure).

(1) Install, calibrate, operate, and maintain your PM CPMS according to the procedures in your approved site-specific monitoring plan developed in accordance with § 60.2145(l) and (r)(1)(i) through (iii) of this section.

(i) The operating principle of the PM CPMS must be based on in-stack or extractive light scatter, light scintillation, beta attenuation, or mass accumulation detection of PM in the exhaust gas or representative sample. The reportable measurement output from the PM CPMS must be expressed as milliamps.

(ii) The PM CPMS must have a cycle time (i.e., period required to complete sampling, measurement, and reporting for each measurement) no longer than 60 minutes.

(iii) The PM CPMS must be capable of detecting and responding to particulate matter concentrations of no greater than 0.5 mg/actual cubic meter.

(2) During the initial performance test or any such subsequent performance test that demonstrates compliance with the PM limit, you must adjust the site-specific operating limit in accordance with the results of the performance test according to the procedures specified in § 60.2110.

(3) Collect PM CPMS hourly average output data for all energy recovery unit or waste-burning kiln operating hours. Express the PM CPMS output as milliamps.

(4) Calculate the arithmetic 30-day rolling average of all of the hourly average PM CPMS output collected during all energy recovery unit or waste-burning kiln operating hours data (milliamps).

(5) You must collect data using the PM CPMS at all times the energy recovery unit or waste-burning kiln is operating and at the intervals specified in paragraph (r)(1)(ii) of this section, except for periods of monitoring system malfunctions, repairs associated with monitoring system malfunctions, required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments), and any scheduled maintenance as defined in your site-specific monitoring plan.

(6) You must use all the data collected during all energy recovery unit or waste-burning kiln operating hours in assessing the compliance with your operating limit except:

(i) Any data collected during monitoring system malfunctions, repairs associated with monitoring system malfunctions, or required monitoring system quality assurance or quality control activities conducted during monitoring system malfunctions are not used in calculations (report any such periods in your annual deviation report);

(ii) Any data collected during periods when the monitoring system is out of control as specified in your site-specific monitoring plan, repairs associated with periods when the monitoring system is out of control, or required monitoring system quality assurance or quality control activities conducted during out-of-control periods are not used in calculations (report emissions or operating levels and report any such periods in your annual deviation report);

(iii) Any PM CPMS data recorded during periods of CEMS data during startup and shutdown, as defined in this subpart.

(7) You must record and make available upon request results of PM CPMS system performance audits, as well as the dates and duration of periods from when the PM CPMS is out of control until completion of the corrective actions necessary to return the PM CPMS to operation consistent with your site-specific monitoring plan.

(8) For any deviation of the 30-day rolling average PM CPMS average value from the established operating parameter limit, you must:

(i) Within 48 hours of the deviation, visually inspect the air pollution control device;

(ii) If inspection of the air pollution control device identifies the cause of the deviation, take corrective action as soon as possible and return the PM CPMS

measurement to within the established value; and

(iii) Within 30 days of the deviation or at the time of the annual compliance test, whichever comes first, conduct a PM emissions compliance test to determine compliance with the PM emissions limit and to verify. Within 45 days of the deviation, you must re-establish the CPMS operating limit. You are not required to conduct additional testing for any deviations that occur between the time of the original deviation and the PM emissions compliance test required under this paragraph.

(iv) PM CPMS deviations leading to more than four required performance tests in a 12-month process operating period (rolling monthly) constitute a violation of this subpart.

(s) If you use a dry scrubber to comply with the emission limits of this subpart, you must monitor the injection rate of each sorbent and maintain the 3-hour block averages at or above the operating limits established during the hydrogen chloride performance test.

■ 16. Section 60.2170 is amended by revising paragraph (b) to read as follows:

§ 60.2170 Is there a minimum amount of monitoring data I must obtain?

* * * * *

(b) You may not use data recorded during monitoring system malfunctions or out-of-control periods, repairs associated with monitoring system malfunctions or out-of-control periods, or required monitoring system quality assurance or control activities in calculations used to report emissions or operating levels. You must use all the data collected during all other periods in assessing the operation of the control device and associated control system.

* * * * *

■ 17. Section 60.2175 is amended by:

■ a. Revising the introductory text.

■ b. Revising paragraph (b)(5).

■ c. Revising paragraph (e).

■ d. Revising paragraph (p)(4).

■ e. Adding paragraphs (p)(8) and (p)(9).

■ f. Revising paragraphs (v) and (w).

■ g. Adding paragraph (x).

The revisions and additions read as follows:

§ 60.2175 What records must I keep?

You must maintain the items (as applicable) as specified in paragraphs (a), (b), and (e) through (x) of this section for a period of at least 5 years:

* * * * *

(b) * * *

(5) For affected CISWI units that establish operating limits for controls other than wet scrubbers under § 60.2110(d) through (g) or § 60.2115, you must maintain data collected for all operating parameters used to determine compliance with the operating limits. For energy recovery units using activated carbon injection or a dry scrubber, you must also maintain records of the load fraction and corresponding sorbent injection rate records.

* * * * *

(e) Identification of calendar dates and times for which data show a deviation from the operating limits in table 2 of this subpart or a deviation from other operating limits established under § 60.2110(d) through (g) or § 60.2115 with a description of the deviations, reasons for such deviations, and a description of corrective actions taken.

* * * * *

(p) * * *

(4) All 1-hour average concentrations of carbon monoxide emissions. You must indicate which data are CEMS data during startup and shutdown.

* * * * *

(8) All 1-hour average percent oxygen concentrations.

(9) All 1-hour average PM CPMS readings or particulate matter CEMS outputs.

* * * * *

(v) For operating units that combust non-hazardous secondary materials that have been determined not to be solid waste pursuant to § 241.3(b)(1) of this chapter, you must keep a record which documents how the secondary material meets each of the legitimacy criteria under § 241.3(d)(1). If you combust a fuel that has been processed from a discarded non-hazardous secondary material pursuant to § 241.3(b)(4) of this chapter, you must keep records as to how the operations that produced the fuel satisfies the definition of processing in § 241.2 and each of the legitimacy criteria of § 241.3(d)(1) of this chapter. If the fuel received a non-waste determination pursuant to the petition process submitted under § 241.3(c) of this chapter, you must keep a record that documents how the fuel satisfies the requirements of the petition process. For operating units that combust non-hazardous secondary materials as fuel per § 241.4, you must keep records documenting that the material is a listed non-waste under § 241.4(a).

(w) Records of the criteria used to establish that the unit qualifies as a small power production facility under section 3(17)(C) of the Federal Power Act (16 U.S.C. 796(17)(C)) and that the waste material the unit is proposed to burn is homogeneous.

(x) Records of the criteria used to establish that the unit qualifies as a cogeneration facility under section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)) and that the waste material the unit is proposed to burn is homogeneous.

■ 18. Section 60.2210 is amended by revising paragraph (m) introductory text and paragraph (n) to read as follows:

§ 60.2210 What information must I include in my annual report?

* * * * *

(m) If there were periods during which the continuous monitoring system, including the CEMS, was out of control as specified in paragraph (o) of this section, the annual report must contain the following information for each deviation from an emission or operating limitation occurring for a CISWI unit for which you are using a continuous monitoring system to comply with the emission and operating limitations in this subpart.

* * * * *

(n) If there were periods during which the continuous monitoring system, including the CEMS, was not out of control as specified in paragraph (o) of this section, a statement that there were not periods during which the continuous monitoring system was out of control during the reporting period.

* * * * *

■ 19. Section 60.2235 is revised to read as follows:

§ 60.2235 In what form can I submit my reports?

(a) Submit initial, annual, and deviation reports electronically or in paper format, postmarked on or before the submittal due dates.

(b) Submit results of performance tests and CEMS performance evaluation tests as follows.

(1) Within 60 days after the date of completing each performance test as required by this subpart, you must submit the results of the performance tests required by this subpart to EPA's WebFIRE database by using the Compliance and Emissions Data Reporting Interface (CEDRI) that is accessed through EPA's Central Data Exchange (CDX)(*www.epa.gov/cdx*). Performance test data must be submitted in the file format generated through use of EPA's Electronic Reporting Tool (ERT) (see *http://www.epa.gov/ttn/chief/ert/index.html*). Only data collected using test methods on the ERT Web site are subject to this requirement for submitting reports electronically to WebFIRE. Owners or operators who claim that some of the information being

submitted for performance tests is confidential business information (CBI) must submit a complete ERT file including information claimed to be CBI on a compact disk, flash drive, or other commonly used electronic storage media to EPA. The electronic media must be clearly marked as CBI and mailed to U.S. EPA/OAPQS/CORE CBI Office, Attention: WebFIRE Administrator, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same ERT file with the CBI omitted must be submitted to EPA via CDX as described earlier in this paragraph. At the discretion of the delegated authority, you must also submit these reports, including the confidential business information, to the delegated authority in the format specified by the delegated authority. For any performance test conducted using test methods that are not listed on the ERT Web site, the owner or operator shall submit the results of the performance test in paper submissions to the Administrator.

(2) Within 60 days after the date of completing each CEMS performance evaluation test, as defined in this subpart and required by this subpart, you must submit the relative accuracy test audit (RATA) data electronically into EPA's Central Data Exchange by using CEDRI as mentioned in paragraph (b)(1) of this section. Only RATA pollutants that can be documented with the ERT (as listed on the ERT Web site) are subject to this requirement. For any performance evaluations with no corresponding RATA pollutants listed on the ERT Web site, the owner or operator shall submit the results of the performance evaluation in paper submissions to the Administrator.

■ 20. Section 60.2265 is amended by:

■ a. Adding in alphabetical order definitions for ''30-day rolling average,'' ''Annual heat input,'' ''Average annual heat input rate,'' ''CEMS data during startup and shutdown,'' ''Contained gaseous material,'' ''Continuous emission monitoring system,'' ''Dry scrubber,'' ''Foundry sand thermal reclamation unit,'' ''Load fraction,'' ''Municipal solid waste or municipal type solid waste,'' ''Oxygen analyzer system,'' ''Oxygen trim system,'' ''Responsible official,'' and ''Solid waste.''

■ b. Revising definitions for ''Chemical recovery unit,'' ''Commercial and industrial solid waste incineration (CISWI) unit,'' ''Continuous monitoring system (CMS),'' ''Cyclonic burn barrel,'' ''Energy recovery unit,'' ''Energy recovery unit designed to burn biomass (Biomass),'' ''Incinerator,'' ''Modification or modified CISWI unit,'' ''Process change,'' ''Raw mill,'' ''Small, remote incinerator,'' ''Soil treatment unit,'' ''Solid waste incineration unit,'' ''Space heater,'' and ''Waste-burning kiln.''

■ c. Removing the definition for ''Homogeneous wastes'' and ''Cyclonic barrel burner.''

The revisions and additions read as follows:

§ 60.2265 What definitions must I know?

* * * * *

30-day rolling average means the arithmetic mean of the previous 720 hours of valid operating data. Valid data excludes periods when this unit is not operating. The 720 hours should be consecutive, but not necessarily continuous if operations are intermittent.

* * * * *

Annual heat input means the heat input for the 12 months preceding the compliance demonstration.

* * * * *

Average annual heat input rate means annual heat input divided by the hours of operation for the 12 months preceding the compliance demonstration.

* * * * *

CEMS data during startup and shutdown means the following:

(1) For incinerators, small remote incinerators, and energy recovery units: CEMS data collected during the first hours of a CISWI unit startup from a cold start until waste is fed to the unit and the hours of operation following the cessation of waste material being fed to the CISWI unit during a unit shutdown. For each startup event, the length of time that CEMS data may be claimed as being CEMS data during startup must be 48 operating hours or less. For each shutdown event, the length of time that CEMS data may be claimed as being CEMS data during shutdown must be 24 operating hours or less.

(2) For waste-burning kilns: CEMS data collected during the periods of kiln operation that do not include normal operations. Startup begins when the kiln's induced fan is turned on and continues until continuous feed is introduced into the kiln, at which time the kiln is in normal operating mode. Shutdown begins when feed to the kiln is halted.

Chemical recovery unit means combustion units burning materials to recover chemical constituents or to produce chemical compounds where there is an existing commercial market for such recovered chemical constituents or compounds. The following seven types of units are considered chemical recovery units:

(1) Units burning only pulping liquors (i.e., black liquor) that are reclaimed in a pulping liquor recovery process and reused in the pulping process.

(2) Units burning only spent sulfuric acid used to produce virgin sulfuric acid.

(3) Units burning only wood or coal feedstock for the production of charcoal.

(4) Units burning only manufacturing byproduct streams/residue containing catalyst metals that are reclaimed and reused as catalysts or used to produce commercial grade catalysts.

(5) Units burning only coke to produce purified carbon monoxide that is used as an intermediate in the production of other chemical compounds.

(6) Units burning only hydrocarbon liquids or solids to produce hydrogen, carbon monoxide, synthesis gas, or other gases for use in other manufacturing processes.

(7) Units burning only photographic film to recover silver.

* * * * *

Commercial and industrial solid waste incineration (CISWI) unit means any distinct operating unit of any commercial or industrial facility that combusts, or has combusted in the preceding 6 months, any solid waste as that term is defined in 40 CFR part 241. If the operating unit burns materials other than traditional fuels as defined in § 241.2 that have been discarded, and you do not keep and produce records as required by § 60.2175(v), the operating unit is a CISWI unit. While not all CISWI units will include all of the following components, a CISWI unit includes, but is not limited to, the solid waste feed system, grate system, flue gas system, waste heat recovery equipment, if any, and bottom ash system. The CISWI unit does not include air pollution control equipment or the stack. The CISWI unit boundary starts at the solid waste hopper (if applicable) and extends through two areas: The combustion unit flue gas system, which ends immediately after the last combustion chamber or after the waste heat recovery equipment, if any; and the combustion unit bottom ash system, which ends at the truck loading station or similar equipment that transfers the ash to final disposal. The CISWI unit includes all ash handling systems connected to the bottom ash handling system.

Contained gaseous material means gases that are in a container when that container is combusted.

Continuous emission monitoring system (CEMS) means the total equipment that may be required to meet

the data acquisition and availability requirements of this subpart, used to sample, condition (if applicable), analyze, and provide a record of emissions.

Continuous monitoring system (CMS) means the total equipment, required under the emission monitoring sections in applicable subparts, used to sample and condition (if applicable), to analyze, and to provide a permanent record of emissions or process parameters. A particulate matter continuous parameter monitoring system (PM CPMS) is a type of CMS.

Cyclonic burn barrel means a combustion device for waste materials that is attached to a 55 gallon, open-head drum. The device consists of a lid, which fits onto and encloses the drum, and a blower that forces combustion air into the drum in a cyclonic manner to enhance the mixing of waste material and air. A cyclonic burn barrel is not an incinerator, a waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

* * * * *

Dry scrubber means an add-on air pollution control system that injects dry alkaline sorbent (dry injection) or sprays an alkaline sorbent (spray dryer) to react with and neutralize acid gas in the exhaust stream forming a dry powder material. Sorbent injection systems in fluidized bed boilers and process heaters are included in this definition. A dry scrubber is a dry control system.

* * * * *

Energy recovery unit means a combustion unit combusting solid waste (as that term is defined by the Administrator in 40 CFR part 241) for energy recovery. Energy recovery units include units that would be considered boilers and process heaters if they did not combust solid waste.

Energy recovery unit designed to burn biomass (Biomass) means an energy recovery unit that burns solid waste, biomass, and non-coal solid materials but less than 10 percent coal, on a heat input basis on an annual average, either alone or in combination with liquid waste, liquid fuel or gaseous fuels.

* * * * *

Foundry sand thermal reclamation unit means a type of part reclamation unit that removes coatings that are on foundry sand. A foundry sand thermal reclamation unit is not an incinerator, a waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

Incinerator means any furnace used in the process of combusting solid waste (as that term is defined by the Administrator in 40 CFR part 241) for the purpose of reducing the volume of the waste by removing combustible matter. Incinerator designs include single chamber and two-chamber.

* * * * *

Load fraction means the actual heat input of an energy recovery unit divided by heat input during the performance test that established the minimum sorbent injection rate or minimum activated carbon injection rate, expressed as a fraction (e.g., for 50 percent load the load fraction is 0.5).

* * * * *

Modification or *modified CISWI unit* means a CISWI unit that has been changed later than August 7, 2013 and that meets one of two criteria:

(1) The cumulative cost of the changes over the life of the unit exceeds 50 percent of the original cost of building and installing the CISWI unit (not including the cost of land) updated to current costs (current dollars). To determine what systems are within the boundary of the CISWI unit used to calculate these costs, see the definition of CISWI unit.

(2) Any physical change in the CISWI unit or change in the method of operating it that increases the amount of any air pollutant emitted for which section 129 or section 111 of the Clean Air Act has established standards.

Municipal solid waste or municipal-type solid waste means household, commercial/retail, or institutional waste. Household waste includes material discarded by residential dwellings, hotels, motels, and other similar permanent or temporary housing. Commercial/retail waste includes material discarded by stores, offices, restaurants, warehouses, nonmanufacturing activities at industrial facilities, and other similar establishments or facilities. Institutional waste includes materials discarded by schools, by hospitals (nonmedical), by nonmanufacturing activities at prisons and government facilities, and other similar establishments or facilities. Household, commercial/retail, and institutional waste does include yard waste and refuse-derived fuel. Household, commercial/retail, and institutional waste does not include used oil; sewage sludge; wood pallets; construction, renovation, and demolition wastes (which include railroad ties and telephone poles); clean wood; industrial process or manufacturing wastes; medical waste; or motor vehicles (including motor vehicle parts or vehicle fluff).

* * * * *

Oxygen analyzer system means all equipment required to determine the oxygen content of a gas stream and used to monitor oxygen in the boiler or process heater flue gas, boiler or process heater, firebox, or other appropriate location. This definition includes oxygen trim systems and certified oxygen CEMS. The source owner or operator is responsible to install, calibrate, maintain, and operate the oxygen analyzer system in accordance with the manufacturer's recommendations.

Oxygen trim system means a system of monitors that is used to maintain excess air at the desired level in a combustion device. A typical system consists of a flue gas oxygen and/or carbon monoxide monitor that automatically provides a feedback signal to the combustion air controller.

* * * * *

Process change means any of the following physical or operational changes:

(1) A physical change (maintenance activities excluded) to the CISWI unit which may increase the emission rate of any air pollutant to which a standard applies;

(2) An operational change to the CISWI unit where a new type of non-hazardous secondary material is being combusted;

(3) A physical change (maintenance activities excluded) to the air pollution control devices used to comply with the emission limits for the CISWI unit (e.g., replacing an electrostatic precipitator with a fabric filter);

(4) An operational change to the air pollution control devices used to comply with the emission limits for the affected CISWI unit (e.g., change in the sorbent injection rate used for activated carbon injection).

* * * * *

Raw mill means a ball or tube mill, vertical roller mill or other size reduction equipment, that is not part of an in-line kiln/raw mill, used to grind feed to the appropriate size. Moisture may be added or removed from the feed during the grinding operation. If the raw mill is used to remove moisture from feed materials, it is also, by definition, a raw material dryer. The raw mill also includes the air separator associated with the raw mill.

* * * * *

Responsible official means one of the following:

(1) For a corporation: A president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized

representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

(i) The facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars); or

(ii) The delegation of authority to such representatives is approved in advance by the permitting authority;

(2) For a partnership or sole proprietorship: A general partner or the proprietor, respectively;

(3) For a municipality, State, Federal, or other public agency: Either a principal executive officer or ranking elected official. For the purposes of this part, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a Regional Administrator of EPA); or

(4) For affected facilities:

(i) The designated representative in so far as actions, standards, requirements, or prohibitions under Title IV of the Clean Air Act or the regulations promulgated thereunder are concerned; or

(ii) The designated representative for any other purposes under part 60.

* * * * *

Small, remote incinerator means an incinerator that combusts solid waste (as that term is defined by the Administrator in 40 CFR part 241) and combusts 3 tons per day or less solid waste and is more than 25 miles driving distance to the nearest municipal solid waste landfill.

Soil treatment unit means a unit that thermally treats petroleum–contaminated soils for the sole purpose of site remediation. A soil treatment unit may be direct-fired or indirect fired. A soil treatment unit is not an incinerator, a waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

Solid waste means the term solid waste as defined in 40 CFR 241.2.

Solid waste incineration unit means a distinct operating unit of any facility which combusts any solid waste (as that term is defined by the Administrator in 40 CFR part 241) material from commercial or industrial establishments or the general public (including single and multiple residences, hotels and motels). Such term does not include incinerators or other units required to have a permit under section 3005 of the Solid Waste Disposal Act. The term ''solid waste incineration unit'' does not include:

(1) Materials recovery facilities (including primary or secondary smelters) which combust waste for the primary purpose of recovering metals;

(2) Qualifying small power production facilities, as defined in section 3(17)(C) of the Federal Power Act (16 U.S.C. 769(17)(C)), or qualifying cogeneration facilities, as defined in section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)), which burn homogeneous waste (such as units which burn tires or used oil, but not including refuse-derived fuel) for the production of electric energy or in the case of qualifying cogeneration facilities which burn homogeneous waste for the production of electric energy and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes; or

(3) Air curtain incinerators provided that such incinerators only burn wood wastes, yard wastes, and clean lumber and that such air curtain incinerators comply with opacity limitations to be established by the Administrator by rule.

Space heater means a unit that meets the requirements of 40 CFR 279.23. A space heater is not an incinerator, a waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

* * * * *

Waste-burning kiln means a kiln that is heated, in whole or in part, by combusting solid waste (as that term is defined by the Administrator in 40 CFR part 241). Secondary materials used in Portland cement kilns shall not be deemed to be combusted unless they are introduced into the flame zone in the hot end of the kiln or mixed with the precalciner fuel.

* * * * *

■ 21. Table 1 to subpart CCCC of part 60 is amended by:

■ a. Revising the table heading.

■ b. Revising the entry for ''Carbon monoxide''.

■ c. Revising the entry for ''Dioxin/Furan (toxic equivalency basis)''.

■ d. Revising the entry for ''Hydrogen Chloride''.

■ e. Revising the entry for ''Nitrogen Oxides''.

■ f. Revising the entry for ''Sulfur Dioxide''.

The revisions read as follows:

TABLE 1 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR CISWI UNITS FOR WHICH CONSTRUCTION IS COMMENCED AFTER NOVEMBER 30, 1999, BUT NO LATER THAN JUNE 4, 2010, OR FOR WHICH MODIFICATION OR RECONSTRUCTION IS COMMENCED ON OR AFTER JUNE 1, 2001, BUT NO LATER THAN AUGUST 7, 2013

For the air pollutant	You must meet this emission limitation [a]	Using this averaging time	And determining compliance using this method
*	*	*	*
Carbon monoxide	157 parts per million by dry volume.	3-run average (1 hour minimum sample time per run)	Performance test (Method 10 at 40 CFR part 60, appendix A–4).
Dioxin/Furan (toxic equivalency basis).	0.41 nanograms per dry standard cubic meter.	3-run average (collect a minimum volume of 4 dry standard cubic meters per run).	Performance test (Method 23 of appendix A–7 of this part).
Hydrogen chloride ...	62 parts per million by dry volume.	3-run average (For Method 26, collect a minimum volume of 120 liters per run. For Method 26A, collect a minimum volume of 1 dry standard cubic meter per run).	Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8).
*	*	*	*
Nitrogen Oxides	388 parts per million by dry volume.	3-run average (for Method 7E, 1 hour minimum sample time per run).	Performance test (Method 7 or 7E at 40 CFR part 60, appendix A–4).

TABLE 1 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR CISWI UNITS FOR WHICH CONSTRUCTION IS COMMENCED AFTER NOVEMBER 30, 1999, BUT NO LATER THAN JUNE 4, 2010, OR FOR WHICH MODIFICATION OR RECONSTRUCTION IS COMMENCED ON OR AFTER JUNE 1, 2001, BUT NO LATER THAN AUGUST 7, 2013—Continued

For the air pollutant	You must meet this emission limitation [a]	Using this averaging time	And determining compliance using this method
*	* *	* * *	*
Sulfur Dioxide	20 parts per million by dry volume.	3-run average (For Method 6, collect a minimum volume of 20 liters per run. For Method 6C, collect sample for a minimum duration of 1 hour per run).	Performance test (Method 6 or 6C at 40 CFR part 60, appendix A–4).

[a] All emission limitations (except for opacity) are measured at 7 percent oxygen, dry basis at standard conditions.
[b] Incorporated by reference, *see* § 60.17.

* * * * *

■ 22. Table 2 to subpart CCCC of part 60 is amended by revising footnote a to read as follows:

Table 2 to Subpart CCCC of Part 60—Operating Limits for Wet Scrubbers

* * * * *

[a] Calculated each hour as the average of the previous 3 operating hours.

■ 23. Table 5 to subpart CCCC of part 60 is amended by:

■ a. Revising the table heading.

■ b. Revising the entry for ''Carbon Monoxide''.

■ c. Revising the entry for ''Dioxin/furan (Total Mass Basis)''.

■ d. Revising the entry for ''Hydrogen chloride''.

■ e. Revising the entry for ''Lead''.

■ f. Revising the entry for ''Mercury''.

■ g. Revising the entry for ''Nitrogen Oxides''.

■ h. Revising the entry for ''Sulfur dioxide''.

■ i. Adding footnote c.

The revisions and addition read as follows:

TABLE 5 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR INCINERATORS THAT COMMENCED CONSTRUCTION AFTER JUNE 4, 2010, OR THAT COMMENCED RECONSTRUCTION OR MODIFICATION AFTER AUGUST 7, 2013

For the air pollutant	You must meet this emission limitation [a]	Using this averaging time	And determining compliance using this method
*	* *	* * *	*
Carbon monoxide	17 parts per million by dry volume.	3-run average (1 hour minimum sample time per run)	Performance test (Method 10 at 40 CFR part 60, appendix A–4).
Dioxin/furan (Total Mass Basis).	0.58 nanograms per dry standard cubic meter [c].	3-run average (collect a minimum volume of 4 dry standard cubic meters per run).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
*	* *	* * *	*
Hydrogen chloride ...	0.091 parts per million by dry volume.	3-run average (For Method 26, collect a minimum volume of 360 liters per run. For Method 26A, collect a minimum volume of 3 dry standard cubic meters per run).	Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8).
Lead	0.015 milligrams per dry standard cubic meter [c].	3-run average (collect a minimum volume of 4 dry standard cubic meters per run).	Performance test (Method 29 of appendix A–8 at 40 CFR part 60). Use ICPMS for the analytical finish.
Mercury	0.00084 milligrams per dry standard cubic meter [c].	3-run average (collect enough volume to meet a detection limit data quality objective of 0.03 ug/dry standard cubic meter).	Performance test (Method 29 or 30B at 40 CFR part 60, appendix A–8) or ASTM D6784–02 (Reapproved 2008).[b]
Nitrogen Oxides	23 parts per million dry volume.	3-run average (for Method 7E, 1 hour minimum sample time per run).	Performance test (Method 7 or 7E at 40 CFR part 60, appendix A–4).
*	* *	* * *	*
Sulfur dioxide	11 parts per million dry volume.	3-run average (1 hour minimum sample time per run)	Performance test (Method 6 or 6C at 40 CFR part 60, appendix A–4).
*	* *	* * *	*

[a] All emission limitations are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the Total Mass Limit or the toxic equivalency basis limit.
[b] Incorporated by reference, *see* § 60.17.
[c] If you are conducting stack tests to demonstrate compliance and your performance tests for this pollutant for at least 2 consecutive years show that your emissions are at or below this limit, you can skip testing according to § 60.2155 if all of the other provisions of § 60.2155 are met. For all other pollutants that do not contain a footnote "c", your performance tests for this pollutant for at least 2 consecutive years must show that your emissions are at or below 75 percent of this limit in order to qualify for skip testing.

■ 24. Table 6 to subpart CCCC of part 60 is amended by:

■ a. Revising the table heading.

■ b. Revising the entry for ''Cadmium''.

■ c. Revising the entry for ''Carbon monoxide''.

■ d. Revising the entry for ''Dioxins/furans (Total Mass Basis)''.

■ e. Revising the entry for ''Dioxins/furans (toxic equivalency basis)''.

■ f. Revising the entry for ''Hydrogen chloride''.

■ g. Revising the entry for ''Lead''.

■ h. Revising the entry for ''Mercury''.

■ i. Revising the entry for ''Oxides of nitrogen''.

■ j. Revising the entry for ''Particulate matter (filterable)''.

■ k. Revising the entry for ''Sulfur dioxide''.

■ l. Adding footnote c.

The revisions and addition read as follows:

TABLE 6 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR ENERGY RECOVERY UNITS THAT COMMENCED CONSTRUCTION AFTER JUNE 4, 2010, OR THAT COMMENCED RECONSTRUCTION OR MODIFICATION AFTER AUGUST 7, 2013

For the air pollutant	You must meet this emission limitation [a]		Using this averaging time	And determining compliance using this method
	Liquid/Gas	Solids		
Cadmium	0.023 milligrams per dry standard cubic meter.	Biomass—0.0014 milligrams per dry standard cubic meter. [c] Coal—0.0095 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 4 dry standard cubic meters per run).	Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish.
Carbon monoxide	35 parts per million dry volume.	Biomass—240 parts per million dry volume. Coal—95 parts per million dry volume.	3-run average (1 hour minimum sample time per run).	Performance test (Method 10 at 40 CFR part 60, appendix A–4).
Dioxin/furans (Total Mass Basis)	No Total Mass Basis limit, must meet the toxic equivalency basis limit below.	Biomass—0.52 nanograms per dry standard cubic meter. [c] Coal—5.1 nanograms per dry standard cubic meter. [c]	3-run average (collect a minimum volume of 4 dry standard cubic meters).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Dioxins/furans (toxic equivalency basis).	0.093 nanograms per dry standard cubic meter. [c]	Biomass—0.076 nanograms per dry standard cubic meter. [c] Coal—0.075 nanograms per dry standard cubic meter. [c]	3-run average (collect a minimum volume of 4 dry standard cubic meters per run).	Performance test (Method 23 of appendix A–7 of this part).
Hydrogen chloride	14 parts per million dry volume.	Biomass—0.20 parts per million dry volume. Coal—13 parts per million dry volume.	3-run average (For Method 26, collect a minimum volume of 360 liters per run. For Method 26A, collect a minimum volume of 3 dry standard cubic meters per run).	Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8).
Lead	0.096 milligrams per dry standard cubic meter.	Biomass—0.014 milligrams per dry standard cubic meter. [c] Coal—0.14 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 4 dry standard cubic meters per run).	Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish.
Mercury	0.00056 milligrams per dry standard cubic meter. [c]	Biomass—0.0022 milligrams per dry standard cubic meter. Coal—0.016 milligrams per dry standard cubic meter.	3-run average (collect enough volume to meet an in-stack detection limit data quality objective of 0.03 ug/dscm).	Performance test (Method 29 or 30B at 40 CFR part 60, appendix A–8) or ASTM D6784–02 (Reapproved 2008)b.
Oxides of nitrogen	76 parts per million dry volume.	Biomass—290 parts per million dry volume. Coal—340 parts per million dry volume.	3-run average (for Method 7E, 1 hour minimum sample time per run).	Performance test (Method 7 or 7E at 40 CFR part 60, appendix A–4).

TABLE 6 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR ENERGY RECOVERY UNITS THAT COMMENCED CONSTRUCTION AFTER JUNE 4, 2010, OR THAT COMMENCED RECONSTRUCTION OR MODIFICATION AFTER AUGUST 7, 2013—Continued

For the air pollutant	You must meet this emission limitation [a]		Using this averaging time	And determining compliance using this method
	Liquid/Gas	Solids		
Particulate matter (filterable)	110 milligrams per dry standard cubic meter.	Biomass—5.1 milligrams per dry standard cubic meter. Coal—160 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meter per run).	Performance test (Method 5 or 29 at 40 CFR part 60, appendix A–3 or appendix A–8) if the unit has an annual average heat input rate less than 250 MMBtu/hr; or PM CPMS (as specified in § 60.2145(x)) if the unit has an annual average heat input rate equal to or greater than 250 MMBtu/hr.
Sulfur dioxide	720 parts per million dry volume.	Biomass—7.3 parts per million dry volume. Coal—650 parts per million dry volume.	3-run average (for Method 6, collect a minimum of 60 liters, for Method 6C,1 hour minimum sample time per run).	Performance test (Method 6 or 6C at 40 CFR part 60, appendix A–4).

[a] All emission limitations are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the Total Mass Basis limit or the toxic equivalency basis limit.
[b] Incorporated by reference, *see* § 60.17.
[c] If you are conducting stack tests to demonstrate compliance and your performance tests for this pollutant for at least 2 consecutive years show that your emissions are at or below this limit, you can skip testing according to § 60.2155 if all of the other provisions of § 60.2155 are met. For all other pollutants that do not contain a footnote "c", your performance tests for this pollutant for at least 2 consecutive years must show that your emissions are at or below 75 percent of this limit in order to qualify for skip testing.

■ 25. Table 7 to Subpart CCCC of part 60 is revised to read as follows:

TABLE 7 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR WASTE-BURNING KILNS THAT COMMENCED CONSTRUCTION AFTER JUNE 4, 2010, OR RECONSTRUCTION OR MODIFICATION AFTER AUGUST 7, 2013

For the air pollutant	You must meet this emission limitation [a]	Using this averaging time	And determining compliance using this method
Cadmium	0.0014 milligrams per dry standard cubic meter. [b]	3-run average (collect a minimum volume of 4 dry standard cubic meters per run).	Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish.
Carbon monoxide	90 (long kilns)/190 (preheater/precalciner) parts per million dry volume.	3-run average (1 hour minimum sample time per run).	Performance test (Method 10 at 40 CFR part 60, appendix A–4).
Dioxins/furans (total mass basis)	0.51 nanograms per dry standard cubic meter. [b]	3-run average (collect a minimum volume of 4 dry standard cubic meters per run).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Dioxins/furans (toxic equivalency basis).	0.075 nanograms per dry standard cubic meter. [b]	3-run average (collect a minimum volume of 4 dry standard cubic meters).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Hydrogen chloride	3.0 parts per million dry volume. [b]	3-run average (1 hour minimum sample time per run) or 30-day rolling average if HCl CEMS are used.	Performance test (Method 321 at 40 CFR part 63, appendix A) or HCl CEMS if a wet scrubber or dry scrubber is not used.
Lead	0.014 milligrams per dry standard cubic meter. [b]	3-run average (collect a minimum volume of 4 dry standard cubic meters).	Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish.

TABLE 7 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR WASTE-BURNING KILNS THAT COMMENCED CONSTRUCTION AFTER JUNE 4, 2010, OR RECONSTRUCTION OR MODIFICATION AFTER AUGUST 7, 2013—Continued

For the air pollutant	You must meet this emission limitation [a]	Using this averaging time	And determining compliance using this method
Mercury	0.0037 milligrams per dry standard cubic meter.	30-day rolling average	Mercury CEMS or sorbent trap monitoring system (performance specification 12A or 12B, respectively, of appendix B of this part.)
Oxides of nitrogen	200 parts per million dry volume	30-day rolling average	NOx CEMS (performance specification 2 of appendix B and procedure 1 of appendix F of this part).
Particulate matter (filterable)	2.2 milligrams per dry standard cubic meter.	30-day rolling average	PM CPMS (as specified in § 60.2145(x)).
Sulfur dioxide	28 parts per million dry volume	30-day rolling average	Sulfur dioxide CEMS (performance specification 2 of appendix B and procedure 1 of appendix F of this part).

[a] All emission limitations are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the Total Mass Basis limit or the toxic equivalency basis limit.

[b] If you are conducting stack tests to demonstrate compliance and your performance tests for this pollutant for at least 2 consecutive years show that your emissions are at or below this limit, you can skip testing according to § 60.2155 if all of the other provisions of § 60.2155 are met. For all other pollutants that do not contain a footnote "b", your performance tests for this pollutant for at least 2 consecutive years must show that your emissions are at or below 75 percent of this limit in order to qualify for skip testing.

■ 26. Table 8 to Subpart CCCC of part 60 is revised to read as follows:

TABLE 8 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR SMALL, REMOTE INCINERATORS THAT COMMENCED CONSTRUCTION AFTER JUNE 4, 2010, OR THAT COMMENCED RECONSTRUCTION OR MODIFICATION AFTER AUGUST 7, 2013

For the air pollutant	You must meet this emission limitation [a]	Using this averaging time	And determining compliance using this method
Cadmium	0.67 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meters per run).	Performance test (Method 29 at 40 CFR part 60, appendix A–8).
Carbon monoxide	13 parts per million dry volume	3-run average (1 hour minimum sample time per run).	Performance test (Method 10 at 40 CFR part 60, appendix A–4).
Dioxins/furans (total mass basis)	1,800 nanograms per dry standard cubic meter. [b]	3-run average (collect a minimum volume of 1 dry standard cubic meters per run).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Dioxins/furans (toxic equivalency basis).	31 nanograms per dry standard cubic meter. [b]	3-run average (collect a minimum volume of 1 dry standard cubic meters).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Fugitive ash	Visible emissions for no more than 5 percent of the hourly observation period.	Three 1-hour observation periods	Visible emissions test (Method 22 at 40 CFR part 60, appendix A–7).
Hydrogen chloride	200 parts per million by dry volume.	3-run average (For Method 26, collect a minimum volume of 60 liters per run. For Method 26A, collect a minimum volume of 1 dry standard cubic meter per run).	Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8).
Lead	2.0 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meters).	Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish.
Mercury	0.0035 milligrams per dry standard cubic meter.	3-run average (For Method 29 and ASTM D6784–02 (Reapproved 2008) [b], collect a minimum volume of 2 dry standard cubic meters per run. For Method 30B, collect a minimum volume as specified in Method 30B at 40 CFR part 60, appendix A).	Performance test (Method 29 or 30B at 40 CFR part 60, appendix A–8) or ASTM D6784–02 (Reapproved 2008). [b]

TABLE 8 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR SMALL, REMOTE INCINERATORS THAT COMMENCED CONSTRUCTION AFTER JUNE 4, 2010, OR THAT COMMENCED RECONSTRUCTION OR MODIFICATION AFTER AUGUST 7, 2013—Continued

For the air pollutant	You must meet this emission limitation [a]	Using this averaging time	And determining compliance using this method
Oxides of nitrogen	170 parts per million dry volume	3-run average (for Method 7E, 1 hour minimum sample time per run).	Performance test (Method 7 or 7E at 40 CFR part 60, appendix A–4).
Particulate matter (filterable)	270 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meters).	Performance test (Method 5 or 29 at 40 CFR part 60, appendix A–3 or appendix A–8).
Sulfur dioxide	1.2 parts per million dry volume	3-run average (1 hour minimum sample time per run).	Performance test (Method 6 or 6c at 40 CFR part 60, appendix A–4).
*	*	*	*	*	*	*

[a] All emission limitations are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the Total Mass Basis limit or the toxic equivalency basis limit.
[b] Incorporated by reference, *see* § 60.17.

Subpart DDDD—[Amended]

■ 27. Section 60.2505 is amended by:
■ a. Revising paragraph (a).
■ b. Revising paragraph (c).
■ c. Revising paragraph (d).
The revisions read as follows:

§ 60.2505 Am I affected by this subpart?

(a) If you are the Administrator of an air quality program in a state or United States protectorate with one or more existing CISWI units that meet the criteria in paragraphs (b) through (d) of this section, you must submit a state plan to U.S. Environmental Protection Agency (EPA) that implements the emission guidelines contained in this subpart.

* * * * *

(c) You must submit a state plan that meets the requirements of this subpart and contains the more stringent emission limit for the respective pollutant in table 6 of this subpart or table 1 of subpart CCCC of this part to EPA by February 7, 2014 for incinerators that commenced construction after November 30, 1999, but no later than June 4, 2010, or commenced modification or reconstruction after June 1, 2001 but no later than August 7, 2013.

(d) You must submit a state plan to EPA that meets the requirements of this subpart and contains the emission limits in tables 7 through 9 of this subpart by February 7, 2014, for CISWI units other than incinerator units that commenced construction on or before June 4, 2010, or commenced modification or reconstruction after June 4, 2010 but no later than August 7, 2013.

■ 28. Section 60.2525 is amended by revising paragraph (b) to read as follows:

§ 60.2525 What if my state plan is not approvable?

* * * * *

(b) If you do not submit an approvable state plan (or a negative declaration letter) to EPA that meets the requirements of this subpart and contains the emission limits in tables 6 through 9 of this subpart for CISWI units that commenced construction on or before June 4, 2010, then EPA will develop a federal plan according to § 60.27 to implement the emission guidelines contained in this subpart. Owners and operators of CISWI units not covered by an approved state plan must comply with the federal plan. The federal plan is an interim action and will be automatically withdrawn when your state plan is approved.

* * * * *

■ 29. Section 60.2535 is amended by:
■ a. Revising paragraph (a) introductory text.
■ b. Revising paragraph (b) introductory text.
■ c. Revising paragraph (b)(1).
The revisions read as follows:

§ 60.2535 What compliance schedule must I include in my state plan?

(a) For CISWI units in the incinerator subcategory that commenced construction on or before November 30, 1999, your state plan must include compliance schedules that require CISWI units to achieve final compliance as expeditiously as practicable after approval of the state plan but not later than the earlier of the two dates specified in paragraphs (a)(1) and (2) of this section.

* * * * *

(b) For CISWI units in the incinerator subcategory that commenced construction after November 30, 1999, but on or before June 4, 2010, and for CISWI units in the small remote incinerator, energy recovery unit, and waste-burning kiln subcategories that commenced construction before June 4, 2010, your state plan must include compliance schedules that require CISWI units to achieve final compliance as expeditiously as practicable after approval of the state plan but not later than the earlier of the two dates specified in paragraphs (b)(1) and (2) of this section.

(1) February 7, 2018.

* * * * *

■ 30. Section 60.2545 is amended by revising paragraph (c) to read as follows:

§ 60.2545 Does this subpart directly affect CISWI unit owners and operators in my state?

* * * * *

(c) If you do not submit an approvable plan to implement and enforce the guidelines contained in this subpart by February 7, 2014, for CISWI units that commenced construction on or before June 4, 2010, EPA will implement and enforce a federal plan, as provided in § 60.2525, to ensure that each unit within your state that commenced construction on or before June 4, 2010, reaches compliance with all the provisions of this subpart by February 7, 2018.

■ 31. Section 60.2550 is amended by revising paragraph (a)(1) to read as follows:

§ 60.2550 What CISWI units must I address in my state plan?

(a) * * *

(1) CISWI units in your state that commenced construction on or before June 4, 2010, or commenced modification or reconstruction after

June 4, 2010 but no later than August 7, 2013.

* * * * *

■ 32. Section 60.2555 is amended by:
■ a. Revising paragraph (c).
■ b. Revising paragraph (e)(3).
■ c. Adding paragraph (e)(4).
■ d. Revising paragraph (f)(3).
■ e. Adding paragraph (f)(4).
■ f. Revising paragraph (n).
■ g. Adding paragraph (o).

The revisions and additions read as follows:

§ 60.2555 What combustion units are exempt from my state plan?

* * * * *

(c) *Municipal waste combustion units.* Incineration units that are subject to subpart Ea of this part (Standards of Performance for Municipal Waste Combustors); subpart Eb of this part (Standards of Performance for Large Municipal Waste Combustors); subpart Cb of this part (Emission Guidelines and Compliance Time for Large Municipal Combustors); AAAA of this part (Standards of Performance for Small Municipal Waste Combustion Units); or subpart BBBB of this part (Emission Guidelines for Small Municipal Waste Combustion Units).

* * * * *

(e) * * *

(3) You submit documentation to the Administrator notifying the Agency that the qualifying small power production facility is combusting homogenous waste.

(4) You maintain the records specified in § 60.2740(v).

(f) * * *

(3) You submit documentation to the Administrator notifying the Agency that the qualifying cogeneration facility is combusting homogenous waste.

(4) You maintain the records specified in § 60.2740(w).

* * * * *

(n) *Sewage sludge incineration units.* Incineration units combusting sewage sludge for the purpose of reducing the volume of the sewage sludge by removing combustible matter that are subject to subpart LLLL of this part (Standards of Performance for Sewage Sludge Incineration Units) or subpart MMMM of this part (Emission Guidelines for Sewage Sludge Incineration Units).

(o) *Other solid waste incineration units.* Incineration units that are subject to subpart EEEE of this part (Standards of Performance for Other Solid Waste Incineration Units) or subpart FFFF of this part (Emission Guidelines and Compliance Times for Other Solid Waste Incineration Units).

■ 33. Section 60.2675 is amended by:
■ a. Revising paragraph (a)(2).
■ b. Revising paragraph (e).
■ c. Revising paragraph (f).
■ d. Redesignating paragraph (g) as paragraph (h).
■ e. Adding new paragraph (g).
■ f. Adding paragraph (i).

The revisions and addition read as follows:

§ 60.2675 What operating limits must I meet and by when?

(a) * * *

(2) Minimum pressure drop across the wet particulate matter scrubber, which is calculated as the lowest 1-hour average pressure drop across the wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations; or minimum amperage to the wet scrubber, which is calculated as the lowest 1-hour average amperage to the wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations.

* * * * *

(e) If you use activated carbon sorbent injection to comply with the emission limitations, you must measure the sorbent flow rate during the performance testing. The operating limit for the carbon sorbent injection is calculated as the lowest 1-hour average sorbent flow rate measured during the most recent performance test demonstrating compliance with the mercury emission limitations. For energy recovery units, when your unit operates at lower loads, multiply your sorbent injection rate by the load fraction, as defined in this subpart, to determine the required injection rate (e.g., for 50 percent load, multiply the injection rate operating limit by 0.5).

(f) If you use selective noncatalytic reduction to comply with the emission limitations, you must measure the charge rate, the secondary chamber temperature (if applicable to your CISWI unit), and the reagent flow rate during the nitrogen oxides performance testing. The operating limits for the selective noncatalytic reduction are calculated as the highest 1-hour average charge rate, lowest secondary chamber temperature, and lowest reagent flow rate measured during the most recent performance test demonstrating compliance with the nitrogen oxides emission limitations.

(g) If you use a dry scrubber to comply with the emission limitations, you must measure the injection rate of each sorbent during the performance testing. The operating limit for the injection rate of each sorbent is calculated as the lowest 1-hour average injection rate of each sorbent measured during the most recent performance test demonstrating compliance with the hydrogen chloride emission limitations. For energy recovery units, when your unit operates at lower loads, multiply your sorbent injection rate by the load fraction, as defined in this subpart, to determine the required injection rate (e.g., for 50 percent load, multiply the injection rate operating limit by 0.5).

(h) If you do not use a wet scrubber, electrostatic precipitator, or fabric filter to comply with the emission limitations, and if you do not determine compliance with your particulate matter emission limitation with a particulate matter CEMS, you must maintain opacity to less than or equal to ten percent opacity (1-hour block average).

(i) If you use a PM CPMS to demonstrate compliance, you must establish your PM CPMS operating limit and determine compliance with it according to paragraphs (i)(1) through (5) of this section.

(1) During the initial performance test or any such subsequent performance test that demonstrates compliance with the PM limit, record all hourly average output values (milliamps) from the PM CPMS for the periods corresponding to the test runs (e.g., three 1-hour average PM CPMS output values for three 1-hour test runs).

(i) Your PM CPMS must provide a 4–20 milliamp output and the establishment of its relationship to manual reference method measurements must be determined in units of milliamps.

(ii) Your PM CPMS operating range must be capable of reading PM concentrations from zero to a level equivalent to at least two times your allowable emission limit. If your PM CPMS is an auto-ranging instrument capable of multiple scales, the primary range of the instrument must be capable of reading PM concentration from zero to a level equivalent to two times your allowable emission limit.

(iii) During the initial performance test or any such subsequent performance test that demonstrates compliance with the PM limit, record and average all milliamp output values from the PM CPMS for the periods corresponding to the compliance test runs (e.g., average all your PM CPMS output values for three corresponding 2-hour Method 5I test runs).

(2) If the average of your three PM performance test runs are below 75% of your PM emission limit, you must calculate an operating limit by establishing a relationship of PM CPMS signal to PM concentration using the PM CPMS instrument zero, the average PM

CPMS values corresponding to the three compliance test runs, and the average PM concentration from the Method 5 or performance test with the procedures in (i)(1)through (5) of this section.

(i) Determine your instrument zero output with one of the following procedures:

(A) Zero point data for *in-situ* instruments should be obtained by removing the instrument from the stack and monitoring ambient air on a test bench.

(B) Zero point data for extractive instruments should be obtained by removing the extractive probe from the stack and drawing in clean ambient air.

(C) The zero point can also can be established obtained by performing manual reference method measurements when the flue gas is free of PM emissions or contains very low PM concentrations (*e.g.,* when your process is not operating, but the fans are operating or your source is combusting only natural gas) and plotting these with the compliance data to find the zero intercept.

(D) If none of the steps in paragraphs (i)(2)(i) through (iv) of this section are possible, you must use a zero output value provided by the manufacturer.

(ii) Determine your PM CPMS instrument average in milliamps, and the average of your corresponding three PM compliance test runs, using equation 5.

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} X_1 \,, \bar{y} = \frac{1}{n}\sum_{i=1}^{n} Y_1 \qquad \text{(Eq. 5)}$$

Where:

X_1 = the PM CPMS data points for the three runs constituting the performance test,

Y_1 = the PM concentration value for the three runs constituting the performance test, and

n = the number of data points.

(iii) With your instrument zero expressed in milliamps, your three run average PM CPMS milliamp value, and your three run average PM concentration from your three compliance tests, determine a relationship of lb/Mmbtu per milliamp with equation 6.

$$R = \frac{Y_1}{(X_1 - z)} \qquad \text{(Eq. 6)}$$

Where:

R = the relative mg/dscm per milliamp for your PM CPMS,

Y_1 = the three run average mg/dscm PM concentration,

X_1 = the three run average milliamp output from you PM CPMS, and

z = the milliamp equivalent of your instrument zero determined from (2)(i).

(iv) Determine your source specific 30-day rolling average operating limit using the mg/dscm per milliamp value from Equation 6 in equation 7, below. This sets your operating limit at the PM CPMS output value corresponding to 75% of your emission limit.

$$O_l = z + \frac{0.75(L)}{R} \qquad \text{(Eq. 7)}$$

Where:

O_l = the operating limit for your PM CPMS on a 30-day rolling average, in milliamps.

L = your source emission limit expressed in lb/Mmbtu,

z = your instrument zero in milliamps, determined from (2)(a), and

R = the relative mg/dscm per milliamp for your PM CPMS, from Equation 3.

(3) If the average of your three PM compliance test runs is at or above 75% of your PM emission limit you must determine your operating limit by averaging the PM CPMS milliamp output corresponding to your three PM performance test runs that demonstrate compliance with the emission limit using equation 8 and you must submit all compliance test and PM CPMS data according to the reporting requirements in paragraph (i)(5) of this section.

$$O_h = \frac{1}{n}\sum_{i=1}^{n} X_1 \qquad \text{(Eq. 8)}$$

Where:

X_1 = the PM CPMS data points for all runs i,

n = the number of data points, and

O_h = your site specific operating limit, in milliamps.

(4) To determine continuous compliance, you must record the PM CPMS output data for all periods when the process is operating and the PM CPMS is not out-of-control. You must demonstrate continuous compliance by using all quality-assured hourly average data collected by the PM CPMS for all operating hours to calculate the arithmetic average operating parameter in units of the operating limit (e.g., milliamps, PM concentration, raw data signal) on a 30-day rolling average basis.

(5) For PM performance test reports used to set a PM CPMS operating limit, the electronic submission of the test report must also include the make and model of the PM CPMS instrument, serial number of the instrument, analytical principle of the instrument (e.g., beta attenuation), span of the instruments primary analytical range, milliamp value equivalent to the instrument zero output, technique by which this zero value was determined, and the average milliamp signals corresponding to each PM compliance test run.

■ 34. Section 60.2680 is amended by revising the section heading and paragraph (a) introductory text to read as follows:

§ 60.2680 What if I do not use a wet scrubber, fabric filter, activated carbon injection, selective noncatalytic reduction, an electrostatic precipitator, or a dry scrubber to comply with the emission limitations?

(a) If you use an air pollution control device other than a wet scrubber, activated carbon injection, selective noncatalytic reduction, fabric filter, an electrostatic precipitator, or a dry scrubber or limit emissions in some other manner, including mass balances, to comply with the emission limitations under § 60.2670, you must petition the EPA Administrator for specific operating limits to be established during the initial performance test and continuously monitored thereafter. You must submit the petition at least sixty days before the performance test is scheduled to begin. Your petition must include the five items listed in paragraphs (a)(1) through (5) of this section.

* * * * *

■ 35. Section 60.2685 is revised to read as follows:

§ 60.2685 Affirmative Defense for Violation of Emission Standards During Malfunction.

In response to an action to enforce the standards set forth in paragraph § 60.2670 you may assert an affirmative defense to a claim for civil penalties for violations of such standards that are

caused by malfunction, as defined at 40 CFR 60.2. Appropriate penalties may be assessed if you fail to meet your burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(a) *Assertion of affirmative defense.* To establish the affirmative defense in any action to enforce such a standard, you must timely meet the reporting requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:

(1) The violation:

(i) Was caused by a sudden, infrequent, and unavoidable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner; and

(ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and

(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(iv) Was not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(2) Repairs were made as expeditiously as possible when a violation occurred. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and

(3) The frequency, amount and duration of the violation (including any bypass) were minimized to the maximum extent practicable; and

(4) If the violation resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(5) All possible steps were taken to minimize the impact of the violation on ambient air quality, the environment, and human health; and

(6) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and

(7) All of the actions in response to the violation were documented by properly signed, contemporaneous operating logs; and

(8) At all times, the affected CISWI unit was operated in a manner consistent with good practices for minimizing emissions; and

(9) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the violation resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of any emissions that were the result of the malfunction.

(b) *Report.* The owner or operator seeking to assert an affirmative defense shall submit a written report to the Administrator with all necessary supporting documentation, that it has met the requirements set forth in paragraph (a) of this section. This affirmative defense report shall be included in the first periodic compliance, deviation report or excess emission report otherwise required after the initial occurrence of the violation of the relevant standard (which may be the end of any applicable averaging period). If such compliance, deviation report or excess emission report is due less than 45 days after the initial occurrence of the violation, the affirmative defense report may be included in the second compliance, deviation report or excess emission report due after the initial occurrence of the violation of the relevant standard.

■ 36. Section 60.2690 is amended by:

■ a. Revising paragraph (g) introductory text.

■ b. Redesignating paragraphs (g)(2) and (3) as paragraphs (g)(3) and (4), respectively.

■ c. Revising newly designated paragraphs (g)(3) and (4).

■ d. Adding new paragraph (g)(2).

■ e. Adding paragraph (j).

The revisions and additions read as follows:

§ 60.2690 How do I conduct the initial and annual performance test?

* * * * *

(g) You must determine dioxins/furans toxic equivalency by following the procedures in paragraphs (g)(1) through (4) of this section.

* * * * *

(2) Quantify isomers meeting identification criteria 2, 3, 4, and 5 in Section 5.3.2.5 of Method 23, regardless of whether the isomers meet identification criteria 1 and 7. You must quantify the isomers per Section 9.0 of Method 23. (Note: You may reanalyze the sample aliquot or split to reduce the number of isomers not meeting identification criteria 1 or 7 of Section 5.3.2.5.)

(3) For each dioxin/furan (tetra- through octa-chlorinated) isomer measured in accordance with paragraph (g)(1) and (2) of this section, multiply the isomer concentration by its corresponding toxic equivalency factor specified in table 4 of this subpart.

(4) Sum the products calculated in accordance with paragraph (g)(3) of this section to obtain the total concentration of dioxins/furans emitted in terms of toxic equivalency.

* * * * *

(j) You must determine dioxins/furans total mass basis by following the procedures in paragraphs (j)(1) through (3) of this section.

(1) Measure the concentration of each dioxin/furan tetra- through octa-chlorinated isomer emitted using EPA Method 23 at 40 CFR part 60, appendix A–7.

(2) Quantify isomers meeting identification criteria 2, 3, 4, and 5 in Section 5.3.2.5 of Method 23, regardless of whether the isomers meet identification criteria 1 and 7. You must quantify the isomers per Section 9.0 of Method 23. (Note: You may reanalyze the sample aliquot or split to reduce the number of isomers not meeting identification criteria 1 or 7 of Section 5.3.2.5.)

(3) Sum the quantities measured in accordance with paragraphs (j)(1) and (2) of this section to obtain the total concentration of dioxins/furans emitted in terms of total mass basis.

■ 37.Section 60.2710 is revised to read as follows:

■ a. Revising paragraph (a)(6).

■ b. Revising paragraphs (b) through (d).

■ c. Revising paragraph (f).

■ d. Revising paragraphs (g) introductory text and (g)(1).

■ e. Revising paragraphs (h) and (i).

■ f. Revising paragraphs (j) introductory text, (j)(1), and (j)(3).

■ j. Revising paragraph (l) introductory text.

■ k. Revising paragraph (m)(2).

■ l. Revising paragraph (n)(4).

■ m. Revising paragraph (o).

■ n. Revising paragraph (r)(1).

■ o. Revising paragraphs (s) introductory text, (s)(1) introductory text, and (s)(2).

■ p. Revising paragraph (t) introductory text, (t)(1) introductory text, and (t)(2).

■ q. Revising paragraphs (u)(1) and (u)(2).

■ r. Revising paragraphs (w) introductory paragraph, (w)(1), (w)(2), and (w)(3).

■ s. Adding paragraph (x).

The revisions and addition read as follows:

§ 60.2710 How do I demonstrate continuous compliance with the emission limitations and the operating limits?

(a) * * *

(6) All monitoring systems necessary for compliance with any newly applicable monitoring requirements which apply as a result of the cessation or commencement or recommencement of combusting solid waste must be installed and operational as of the

effective date of the waste-to-fuel, or fuel-to-waste switch. All calibration and drift checks must be performed as of the effective date of the waste-to-fuel, or fuel-to-waste switch. Relative accuracy tests must be performed as of the performance test deadline for PM CEMS (if PM CEMS are elected to demonstrate continuous compliance with the particulate matter emission limits). Relative accuracy testing for other CEMS need not be repeated if that testing was previously performed consistent with section 112 monitoring requirements or monitoring requirements under this subpart.

(b) You must conduct an annual performance test for the pollutants listed in table 2 of this subpart or tables 6 through 9 of this subpart and opacity for each CISWI unit as required under § 60.2690. The annual performance test must be conducted using the test methods listed in table 2 of this subpart or tables 6 through 9 of this subpart and the procedures in § 60.2690. Opacity must be measured using EPA Reference Method 9 at 40 CFR part 60. Annual performance tests are not required if you use CEMS or continuous opacity monitoring systems to determine compliance.

(c) You must continuously monitor the operating parameters specified in § 60.2675 or established under § 60.2680 and as specified in § 60.2735. Operation above the established maximum or below the established minimum operating limits constitutes a deviation from the established operating limits. Three-hour block average values are used to determine compliance (except for baghouse leak detection system alarms) unless a different averaging period is established under § 60.2680 or, for energy recovery units, where the averaging time for each operating parameter is a 30-day rolling, calculated each hour as the average of the previous 720 operating hours. Operation above the established maximum, below the established minimum, or outside the allowable range of the operating limits specified in paragraph (a) of this section constitutes a deviation from your operating limits established under this subpart, except during performance tests conducted to determine compliance with the emission and operating limits or to establish new operating limits. Operating limits are confirmed or reestablished during performance tests.

(d) You must burn only the same types of waste and fuels used to establish subcategory applicability (for ERUs) and operating limits during the performance test.

* * * * *

(f) For energy recovery units, you must conduct an annual performance test for opacity using EPA Reference Method 9 at 40 CFR part 60 (except where particulate matter continuous monitoring system or continuous parameter monitoring systems are used) and the pollutants listed in table 7 of this subpart.

(g) For facilities using a CEMS to demonstrate compliance with the carbon monoxide emission limit, compliance with the carbon monoxide emission limit may be demonstrated by using the CEMS according to the following requirements:

(1) You must measure emissions according to § 60.13 to calculate 1-hour arithmetic averages, corrected to 7 percent oxygen. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. You must demonstrate initial compliance with the carbon monoxide emissions limit using a 30-day rolling average of the 1-hour arithmetic average emission concentrations, including CEMS data during startup and shutdown as defined in this subpart, calculated using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7.

* * * * *

(h) Coal and liquid/gas energy recovery units with annual average heat input rates greater than 250 MMBtu/hr may elect to demonstrate continuous compliance with the particulate matter emissions limit using a particulate matter CEMS according to the procedures in § 60.2730(n) instead of the continuous parameter monitoring system specified in § 60.2710(i). Coal and liquid/gas energy recovery units with annual average heat input rates less than 250 MMBtu/hr, incinerators, and small remote incinerators may also elect to demonstrate compliance using a particulate matter CEMS according to the procedures in § 60.2730(n) instead of particulate matter testing with EPA Method 5 at 40 CFR part 60, appendix A–3 and, if applicable, the continuous opacity monitoring requirements in paragraph (i) of this section.

(i) For energy recovery units with annual average heat input rates greater than or equal to 10 MMBTU/hour but less than 250 MMBtu/hr you must install, operate, certify and maintain a continuous opacity monitoring system (COMS) according to the procedures in § 60.2730.

(j) For waste-burning kilns, you must conduct an annual performance test for the pollutants (except mercury and particulate matter, and hydrogen chloride if no acid gas wet scrubber is used) listed in table 8 of this subpart. If your waste-burning kiln is not equipped with a wet scrubber or dry scrubber, you must determine compliance with the hydrogen chloride emission limit using a CEMS as specified in § 60.2730. You must determine compliance with particulate matter using CPMS. You must determine compliance with the mercury emissions limit using a mercury CEMS according to the following requirements:

(1) Operate a CEMS in accordance with performance specification 12A at 40 CFR part 60, appendix B or a sorbent trap based integrated monitor in accordance with performance specification 12B at 40 CFR part 60, appendix B. The duration of the performance test must be a calendar month. For each calendar month in which the waste-burning kiln operates, hourly mercury concentration data and stack gas volumetric flow rate data must be obtained. You must demonstrate compliance with the mercury emissions limit using a 30-day rolling average of these 1-hour mercury concentrations, including CEMS data during startup and shutdown as defined in this subpart, calculated using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7 of this part. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content.

* * * * *

(3) The owner or operator of a waste-burning kiln must demonstrate initial compliance by operating a mercury CEMS while the raw mill of the in-line kiln/raw mill is operating under normal conditions and including at least one period when the raw mill is off.

* * * * *

(l) For each CMS required in this section, you must develop and submit to the EPA Administrator for approval a site-specific monitoring plan according to the requirements of this paragraph (l) that addresses paragraphs (l)(1)(i) through (vi) of this section.

* * * * *

(m) * * *

(2) Use a flow sensor with a measurement sensitivity at full scale of no greater than 2 percent.

* * * * *

(n) * * *

(4) Perform checks at the frequency outlined in your site-specific monitoring

plan to ensure pressure measurements are not obstructed (e.g., check for pressure tap pluggage daily).

* * * * *

(o) If you have an operating limit that requires a pH monitoring system, you must meet the requirements in paragraphs (l) and (o)(1) through (4) of this section.

(1) Install the pH sensor in a position that provides a representative measurement of scrubber effluent pH.

(2) Ensure the sample is properly mixed and representative of the fluid to be measured.

(3) Conduct a performance evaluation of the pH monitoring system in accordance with your monitoring plan at least once each process operating day.

(4) Conduct a performance evaluation (including a two-point calibration with one of the two buffer solutions having a pH within 1 of the pH of the operating limit) of the pH monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than quarterly.

* * * * *

(r) * * *

(1) Install a bag leak detection sensor(s) in a position(s) that will be representative of the relative or absolute particulate matter loadings for each exhaust stack, roof vent, or compartment (e.g., for a positive pressure fabric filter) of the fabric filter.

* * * * *

(s) For facilities using a CEMS to demonstrate compliance with the sulfur dioxide emission limit, compliance with the sulfur dioxide emission limit may be demonstrated by using the CEMS specified in § 60.2730 to measure sulfur dioxide. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. You must calculate a 30-day rolling average of the 1-hour arithmetic average emission concentrations, including CEMS data during startup and shutdown as defined in this subpart, using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7. The sulfur dioxide CEMS must be operated according to performance specification 2 in appendix B of this part and must follow the procedures and methods specified in this paragraph(s). For sources that have actual inlet emissions less than 100 parts per million dry volume, the relative accuracy criterion for inlet sulfur dioxide CEMS should be no greater than 20 percent of the mean value of the reference method test data in terms of the units of the emission standard, or 5 parts per million dry volume absolute value of the mean difference between the reference method and the CEMS, whichever is greater.

(1) During each relative accuracy test run of the CEMS required by performance specification 2 in appendix B of this part, collect sulfur dioxide and oxygen (or carbon dioxide) data concurrently (or within a 30- to 60-minute period) with both the CEMS and the test methods specified in paragraphs (s)(1)(i) and (ii) of this section.

* * * * *

(2) The span value of the CEMS at the inlet to the sulfur dioxide control device must be 125 percent of the maximum estimated hourly potential sulfur dioxide emissions of the unit subject to this rule. The span value of the CEMS at the outlet of the sulfur dioxide control device must be 50 percent of the maximum estimated hourly potential sulfur dioxide emissions of the unit subject to this rule.

* * * * *

(t) For facilities using a CEMS to demonstrate continuous compliance with the nitrogen oxides emission limit, compliance with the nitrogen oxides emission limit may be demonstrated by using the CEMS specified in § 60.2730 to measure nitrogen oxides. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. You must calculate a 30-day rolling average of the 1-hour arithmetic average emission concentration using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7. The nitrogen oxides CEMS must be operated according to performance specification 2 in appendix B of this part and must follow the procedures and methods specified in paragraphs (t)(1) through (t)(5) of this section.

(1) During each relative accuracy test run of the CEMS required by performance specification 2 of appendix B of this part, collect nitrogen oxides and oxygen (or carbon dioxide) data concurrently (or within a 30- to 60-minute period) with both the CEMS and the test methods specified in paragraphs (t)(1)(i) and (ii) of this section.

(i) For nitrogen oxides, EPA Reference Method 7 or 7E at 40 CFR part 60, appendix A–4 must be used.

(ii) For oxygen (or carbon dioxide), EPA Reference Method 3A or 3B, or as an alternative ANSI/ASME PTC 19.10–1981 (incorporated by reference, see § 60.17), as applicable, must be used.

(2) The span value of the CEMS must be 125 percent of the maximum estimated hourly potential nitrogen oxide emissions of unit.

* * * * *

(u) * * *

(1) Demonstrate compliance with the appropriate emission limit(s) using a 30-day rolling average of 1-hour arithmetic average emission concentrations, including CEMS data during startup and shutdown, as defined in this subpart, calculated using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content.

(2) Operate all CEMS in accordance with the applicable procedures under appendices B and F of this part.

* * * * *

(w) For energy recovery units with a design heat input capacity of 100 MMBtu per hour or greater that do not use a carbon monoxide CEMS, you must install, operate, and maintain an oxygen analyzer system as defined in § 60.2875 according to the procedures in paragraphs (w)(1) through (4) of this section.

(1) The oxygen analyzer system must be installed by the initial performance test date specified in § 60.2675.

(2) You must operate the oxygen trim system within compliance with paragraph (w)(3) of this section at all times.

(3) You must maintain the oxygen level such that the 30-day rolling average that is established as the operating limit for oxygen is not below the lowest hourly average oxygen concentration measured during the most recent CO performance test.

* * * * *

(x) For energy recovery units with annual average heat input rates greater than or equal to 250 MMBtu/hour and waste-burning kilns, you must install, calibrate, maintain, and operate a PM CPMS and record the output of the system as specified in paragraphs (x)(1) through (8) of this section. For other energy recovery units, you may elect to use PM CPMS operated in accordance with this section. PM CPMS are suitable in lieu of using other CMS for monitoring PM compliance (e.g., bag leak detectors, ESP secondary power, PM scrubber pressure).

(1) Install, calibrate, operate, and maintain your PM CPMS according to the procedures in your approved site-specific monitoring plan developed in accordance with § 60.2710(l) and (x)(1)(i) through (iii) of this section.

(i) The operating principle of the PM CPMS must be based on in-stack or

extractive light scatter, light scintillation, beta attenuation, or mass accumulation of the exhaust gas or representative sample. The reportable measurement output from the PM CPMS must be expressed as milliamps.

(ii) The PM CPMS must have a cycle time (i.e., period required to complete sampling, measurement, and reporting for each measurement) no longer than 60 minutes.

(iii) The PM CPMS must be capable of detecting and responding to particulate matter concentrations of no greater than 0.5 mg/actual cubic meter.

(2) During the initial performance test or any such subsequent performance test that demonstrates compliance with the PM limit, you must adjust the site-specific operating limit in accordance with the results of the performance test according to the procedures specified in § 60.2675.

(3) Collect PM CPMS hourly average output data for all energy recovery unit or waste-burning kiln operating hours. Express the PM CPMS output as milliamps.

(4) Calculate the arithmetic 30-day rolling average of all of the hourly average PM CPMS output collected during all energy recovery unit or waste-burning kiln operating hours data (milliamps).

(5) You must collect data using the PM CPMS at all times the energy recovery unit or waste-burning kiln is operating and at the intervals specified in paragraph (x)(1)(ii) of this section, except for periods of monitoring system malfunctions, repairs associated with monitoring system malfunctions, required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments), and any scheduled maintenance as defined in your site-specific monitoring plan.

(6) You must use all the data collected during all energy recovery unit or waste-burning kiln operating hours in assessing the compliance with your operating limit except:

(i) Any data collected during monitoring system malfunctions, repairs associated with monitoring system malfunctions, or required monitoring system quality assurance or quality control activities conducted during monitoring system malfunctions are not used in calculations (report any such periods in your annual deviation report);

(ii) Any data collected during periods when the monitoring system is out of control as specified in your site-specific monitoring plan, repairs associated with periods when the monitoring system is out of control, or required monitoring system quality assurance or quality control activities conducted during out-of-control periods are not used in calculations (report emissions or operating levels and report any such periods in your annual deviation report);

(iii) Any PM CPMS data recorded during periods of CEMS data during startup and shutdown, as defined in this subpart.

(7) You must record and make available upon request results of PM CPMS system performance audits, as well as the dates and duration of periods from when the PM CPMS is out of control until completion of the corrective actions necessary to return the PM CPMS to operation consistent with your site-specific monitoring plan.

(8) For any deviation of the 30-day rolling average PM CPMS average value from the established operating parameter limit, you must:

(i) Within 48 hours of the deviation, visually inspect the air pollution control device;

(ii) If inspection of the air pollution control device identifies the cause of the deviation, take corrective action as soon as possible and return the PM CPMS measurement to within the established value; and

(iii) Within 30 days of the deviation or at the time of the annual compliance test, whichever comes first, conduct a PM emissions compliance test to determine compliance with the PM emissions limit and to verify. Within 45 days of the deviation, you must re-establish the CPMS operating limit. You are not required to conduct additional testing for any deviations that occur between the time of the original deviation and the PM emissions compliance test required under this paragraph.

(iv) PM CPMS deviations leading to more than four required performance tests in a 12-month process operating period (rolling monthly) constitute a violation of this subpart.

■ 38. Section 60.2720 is amended by revising paragraph (a)(3)(ii) to read as follows:

§ 60.2720 May I conduct performance testing less often?

(a) * * *

(3) * * *

(ii) For fugitive emissions, visible emissions (of combustion ash from the ash conveying system) for 2 percent of the time during each of the three 1-hour observation periods.

* * * * *

■ 39. Section 60.2730 is amended by:

■ a. Revising paragraph (c).

■ b. Revising paragraph (e) introductory text.

■ c. Revising paragraphs (f) through (j).

■ d. Revising paragraph (l)(1) and (2).

■ e. Revising paragraph (m) introductory text.

■ f. Revising paragraphs (n) introductory text, (n)(6), (n)(7), (n)(9), (n)(10), (n)(11), and paragraph (n)(12) introductory text.

■ g. Removing paragraph (n)(14).

■ h. Revising paragraphs (o)(1), (o)(2), and (o)(9).

■ i. Adding paragraphs (r) and (s).

The revisions and additions read as follows:

§ 60.2730 What monitoring equipment must I install and what parameters must I monitor?

* * * * *

(c) If you are using something other than a wet scrubber, activated carbon, selective non-catalytic reduction, an electrostatic precipitator, or a dry scrubber to comply with the emission limitations under § 60.2670, you must install, calibrate (to the manufacturers' specifications), maintain, and operate the equipment necessary to monitor compliance with the site-specific operating limits established using the procedures in § 60.2680.

* * * * *

(e) If you use selective noncatalytic reduction to comply with the emission limitations, you must complete the following:

* * * * *

(f) If you use an electrostatic precipitator to comply with the emission limits of this subpart, you must monitor the secondary power to the electrostatic precipitator collection plates and maintain the 3-hour block averages at or above the operating limits established during the mercury or particulate matter performance test.

(g) For waste-burning kilns not equipped with a wet scrubber or dry scrubber, in place of hydrogen chloride testing with EPA Method 321 at 40 CFR part 63, appendix A, an owner or operator must install, calibrate, maintain, and operate a CEMS for monitoring hydrogen chloride emissions discharged to the atmosphere and record the output of the system. To demonstrate continuous compliance with the hydrogen chloride emissions limit for units other than waste-burning kilns not equipped with a wet scrubber or dry scrubber, a facility may substitute use of a hydrogen chloride CEMS for conducting the hydrogen chloride annual performance test, monitoring the minimum hydrogen chloride sorbent flow rate, monitoring the minimum scrubber liquor pH.

(h) To demonstrate continuous compliance with the particulate matter emissions limit, a facility may substitute use of a particulate matter CEMS for conducting the particulate matter annual performance test and other CMS monitoring for PM compliance (e.g., bag leak detectors, ESP secondary power, PM scrubber pressure).

(i) To demonstrate continuous compliance with the dioxin/furan emissions limit, a facility may substitute use of a continuous automated sampling system for the dioxin/furan annual performance test. You must record the output of the system and analyze the sample according to EPA Method 23 at 40 CFR part 60, appendix A–7. This option to use a continuous automated sampling system takes effect on the date a final performance specification applicable to dioxin/furan from continuous monitors is published in the **Federal Register**. The owner or operator who elects to continuously sample dioxin/furan emissions instead of sampling and testing using EPA Method 23 at 40 CFR part 60, appendix A–7 must install, calibrate, maintain and operate a continuous automated sampling system and must comply with the requirements specified in § 60.58b(p) and (q). A facility may substitute continuous dioxin/furan monitoring for the minimum sorbent flow rate, if activated carbon sorbent injection is used solely for compliance with the dioxin/furan emission limit.

(j) To demonstrate continuous compliance with the mercury emissions limit, a facility may substitute use of a continuous automated sampling system for the mercury annual performance test. You must record the output of the system and analyze the sample at set intervals using any suitable determinative technique that can meet performance specification 12B criteria. This option to use a continuous automated sampling system takes effect on the date a final performance specification applicable to mercury from monitors is published in the **Federal Register**. The owner or operator who elects to continuously sample mercury emissions instead of sampling and testing using EPA Method 29 or 30B at 40 CFR part 60, appendix A–8, ASTM D6784–02 (Reapproved 2008) (incorporated by reference, see § 60.17), or an approved alternative method for measuring mercury emissions, must install, calibrate, maintain and operate a continuous automated sampling system and must comply with the requirements specified in § 60.58b(p) and (q). A facility may substitute continuous mercury monitoring for the minimum sorbent flow rate, if activated carbon sorbent injection is used solely for compliance with the mercury emission limit.

(k) To demonstrate continuous compliance with the nitrogen oxides emissions limit, a facility may substitute use of a CEMS for the nitrogen oxides annual performance test to demonstrate compliance with the nitrogen oxides emissions limits and monitoring the charge rate, secondary chamber temperature and reagent flow for selective noncatalytic reduction, if applicable.

(1) Install, calibrate, maintain and operate a CEMS for measuring nitrogen oxides emissions discharged to the atmosphere and record the output of the system. The requirements under performance specification 2 of appendix B of this part, the quality assurance procedure 1 of appendix F of this part and the procedures under § 60.13 must be followed for installation, evaluation and operation of the CEMS.

(2) Following the date that the initial performance test for nitrogen oxides is completed or is required to be completed under § 60.2690, compliance with the emission limit for nitrogen oxides required under § 60.52b(d) must be determined based on the 30-day rolling average of the hourly emission concentrations using CEMS outlet data. The 1-hour arithmetic averages must be expressed in parts per million by volume corrected to 7 percent oxygen (dry basis) and used to calculate the 30-day rolling average concentrations. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

(l) * * *

(1) Install, calibrate, maintain and operate a CEMS for measuring sulfur dioxide emissions discharged to the atmosphere and record the output of the system. The requirements under performance specification 2 of appendix B of this part, the quality assurance requirements of procedure 1 of appendix F of this part and the procedures under § 60.13 must be followed for installation, evaluation and operation of the CEMS.

(2) Following the date that the initial performance test for sulfur dioxide is completed or is required to be completed under § 60.2690, compliance with the sulfur dioxide emission limit may be determined based on the 30-day rolling average of the hourly arithmetic average emission concentrations using CEMS outlet data. The 1-hour arithmetic averages must be expressed in parts per million corrected to 7 percent oxygen (dry basis) and used to calculate the 30-day rolling average emission concentrations. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

(m) For energy recovery units that do not use a wet scrubber, fabric filter with bag leak detection system, or particulate matter CEMS, you must install, operate, certify and maintain a continuous opacity monitoring system according to the procedures in paragraphs (m)(1) through (5) of this section by the compliance date specified in § 60.2670. Energy recovery units that use a particulate matter CEMS to demonstrate initial and continuing compliance according to the procedures in § 60.2730(n) are not required to install a continuous opacity monitoring system and must perform the annual performance tests for opacity consistent with § 60.2710(f).

* * * * *

(n) For coal and liquid/gas energy recovery units, incinerators, and small remote incinerators, an owner or operator may elect to install, calibrate, maintain and operate a CEMS for monitoring particulate matter emissions discharged to the atmosphere and record the output of the system. The owner or operator of an affected facility who continuously monitors particulate matter emissions instead of conducting performance testing using EPA Method 5 at 40 CFR part 60, appendix A–3 or, as applicable, monitor with a particulate matter CPMS according to paragraph (r) of this section, must install, calibrate, maintain and operate a CEMS and must comply with the requirements specified in paragraphs (n)(1) through (13) of this section.

* * * * *

(6) The owner or operator of an affected facility must conduct an initial performance test for particulate matter emissions as required under § 60.2690. Compliance with the particulate matter emission limit, if PM CEMS are elected for demonstrating compliance, must be determined by using the CEMS specified in paragraph (n) of this section to measure particulate matter. You must calculate a 30-day rolling average of 1-hour arithmetic average emission concentrations, including CEMS data during startup and shutdown, as defined in this subpart, using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7 of this part.

(7) Compliance with the particulate matter emission limit must be determined based on the 30-day rolling average calculated using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, Appendix A–7 of the part from the 1-hour arithmetic average of the CEMS outlet data.

* * * * *

(9) The 1-hour arithmetic averages required under paragraph (n)(7) of this section must be expressed in milligrams per dry standard cubic meter corrected to 7 percent oxygen (or carbon dioxide)(dry basis) and must be used to calculate the 30-day rolling average emission concentrations. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

(10) All valid CEMS data must be used in calculating average emission concentrations even if the minimum CEMS data requirements of paragraph (n)(8) of this section are not met.

(11) The CEMS must be operated according to performance specification 11 in appendix B of this part.

(12) During each relative accuracy test run of the CEMS required by performance specification 11 in appendix B of this part, particulate matter and oxygen (or carbon dioxide) data must be collected concurrently (or within a 30-to 60-minute period) by both the CEMS and the following test methods.

* * * * *

(o) * * *

(1) Install, calibrate, maintain, and operate a CEMS for measuring carbon monoxide emissions discharged to the atmosphere and record the output of the system. The requirements under performance specification 4B of appendix B of this part, the quality assurance procedure 1 of appendix F of this part and the procedures under § 60.13 must be followed for installation, evaluation, and operation of the CEMS.

(2) Following the date that the initial performance test for carbon monoxide is completed or is required to be completed under § 60.2690, compliance with the carbon monoxide emission limit may be determined based on the 30-day rolling average of the hourly arithmetic average emission concentrations, including CEMS data during startup and shutdown as defined in this subpart, using CEMS outlet data. Except for CEMS data during startup and shutdown, as defined in this subpart, the 1-hour arithmetic averages must be expressed in parts per million corrected to 7 percent oxygen (dry basis) and used to calculate the 30-day rolling average emission concentrations. CEMS data collected during startup or shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

* * * * *

(q) For energy recovery units with a design heat input capacity of 100 MMBtu per hour or greater that do not use a carbon monoxide CEMS, you must install, operate, and maintain a oxygen analyzer system as defined in § 60.2875 according to the procedures in paragraphs (q)(1) through (4) of this section.

(1) The oxygen analyzer system must be installed by the initial performance test date specified in § 60.2675.

(2) You must operate the oxygen trim system within compliance with paragraph (q)(3) of this section at all times.

(3) You must maintain the oxygen level such that the 30-day rolling average that is established as the operating limit for oxygen according to paragraph (q)(4) of this section is not below the lowest hourly average oxygen concentration measured during the most recent CO performance test.

(4) You must calculate and record a 30-day rolling average oxygen concentration using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 of Appendix A–7 of this part.

(r) For energy recovery units with annual average heat input rates greater than or equal to 250 MMBtu/hour and waste-burning kilns, you must install, calibrate, maintain, and operate a PM CPMS and record the output of the system as specified in paragraphs (r)(1) through (8) of this section. For other energy recovery units, you may elect to use PM CPMS operated in accordance with this section. PM CPMS are suitable in lieu of using other CMS for monitoring PM compliance (e.g., bag leak detectors, ESP secondary power, PM scrubber pressure).

(1) Install, calibrate, operate, and maintain your PM CPMS according to the procedures in your approved site-specific monitoring plan developed in accordance with § 60.2710(l) and (r)(1)(i) through (iii) of this section.

(i) The operating principle of the PM CPMS must be based on in-stack or extractive light scatter, light scintillation, beta attenuation, or mass accumulation of the exhaust gas or representative sample. The reportable measurement output from the PM CPMS must be expressed as milliamps.

(ii) The PM CPMS must have a cycle time (i.e., period required to complete sampling, measurement, and reporting for each measurement) no longer than 60 minutes.

(iii) The PM CPMS must be capable of detecting and responding to particulate matter concentrations of no greater than 0.5 mg/actual cubic meter.

(2) During the initial performance test or any such subsequent performance test that demonstrates compliance with the PM limit, you must adjust the site-specific operating limit in accordance with the results of the performance test according to the procedures specified in § 60.2675.

(3) Collect PM CPMS hourly average output data for all energy recovery unit or waste-burning kiln operating hours. Express the PM CPMS output as milliamps..

(4) Calculate the arithmetic 30-day rolling average of all of the hourly average PM CPMS output collected during all energy recovery unit or waste-burning kiln operating hours data (milliamps).

(5) You must collect data using the PM CPMS at all times the energy recovery unit or waste-burning kiln is operating and at the intervals specified in paragraph (r)(1)(ii) of this section, except for periods of monitoring system malfunctions, repairs associated with monitoring system malfunctions, required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments), and any scheduled maintenance as defined in your site-specific monitoring plan.

(6) You must use all the data collected during all energy recovery unit or waste-burning kiln operating hours in assessing the compliance with your operating limit except:

(i) Any data collected during monitoring system malfunctions, repairs associated with monitoring system malfunctions, or required monitoring system quality assurance or quality control activities conducted during monitoring system malfunctions are not used in calculations (report any such periods in your annual deviation report);

(ii) Any data collected during periods when the monitoring system is out of control as specified in your site-specific monitoring plan, repairs associated with periods when the monitoring system is out of control, or required monitoring system quality assurance or quality

control activities conducted during out-of-control periods are not used in calculations (report emissions or operating levels and report any such periods in your annual deviation report);

(iii) Any PM CPMS data recorded during periods of CEMS data during startup and shutdown, as defined in this subpart.

(7) You must record and make available upon request results of PM CPMS system performance audits, as well as the dates and duration of periods from when the PM CPMS is out of control until completion of the corrective actions necessary to return the PM CPMS to operation consistent with your site-specific monitoring plan.

(8) For any deviation of the 30-day rolling average PM CPMS average value from the established operating parameter limit, you must:

(i) Within 48 hours of the deviation, visually inspect the air pollution control device;

(ii) If inspection of the air pollution control device identifies the cause of the deviation, take corrective action as soon as possible and return the PM CPMS measurement to within the established value; and

(iii) Within 30 days of the deviation or at the time of the annual compliance test, whichever comes first, conduct a PM emissions compliance test to determine compliance with the PM emissions limit and to verify. Within 45 days of the deviation, you must re-establish the CPMS operating limit. You are not required to conduct additional testing for any deviations that occur between the time of the original deviation and the PM emissions compliance test required under this paragraph.

(iv) PM CPMS deviations leading to more than four required performance tests in a 12-month process operating period (rolling monthly) constitute a violation of this subpart.

(s) If you use a dry scrubber to comply with the emission limits of this subpart, you must monitor the injection rate of each sorbent and maintain the 3-hour block averages at or above the operating limits established during the hydrogen chloride performance test.

■ 40. Section 60.2740 is amended by:
■ a. Revising introductory text.
■ b. Revising paragraph (b)(5).
■ c. Revising paragraph (e).
■ d. Revising paragraphs (o)(2) through (7).
■ e. Adding paragraphs (o)(8) and (9).
■ f. Revising paragraph (u) and (v).
■ g. Adding paragraph (w).

The revisions read as follows:

§ 60.2740 What records must I keep?

You must maintain the items (as applicable) as specified in paragraphs (a), (b), and (e) through (w) of this section for a period of at least 5 years:

* * * * *

(b) * * *

(5) For affected CISWI units that establish operating limits for controls other than wet scrubbers under § 60.2675(d) through (g) or § 60.2680, you must maintain data collected for all operating parameters used to determine compliance with the operating limits. For energy recovery units using activated carbon injection or a dry scrubber, you must also maintain records of the load fraction and corresponding sorbent injection rate records.

* * * * *

(e) Identification of calendar dates and times for which data show a deviation from the operating limits in table 3 of this subpart or a deviation from other operating limits established under § 60.2675(d) through (g) or § 60.2680 with a description of the deviations, reasons for such deviations, and a description of corrective actions taken.

* * * * *

(o) * * *

(2) All 1-hour average concentrations of sulfur dioxide emissions. You must indicate which data are CEMS data during startup and shutdown.

(3) All 1-hour average concentrations of nitrogen oxides emissions. You must indicate which data are CEMS data during startup and shutdown.

(4) All 1-hour average concentrations of carbon monoxide emissions. You must indicate which data are CEMS data during startup and shutdown.

(5) All 1-hour average concentrations of particulate matter emissions. You must indicate which data are CEMS data during startup and shutdown.

(6) All 1-hour average concentrations of mercury emissions. You must indicate which data are CEMS data during startup and shutdown.

(7) All 1-hour average concentrations of hydrogen chloride emissions. You must indicate which data are CEMS data during startup and shutdown.

(8) All 1-hour average percent oxygen concentrations.

(9) All 1-hour average PM CPMS readings or particulate matter CEMS outputs.

* * * * *

(u) For operating units that combust non-hazardous secondary materials that have been determined not to be solid waste pursuant to § 241.3(b)(1), you must keep a record which documents how the secondary material meets each of the legitimacy criteria under § 241.3(d)(1). If you combust a fuel that has been processed from a discarded non-hazardous secondary material pursuant to § 241.3(b)(4), you must keep records as to how the operations that produced the fuel satisfies the definition of processing in § 241.2 and each of the legitimacy criteria in § 241.3(d)(1) of this chapter. If the fuel received a non-waste determination pursuant to the petition process submitted under § 241.3(c), you must keep a record that documents how the fuel satisfies the requirements of the petition process. For operating units that combust non-hazardous secondary materials as fuel per § 241.4, you must keep records documenting that the material is a listed non-waste under § 241.4(a).

(v) Records of the criteria used to establish that the unit qualifies as a small power production facility under section 3(17)(C) of the Federal Power Act (16 U.S.C. 796(17)(C)) and that the waste material the unit is proposed to burn is homogeneous.

(w) Records of the criteria used to establish that the unit qualifies as a cogeneration facility under section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)) and that the waste material the unit is proposed to burn is homogeneous.

■ 41. Section 60.2770 is amended by:
■ a. Revising paragraph (m) introductory text.
■ b. Revising paragraph (n).
■ c. Adding paragraph (p).

The revisions and addition read as follows:

§ 60.2770 What information must I include in my annual report?

* * * * *

(m) If there were periods during which the continuous monitoring system, including the CEMS, was out of control as specified in paragraph (o) of this section, the annual report must contain the following information for each deviation from an emission or operating limitation occurring for a CISWI unit for which you are using a continuous monitoring system to comply with the emission and operating limitations in this subpart.

* * * * *

(n) If there were periods during which the continuous monitoring system, including the CEMS, was not out of control as specified in paragraph (o) of this section, a statement that there were not periods during which the continuous monitoring system was out of control during the reporting period.

* * * * *

(p) For energy recovery units, include the annual heat input and average annual heat input rate of all fuels being burned in the unit to verify which subcategory of energy recovery unit applies.

■ 42. Section 60.2795 is revised to read as follows:

§ 60.2795 In what form can I submit my reports?

(a) Submit initial, annual, and deviation reports electronically or in paper format, postmarked on or before the submittal due dates.

(b) Submit results of performance tests and CEMS performance evaluation tests as follows.

(1) Within 60 days after the date of completing each performance test as required by this subpart, you must submit the results of the performance tests required by this subpart to EPA's WebFIRE database by using the Compliance and Emissions Data Reporting Interface (CEDRI) that is accessed through EPA's Central Data Exchange (CDX)(*www.epa.gov/cdx*). Performance test data must be submitted in the file format generated through use of EPA's Electronic Reporting Tool (ERT) (see *http://www.epa.gov/ttn/chief/ert/index.html*). Only data collected using test methods on the ERT Web site are subject to this requirement for submitting reports electronically to WebFIRE. Owners or operators who claim that some of the information being submitted for performance tests is confidential business information (CBI) must submit a complete ERT file including information claimed to be CBI on a compact disk, flash drive, or other commonly used electronic storage media to EPA. The electronic media must be clearly marked as CBI and mailed to U.S. EPA/OAPQS/CORE CBI Office, Attention: WebFIRE Administrator, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same ERT file with the CBI omitted must be submitted to EPA via CDX as described earlier in this paragraph. At the discretion of the delegated authority, you must also submit these reports, including the confidential business information, to the delegated authority in the format specified by the delegated authority. For any performance test conducted using test methods that are not listed on the ERT Web site, the owner or operator shall submit the results of the performance test in paper submissions to the Administrator.

(2) Within 60 days after the date of completing each CEMS performance evaluation test, as defined in this subpart and required by this subpart, you must submit the relative accuracy test audit (RATA) data electronically into EPA's Central Data Exchange by using CEDRI as mentioned in paragraph (b)(1) of this section. Only RATA pollutants that can be documented with the ERT (as listed on the ERT Web site) are subject to this requirement. For any performance evaluations with no corresponding RATA pollutants listed on the ERT Web site, the owner or operator shall submit the results of the performance evaluation in paper submissions to the Administrator.

■ 43. Section 60.2875 is amended by:

■ a. Adding definitions for ''30-day rolling average,'' ''Annual heat input,'' ''Average annual heat input rate,'' ''Contained gaseous material,'' ''Continuous emission monitoring system,'' ''Dry scrubber,'' ''Foundry sand thermal reclamation unit,'' ''Load fraction,'' ''Municipal solid waste or municipal type solid waste,'' ''Oxygen analyzer system,'' ''Oxygen trim system,'' ''Responsible official,'' and ''Solid waste.''

■ b. Revising definitions for ''Calendar year,'' ''Chemical recovery unit,'' ''Commercial and industrial solid waste incinerator (CISWI),'' ''Continuous monitoring system (CMS),'' ''Cyclonic burn barrel,'' ''Energy recovery unit,'' ''Energy recovery unit designed to burn biomass (Biomass),'' ''Energy recovery unit designed to burn liquid waste materials and gas (Liquid/gas),'' ''Incinerator,'' ''Modification or modified CISWI unit,'' ''Process change'', ''Raw mill'', ''Small, remote incinerator'', ''Soil treatment unit,'' ''Solid waste incineration unit,'' ''Space heater,'' ''Waste burning kiln,'' and ''Wet scrubber.''

■ c. Removing the definitions for ''Cyclonic barrel burner'' and ''Homogeneous waste.''

The revisions and additions read as follows:

§ 60.2875 What definitions must I know?

* * * * *

30-day rolling average means the arithmetic mean of the previous 720 hours of valid operating data. Valid data excludes periods when this unit is not operating. The 720 hours should be consecutive, but not necessarily continuous if operations are intermittent.

* * * * *

Annual heat input means the heat input for the 12 months preceding the compliance demonstration.

* * * * *

Average annual heat input rate means annual heat input divided by the hours of operation for the 12 months preceding the compliance demonstration.

* * * * *

Calendar year means 365 consecutive days starting on January 1 and ending on December 31.

CEMS data during startup and shutdown means the following:

(1) For incinerators, small remote incinerators, and energy recovery units: CEMS data collected during the first hours of operation of a CISWI unit startup from a cold start until waste is fed into the unit and the hours of operation following the cessation of waste material being fed to the CISWI unit during a unit shutdown. For each startup event, the length of time that CEMS data may be claimed as being CEMS data during startup must be 48 operating hours or less. For each shutdown event, the length of time that CEMS data may be claimed as being CEMS data during shutdown must be 24 operating hours or less.

(2) For waste-burning kilns: CEMS data collected during the periods of kiln operation that do not include normal operations. Startup begins when the kiln's induced fan is turned on and continues until continuous feed is introduced into the kiln, at which time the kiln is in normal operating mode. Shutdown begins when feed to the kiln is halted.

Chemical recovery unit means combustion units burning materials to recover chemical constituents or to produce chemical compounds where there is an existing commercial market for such recovered chemical constituents or compounds. A chemical recovery unit is not an incinerator, a waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart. The following seven types of units are considered chemical recovery units:

(1) Units burning only pulping liquors (i.e., black liquor) that are reclaimed in a pulping liquor recovery process and reused in the pulping process.

(2) Units burning only spent sulfuric acid used to produce virgin sulfuric acid.

(3) Units burning only wood or coal feedstock for the production of charcoal.

(4) Units burning only manufacturing byproduct streams/residue containing catalyst metals that are reclaimed and reused as catalysts or used to produce commercial grade catalysts.

(5) Units burning only coke to produce purified carbon monoxide that is used as an intermediate in the production of other chemical compounds.

(6) Units burning only hydrocarbon liquids or solids to produce hydrogen,

carbon monoxide, synthesis gas, or other gases for use in other manufacturing processes.

(7) Units burning only photographic film to recover silver.

* * * * *

Commercial and industrial solid waste incineration (CISWI) unit means any distinct operating unit of any commercial or industrial facility that combusts, or has combusted in the preceding 6 months, any solid waste as that term is defined in 40 CFR part 241. If the operating unit burns materials other than traditional fuels as defined in § 241.2 that have been discarded, and you do not keep and produce records as required by § 60.2740(u), the operating unit is a CISWI unit. While not all CISWI units will include all of the following components, a CISWI unit includes, but is not limited to, the solid waste feed system, grate system, flue gas system, waste heat recovery equipment, if any, and bottom ash system. The CISWI unit does not include air pollution control equipment or the stack. The CISWI unit boundary starts at the solid waste hopper (if applicable) and extends through two areas: The combustion unit flue gas system, which ends immediately after the last combustion chamber or after the waste heat recovery equipment, if any; and the combustion unit bottom ash system, which ends at the truck loading station or similar equipment that transfers the ash to final disposal. The CISWI unit includes all ash handling systems connected to the bottom ash handling system.

Contained gaseous material means gases that are in a container when that container is combusted.

Continuous emission monitoring system (CEMS) means the total equipment that may be required to meet the data acquisition and availability requirements of this subpart, used to sample, condition (if applicable), analyze, and provide a record of emissions.

Continuous monitoring system (CMS) means the total equipment, required under the emission monitoring sections in applicable subparts, used to sample and condition (if applicable), to analyze, and to provide a permanent record of emissions or process parameters. A particulate matter continuous parameter monitoring system (PM CPMS) is a type of CMS.

Cyclonic burn barrel means a combustion device for waste materials that is attached to a 55 gallon, open-head drum. The device consists of a lid, which fits onto and encloses the drum, and a blower that forces combustion air into the drum in a cyclonic manner to enhance the mixing of waste material and air. A cyclonic burn barrel is not an incinerator, a waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

* * * * *

Dry scrubber means an add-on air pollution control system that injects dry alkaline sorbent (dry injection) or sprays an alkaline sorbent (spray dryer) to react with and neutralize acid gas in the exhaust stream forming a dry powder material. Sorbent injection systems in fluidized bed boilers and process heaters are included in this definition. A dry scrubber is a dry control system.

* * * * *

Energy recovery unit means a combustion unit combusting solid waste (as that term is defined by the Administrator in 40 CFR part 241) for energy recovery. Energy recovery units include units that would be considered boilers and process heaters if they did not combust solid waste.

Energy recovery unit designed to burn biomass (Biomass) means an energy recovery unit that burns solid waste, biomass, and non-coal solid materials but less than 10 percent coal, on a heat input basis on an annual average, either alone or in combination with liquid waste, liquid fuel or gaseous fuels.

* * * * *

Energy recovery unit designed to burn liquid waste materials and gas (Liquid/gas) means an energy recovery unit that burns a liquid waste with liquid or gaseous fuels not combined with any solid fuel or waste materials.

* * * * *

Foundry sand thermal reclamation unit means a type of part reclamation unit that removes coatings that are on foundry sand. A foundry sand thermal reclamation unit is not an incinerator, a waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

Incinerator means any furnace used in the process of combusting solid waste (as that term is defined by the Administrator in 40 CFR part 241) for the purpose of reducing the volume of the waste by removing combustible matter. Incinerator designs include single chamber and two-chamber.

* * * * *

Load fraction means the actual heat input of an energy recovery unit divided by heat input during the performance test that established the minimum sorbent injection rate or minimum activated carbon injection rate, expressed as a fraction (e.g., for 50 percent load the load fraction is 0.5).

* * * * *

Modification or *modified CISWI unit* means a CISWI unit that has been changed later than August 7, 2013, and that meets one of two criteria:

(i) The cumulative cost of the changes over the life of the unit exceeds 50 percent of the original cost of building and installing the CISWI unit (not including the cost of land) updated to current costs (current dollars). To determine what systems are within the boundary of the CISWI unit used to calculate these costs, see the definition of CISWI unit.

(2) Any physical change in the CISWI unit or change in the method of operating it that increases the amount of any air pollutant emitted for which section 129 or section 111 of the Clean Air Act has established standards.

Municipal solid waste or municipal-type solid waste means household, commercial/retail, or institutional waste. Household waste includes material discarded by residential dwellings, hotels, motels, and other similar permanent or temporary housing. Commercial/retail waste includes material discarded by stores, offices, restaurants, warehouses, nonmanufacturing activities at industrial facilities, and other similar establishments or facilities. Institutional waste includes materials discarded by schools, by hospitals (nonmedical), by nonmanufacturing activities at prisons and government facilities, and other similar establishments or facilities. Household, commercial/retail, and institutional waste does include yard waste and refuse-derived fuel. Household, commercial/retail, and institutional waste does not include used oil; sewage sludge; wood pallets; construction, renovation, and demolition wastes (which include railroad ties and telephone poles); clean wood; industrial process or manufacturing wastes; medical waste; or motor vehicles (including motor vehicle parts or vehicle fluff).

* * * * *

Oxygen analyzer system means all equipment required to determine the oxygen content of a gas stream and used to monitor oxygen in the boiler or process heater flue gas, boiler/process heater, firebox, or other appropriate location. This definition includes oxygen trim systems and certified oxygen CEMS. The source owner or operator is responsible to install, calibrate, maintain, and operate the oxygen analyzer system in accordance with the manufacturer's recommendations.

Oxygen trim system means a system of monitors that is used to maintain excess

air at the desired level in a combustion device. A typical system consists of a flue gas oxygen and/or carbon monoxide monitor that automatically provides a feedback signal to the combustion air controller.

* * * * *

Process change means any of the following physical or operational changes:

(1) A physical change (maintenance activities excluded) to the CISWI unit which may increase the emission rate of any air pollutant to which a standard applies;

(2) An operational change to the CISWI unit where a new type of non-hazardous secondary material is being combusted;

(3) A physical change (maintenance activities excluded) to the air pollution control devices used to comply with the emission limits for the CISWI unit (e.g., replacing an electrostatic precipitator with a fabric filter);

(4) An operational change to the air pollution control devices used to comply with the emission limits for the affected CISWI unit (e.g., change in the sorbent injection rate used for activated carbon injection).

* * * * *

Raw mill means a ball or tube mill, vertical roller mill or other size reduction equipment, that is not part of an in-line kiln/raw mill, used to grind feed to the appropriate size. Moisture may be added or removed from the feed during the grinding operation. If the raw mill is used to remove moisture from feed materials, it is also, by definition, a raw material dryer. The raw mill also includes the air separator associated with the raw mill.

* * * * *

Responsible official means one of the following:

(1) For a corporation: A president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

(i) The facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars); or

(ii) The delegation of authority to such representatives is approved in advance by the permitting authority;

(2) For a partnership or sole proprietorship: a general partner or the proprietor, respectively;

(3) For a municipality, State, Federal, or other public agency: Either a principal executive officer or ranking elected official. For the purposes of this part, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a Regional Administrator of EPA); or

(4) For affected facilities:

(i) The designated representative in so far as actions, standards, requirements, or prohibitions under Title IV of the Clean Air Act or the regulations promulgated thereunder are concerned; or

(ii) The designated representative for any other purposes under part 60.

* * * * *

Small, remote incinerator means an incinerator that combusts solid waste (as that term is defined by the Administrator in 40 CFR part 241) and combusts 3 tons per day or less solid waste and is more than 25 miles driving distance to the nearest municipal solid waste landfill.

Soil treatment unit means a unit that thermally treats petroleum-contaminated soils for the sole purpose of site remediation. A soil treatment unit may be direct-fired or indirect fired. A soil treatment unit is not an incinerator, a waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

Solid waste means the term solid waste as defined in 40 CFR 241.2.

Solid waste incineration unit means a distinct operating unit of any facility which combusts any solid waste (as that term is defined by the Administrator in 40 CFR part 241) material from commercial or industrial establishments or the general public (including single and multiple residences, hotels and motels). Such term does not include incinerators or other units required to have a permit under section 3005 of the Solid Waste Disposal Act. The term ''solid waste incineration unit'' does not include:

(1) Materials recovery facilities (including primary or secondary smelters) which combust waste for the primary purpose of recovering metals;

(2) Qualifying small power production facilities, as defined in section 3(17)(C) of the Federal Power Act (16 U.S.C. 769(17)(C)), or qualifying cogeneration facilities, as defined in section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)), which burn homogeneous waste (such as units which burn tires or used oil, but not including refuse-derived fuel) for the production of electric energy or in the case of qualifying cogeneration facilities which burn homogeneous waste for the production of electric energy and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes; or

(3) Air curtain incinerators provided that such incinerators only burn wood wastes, yard wastes and clean lumber and that such air curtain incinerators comply with opacity limitations to be established by the Administrator by rule.

Space heater means a unit that meets the requirements of 40 CFR 279.23. A space heater is not an incinerator, a waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

* * * * *

Waste-burning kiln means a kiln that is heated, in whole or in part, by combusting solid waste (as the term is defined by the Administrator in 40 CFR part 241). Secondary materials used in Portland cement kilns shall not be deemed to be combusted unless they are introduced into the flame zone in the hot end of the kiln or mixed with the precalciner fuel.

Wet scrubber means an add-on air pollution control device that uses an aqueous or alkaline scrubbing liquor to collect particulate matter (including nonvaporous metals and condensed organics) and/or to absorb and neutralize acid gases.

* * * * *

■ 44. Table 1 to subpart DDDD is amended by revising footnotes a and b to read as follows:

Table 1 to Subpart DDDD of Part 60—Model Rule—Increments of Progress and Compliance Schedules

* * * * *

[a] Site-specific schedules can be used at the discretion of the state.

[b] The date can be no later than 3 years after the effective date of state plan approval or December 1, 2005 for CISWI units that commenced construction on or before November 30, 1999. The date can be no later than 3 years after the effective date of approval of a revised state plan or February 7, 2018, for CISWI units that commenced construction on or before June 4, 2010.

■ 45. Table 2 to subpart DDDD of part 60 is amended by:

■ a. Revising the table heading.

■ b. Revising the entry for ''Hydrogen Chloride''.

■ c. Revising the entry for ''Opacity''.

■ d. Revising the entry for ''Oxides of nitrogen''.

■ e. Revising footnotes a and b. The revisions read as follows:

TABLE 2 TO SUBPART DDDD OF PART 60—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO INCINERATORS BEFORE

[Date to be specified in state plan] [b]

For the air pollutant	You must meet this emission limitation [a]	Using this averaging time	And determining compliance using this method
*	*	*	*
Hydrogen chloride	62 parts per million by dry volume.	3-run average (For Method 26, collect a minimum volume of 120 liters per run. For Method 26A, collect a minimum volume of 1 dry standard cubic meter per run).	Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8).
*	*	*	*
Opacity	10 percent	Three 1-hour blocks consisting of ten 6-minute average opacity values.	Performance test (Method 9 at 40 CFR part 60, appendix A–4).
Oxides of nitrogen	388 parts per million by dry volume.	3-run average (1 hour minimum sample time per run).	Performance test (Methods 7or 7E at 40 CFR part 60, appendix A–4).
*	*	*	*

[a] All emission limitations (except for opacity) are measured at 7 percent oxygen, dry basis at standard conditions.

[b] Applies only to incinerators subject to the CISWI standards through a state plan or the Federal plan prior to June 4, 2010. The date specified in the state plan can be no later than 3 years after the effective date of approval of a revised state plan or February 7, 2018.

* * * * *

■ 46. Table 6 to subpart DDDD of part 60 is amended by:

■ a. Revising the entry for ''Carbon monoxide''.

■ b. Revising the entry for ''Lead''.

■ c. Revising the entry for ''Mercury''.

■ d. Revising the entry for ''Oxides of nitrogen''.

■ e. Revising the entry for ''Sulfur dioxide''.

■ f. Revising footnote a.

■ g. Redesignating footnote c as footnote d.

■ h. Adding footnote c.

The revisions read as follows:

TABLE 6 TO SUBPART DDDD OF PART 60—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO INCINERATORS ON AND AFTER

[Date to be specified in state plan] [a]

For the air pollutant	You must meet this emission limitation [b]	Using this averaging time	And determining compliance using this method
*	*	*	*
Carbon monoxide.	17 parts per million dry volume.	3-run average (1 hour minimum sample time per run).	Performance test (Method 10 at 40 CFR part 60, appendix A–4).
*	*	*	*
Lead	0.015 milligrams per dry standard cubic meter. [c]	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish.
Mercury	0.0048 milligrams per dry standard cubic meter.	3-run average (For Method 29 an ASTM D6784–02 (Reapproved 2008) [d], collect a minimum volume of 2 dry standard cubic meters per run. For Method 30B, collect a minimum sample as specified in Method 30B at 40 CFR part 60, appendix A).	Performance test (Method 29 or 30B at 40 CFR part 60, appendix A–8) or ASTM D6784–02 (Reapproved 2008). [d]
Oxides of nitrogen.	53 parts per million dry volume.	3-run average (for Method 7E, 1 hour minimum sample time per run).	Performance test (Method 7 or 7E at 40 CFR part 60, appendix A–4).
*	*	*	*
Sulfur dioxide.	11 parts per million dry volume.	3-run average (1 hour minimum sample time per run).	Performance test (Method 6 or 6c at 40 CFR part 60, appendix A–4).
*	*	*	*

[a] The date specified in the state plan can be no later than 3 years after the effective date of approval of a revised state plan or February 7, 2018.

[c] If you are conducting stack tests to demonstrate compliance and your performance tests for this pollutant for at least 2 consecutive years show that your emissions are at or below this limit, you can skip testing according to § 60.2720 if all of the other provisions of § 60.2720 are met. For all other pollutants that do not contain a footnote ''c'', your performance tests for this pollutant for at least 2 consecutive years must show that your emissions are at or below 75 percent of this limit in order to qualify for skip testing.

[d] Incorporated by reference, see § 60.17.

■ 47. Table 7 to subpart DDDD of part 60 is revised to read as follows:

TABLE 7 TO SUBPART DDDD OF PART 60—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO ENERGY RECOVERY UNITS AFTER MAY 20, 2011

[Date to be specified in state plan] [a]

For the air pollutant	You must meet this emission limitation [b]		Using this averaging time	And determining compliance using this method
	Liquid/Gas	Solids		
Cadmium	0.023 milligrams per dry standard cubic meter.	Biomass—0.0014 milligrams per dry standard cubic meter. [c] Coal—0.0095 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish.
Carbon monoxide.	35 parts per million dry volume.	Biomass—260 parts per million dry volume. Coal—95 parts per million dry volume.	3-run average (1 hour minimum sample time per run).	Performance test (Method 10 at 40 CFR part 60, appendix A–4).
Dioxins/furans (total mass basis).	2.9 nanograms per dry standard cubic meter.	Biomass—0.52 nanograms per dry standard cubic meter. [c] Coal—5.1 nanograms per dry standard cubic meter. [c].	3-run average (collect a minimum volume of 4 dry standard cubic meter).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Dioxins/furans (toxic equivalency basis).	0.32 nanograms per dry standard cubic meter.	Biomass—0.12 nanograms per dry standard cubic meter. Coal—0.075 nanograms per dry standard cubic meter. [c].	3-run average (collect a minimum volume of 4 dry standard cubic meters).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Hydrogen chloride.	14 parts per million dry volume.	Biomass—0.20 parts per million dry volume. Coal—13 parts per million dry volume.	3-run average (for Method 26, collect a minimum of 120 liters; for Method 26A, collect a minimum volume of 1 dry standard cubic meter).	Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8).
Lead	0.096 milligrams per dry standard cubic meter.	Biomass—0.014 milligrams per dry standard cubic meter. [c]. Coal—0.14 milligrams per dry standard cubic meter. [c].	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish.
Mercury	0.0024 milligrams per dry standard cubic meter.	Biomass—0.0022 milligrams per dry standard cubic meter. Coal—0.016 milligrams per dry standard cubic meter.	3-run average (For Method 29 and ASTM D6784–02 (Reapproved 2008) [d], collect a minimum volume of 2 dry standard cubic meters per run. For Method 30B, collect a minimum sample as specified in Method 30B at 40 CFR part 60, appendix A).	Performance test (Method 29 or 30B at 40 CFR part 60, appendix A–8) or ASTM D6784–02 (Reapproved 2008) [d].
Oxides of nitrogen.	76 parts per million dry volume.	Biomass—290 parts per million dry volume. Coal—340 parts per million dry volume.	3-run average (for Method 7E, 1 hour minimum sample time per run).	Performance test (Method 7 or 7E at 40 CFR part 60, appendix A–4).
Particulate matter filterable.	110 milligrams per dry standard cubic meter.	Biomass—11 milligrams per dry standard cubic meter. Coal—160 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meter).	Performance test (Method 5 or 29 at 40 CFR part 60, appendix A–3 or appendix A–8) if the unit has an annual average heat input rate less than or equal to 250 MMBtu/hr; or PM CPMS (as specified in § 60.2710(x)) if the unit has an annual average heat input rate greater than 250 MMBtu/hr.
Sulfur dioxide	720 parts per million dry volume.	Biomass—7.3 parts per million dry volume. Coal—650 parts per million dry volume.	3-run average (1 hour minimum sample time per run).	Performance test (Method 6 or 6c at 40 CFR part 60, appendix A–4).

TABLE 7 TO SUBPART DDDD OF PART 60—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO ENERGY RECOVERY UNITS AFTER MAY 20, 2011—Continued

[Date to be specified in state plan] [a]

For the air pollutant	You must meet this emission limitation [b]		Using this averaging time	And determining compliance using this method
	Liquid/Gas	Solids		
Fugitive ash ...	Visible emissions for no more than 5 percent of the hourly observation period.	Visible emissions for no more than 5 percent of the hourly observation period.	Three 1-hour observation periods.	Visible emission test (Method 22 at 40 CFR part 60, appendix A–7).

[a] The date specified in the state plan can be no later than 3 years after the effective date of approval of a revised state plan or February 7, 2018.

[b] All emission limitations (except for opacity) are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the total mass basis limit or the toxic equivalency basis limit.

[c] If you are conducting stack tests to demonstrate compliance and your performance tests for this pollutant for at least 2 consecutive years show that your emissions are at or below this limit, you can skip testing according to § 60.2720 if all of the other provisions of § 60.2720 are met. For all other pollutants that do not contain a footnote "c", your performance tests for this pollutant for at least 2 consecutive years must show that your emissions are at or below 75 percent of this limit in order to qualify for skip testing, with the exception of annual performance tests to certify a CEMS or PM CPMS.

[d] Incorporated by reference, see § 60.17.

■ 48. Table 8 to subpart DDDD of part 60 is revised to read as follows:

TABLE 8 TO SUBPART DDDD OF PART 60—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO WASTE-BURNING KILNS AFTER

[Date to be specified in state plan.] [a]

For the air pollutant	You must meet this emission limitation [b]	Using this averaging time	And determining compliance using this method
Cadmium	0.0014 milligrams per dry standard cubic meter. [c].	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 29 at 40 CFR part 60, appendix A–8).
Carbon monoxide ..	110 (long kilns)/790 (preheater/precalciner) parts per million dry volume.	3-run average (1 hour minimum sample time per run).	Performance test (Method 10 at 40 CFR part 60, appendix A–4).
Dioxins/furans (total mass basis).	1.3 nanograms per dry standard cubic meter. [c].	3-run average (collect a minimum volume of 4 dry standard cubic meters).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Dioxins/furans (toxic equivalency basis).	0.075 nanograms per dry standard cubic meter. [c].	3-run average (collect a minimum volume of 4 dry standard cubic meters).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Hydrogen chloride	3.0 parts per million dry volume. [c]	3-run average (collect a minimum volume of 1 dry standard cubic meter) or 30-day rolling average if HCl CEMS is being used.	Performance test (Method 321 at 40 CFR part 63, appendix A of this part) or HCl CEMS if a wet scrubber is not used.
Lead	0.014 milligrams per dry standard cubic meter. [c].	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 29 at 40 CFR part 60, appendix A–8).
Mercury	0.011 milligrams per dry standard cubic meter.	30-day rolling average	Mercury CEMS or sorbent trap monitoring system (performance specification 12A or 12B, respectively, of appendix B of this part.)
Oxides of nitrogen	630 parts per million dry volume	3-run average (for Method 7E, 1 hour minimum sample time per run).	Performance test (Method 7 or 7E at 40 CFR part 60, appendix A–4).
Particulate matter filterable.	4.6 milligrams per dry standard cubic meter.	30-day rolling average	PM CPMS (as specified in § 60.2710(x))
Sulfur dioxide	600 parts per million dry volume	3-run average (for Method 6, collect a minimum of 20 liters; for Method 6C, 1 hour minimum sample time per run).	Performance test (Method 6 or 6c at 40 CFR part 60, appendix A–4).

[a] The date specified in the state plan can be no later than 3 years after the effective date of approval of a revised state plan or February 7, 2018.

[b] All emission limitations are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the total mass basis limit or the toxic equivalency basis limit.

[c] If you are conducting stack tests to demonstrate compliance and your performance tests for this pollutant for at least 2 consecutive years show that your emissions are at or below this limit, you can skip testing according to § 60.2720 if all of the other provisions of § 60.2720 are met. For all other pollutants that do not contain a footnote "c", your performance tests for this pollutant for at least 2 consecutive years must show that your emissions are at or below 75 percent of this limit in order to qualify for skip testing, with the exception of annual performance tests to certify a CEMS or PM CPMS.

■ 49. Table 9 to subpart DDDD of part 60 is revised to read as follows:

TABLE 9 TO SUBPART DDDD OF PART 60—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO SMALL, REMOTE INCINERATORS AFTER

[Date to be specified in state plan] [a]

For the air pollutant	You must meet this emission limitation [b]	Using this averaging time	And determining compliance using this method
Cadmium	0.95 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meters per run).	Performance test (Method 29 at 40 CFR part 60, appendix A–8).
Carbon monoxide	64 parts per million dry volume	3-run average (1 hour minimum sample time per run).	Performance test (Method 10 at 40 CFR part 60, appendix A–4).
Dioxins/furans (total mass basis).	4,400 nanograms per dry standard cubic meter [b].	3-run average (collect a minimum volume of 1 dry standard cubic meters per run).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Dioxins/furans (toxic equivalency basis).	180 nanograms per dry standard cubic meter [b].	3-run average (collect a minimum volume of 1 dry standard cubic meters).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Fugitive ash	Visible emissions for no more than 5 percent of the hourly observation period.	Three 1-hour observation periods	Visible emissions test (Method 22 at 40 CFR part 60, appendix A–7).
Hydrogen chloride	300 parts per million dry volume	3-run average (For Method 26, collect a minimum volume of 120 liters per run. For Method 26A, collect a minimum volume of 1 dry standard cubic meter per run).	Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8).
Lead	2.1 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meters).	Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish.
Mercury	0.0053 milligrams per dry standard cubic meter.	3-run average (For Method 29 and ASTM D6784–02 (Reapproved 2008),[c] collect a minimum volume of 2 dry standard cubic meters per run. For Method 30B, collect a minimum sample as specified in Method 30B at 40 CFR part 60, appendix A).	Performance test (Method 29 or 30B at 40 CFR part 60, appendix A–8) or ASTM D6784–02 (Reapproved 2008). [c]
Oxides of nitrogen	190 parts per million dry volume	3-run average (for Method 7E, 1 hour minimum sample time per run).	Performance test (Method 7 or 7E at 40 CFR part 60, appendix A–4).
Particulate matter (filterable)	270 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meters).	Performance test (Method 5 or 29 at 40 CFR part 60, appendix A–3 or appendix A–8).
Sulfur dioxide	150 parts per million dry volume	3-run average (for Method 6, collect a minimum of 20 liters per run; for Method 6C, 1 hour minimum sample time per run).	Performance test (Method 6 or 6c at 40 CFR part 60, appendix A–4).

[a] The date specified in the state plan can be no later than 3 years after the effective date of approval of a revised state plan or February 7, 2018.

[b] All emission limitations (except for opacity) are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the total mass basis limit or the toxic equivalency basis limit.

[c] Incorporated by reference, see § 60.17.

PART 241—SOLID WASTES USED AS FUELS OR INGREDIENTS IN COMBUSTION UNITS

■ 50. The authority citation for part 241 continues to read as follows:

Authority: 42 U.S.C. 6903, 6912, 7429.

Subpart A—General

■ 51. Section 241.2 is amended by:

■ a. Revising the definition of ''Clean cellulosic biomass'';

■ b. Revising the definition of ''Contaminants'';

■ c. Revising the definition of ''Established tire collection programs''; and

■ d. Revising the definition of ''Resinated wood''.

The revisions read as follows:

§ 241.2 Definitions.

* * * * *

Clean cellulosic biomass means those residuals that are akin to traditional cellulosic biomass, including, but not limited to: Agricultural and forest-derived biomass (e.g., green wood, forest thinnings, clean and unadulterated bark, sawdust, trim, tree harvesting residuals from logging and sawmill materials, hogged fuel, wood pellets, untreated wood pallets); urban wood (e.g., tree trimmings, stumps, and related forest-derived biomass from urban settings); corn stover and other biomass crops used specifically for the production of cellulosic biofuels (e.g., energy cane, other fast growing grasses, byproducts of ethanol natural fermentation processes); bagasse and other crop residues (e.g., peanut shells, vines, orchard trees, hulls, seeds, spent grains, cotton byproducts, corn and peanut production residues, rice milling and grain elevator operation residues); wood collected from forest fire clearance activities, trees and clean wood found in disaster debris, clean biomass from land clearing operations, and clean construction and demolition wood. These fuels are not secondary materials or solid wastes unless discarded. Clean biomass is biomass that does not contain contaminants at concentrations not

normally associated with virgin biomass materials.

* * * * *

Contaminants means all pollutants listed in Clean Air Act sections 112(b) or 129(a)(4), with the following three modifications:

(1) The definition includes the elements chlorine, fluorine, nitrogen, and sulfur in cases where non-hazardous secondary materials are burned as a fuel and combustion will result in the formation of hydrogen chloride (HCl), hydrogen fluoride (HF), nitrogen oxides (NO_X), or sulfur dioxide (SO_2). Chlorine, fluorine, nitrogen, and sulfur are not included in the definition in cases where non-hazardous secondary materials are used as an ingredient and not as a fuel.

(2) The definition does not include the following pollutants that are either unlikely to be found in non-hazardous secondary materials and products made from such materials or are adequately measured by other parts of this definition: hydrogen chloride (HCl), chlorine gas (Cl_2), hydrogen fluoride (HF), nitrogen oxides (NO_X), sulfur dioxide (SO_2), fine mineral fibers, particulate matter, coke oven emissions, opacity, diazomethane, white phosphorus, and titanium tetrachloride.

(3) The definition does not include m-cresol, o-cresol, p-cresol, m-xylene, o-xylene, and p-xylene as individual contaminants distinct from the grouped pollutants total cresols and total xylenes.

* * * * *

Established tire collection program means a comprehensive collection system or contractual arrangement that ensures scrap tires are not discarded and are handled as valuable commodities through arrival at the combustion facility. This can include tires that were not abandoned and were received from the general public at collection program events.

* * * * *

Resinated wood means wood products (containing binders and adhesives) produced by primary and secondary wood products manufacturing. Resinated wood includes residues from the manufacture and use of resinated wood, including materials such as board trim, sander dust, panel trim, and off-specification resinated wood products that do not meet a manufacturing quality or standard.

* * * * *

Subpart B—Identification of Non-Hazardous Secondary Materials That Are Solid Wastes When Used as Fuels or Ingredients in Combustion Units

■ 52. Amend 241.3 as follows:

■ a. Revise paragraph (a) and (b).

■ b. Revise paragraph (c) introductory text, and paragraphs (c)(1) introductory text, (c)(2) introductory text, and (c)(2)(ii), (iii), and (iv).

■ c. Revise paragraph (d)(1)(iii).

The revisions read as follows:

§ 241.3 Standards and procedures for identification of non-hazardous secondary materials that are solid wastes when used as fuels or ingredients in combustion units.

(a) Except as provided in paragraph (b) of this section or in § 241.4(a) of this subpart, non-hazardous secondary materials that are combusted are solid wastes, unless a petition is submitted to, and a determination granted by, the EPA pursuant to paragraph (c) of this section. The criteria to be addressed in the petition, as well as the process for making the non-waste determination, are specified in paragraph (c) of this section.

(b) The following non-hazardous secondary materials are not solid wastes when combusted:

(1) Non-hazardous secondary materials used as a fuel in a combustion unit that remain within the control of the generator and that meet the legitimacy criteria specified in paragraph (d)(1) of this section.

(2) The following non-hazardous secondary materials that have not been discarded and meet the legitimacy criteria specified in paragraph (d)(1) of this section when used in a combustion unit (by the generator or outside the control of the generator):

(i) [Reserved]

(ii) [Reserved]

(3) Non-hazardous secondary materials used as an ingredient in a combustion unit that meet the legitimacy criteria specified in paragraph (d)(2) of this section.

(4) Fuel or ingredient products that are used in a combustion unit, and are produced from the processing of discarded non-hazardous secondary materials and that meet the legitimacy criteria specified in paragraph (d)(1) of this section, with respect to fuels, and paragraph (d)(2) of this section, with respect to ingredients. The legitimacy criteria apply after the non-hazardous secondary material is processed to produce a fuel or ingredient product. Until the discarded non-hazardous secondary material is processed to produce a non-waste fuel or ingredient, the discarded non-hazardous secondary material is considered a solid waste and would be subject to all appropriate federal, state, and local requirements.

(c) The Regional Administrator may grant a non-waste determination that a non-hazardous secondary material that is used as a fuel, which is not managed within the control of the generator, is not discarded and is not a solid waste when combusted. This responsibility may be retained by the Assistant Administrator for the Office of Solid Waste and Emergency Response if combustors are located in multiple EPA Regions and the petitioner requests that the Assistant Administrator process the non-waste determination petition. If multiple combustion units are located in one EPA Region, the application must be submitted to the Regional Administrator for that Region. The criteria and process for making such non-waste determinations includes the following:

(1) Submittal of an application to the Regional Administrator for the EPA Region where the facility or facilities are located or the Assistant Administrator for the Office of Solid Waste and Emergency Response for a determination that the non-hazardous secondary material, even though it has been transferred to a third party, has not been discarded and is indistinguishable in all relevant aspects from a fuel product. The determination will be based on whether the non-hazardous secondary material that has been discarded is a legitimate fuel as specified in paragraph (d)(1) of this section and on the following criteria:

* * * * *

(2) The Regional Administrator or Assistant Administrator for the Office of Solid Waste and Emergency Response will evaluate the application pursuant to the following procedures:

* * * * *

(ii) The Regional Administrator or Assistant Administrator for the Office of Solid Waste and Emergency Response will evaluate the application and issue a draft notice tentatively granting or denying the application. Notification of this tentative decision will be published in a newspaper advertisement or radio broadcast in the locality where the facility combusting the non-hazardous secondary material is located, and be made available on the EPA's Web site.

(iii) The Regional Administrator or the Assistant Administrator for the Office of Solid Waste and Emergency Response will accept public comments on the tentative decision for 30 days, and may also hold a public hearing upon request or at his discretion. The Regional Administrator or the Assistant

Administrator for the Office of Solid Waste and Emergency Response will issue a final decision after receipt of comments and after a hearing (if any). If a determination is made that the non-hazardous secondary material is a non-waste fuel, it will be retroactive and apply on the date the petition was submitted.

(iv) If a change occurs that affects how a non-hazardous secondary material meets the relevant criteria contained in this paragraph after a formal non-waste determination has been granted, the applicant must re-apply to the Regional Administrator or the Assistant Administrator for the Office of Solid Waste and Emergency Response for a formal determination that the non-hazardous secondary material continues to meet the relevant criteria and, thus, is not a solid waste.

(d) * * *

(1) * * *

(iii) The non-hazardous secondary material must contain contaminants or groups of contaminants at levels comparable in concentration to or lower than those in traditional fuel(s) which the combustion unit is designed to burn. In determining which traditional fuel(s) a unit is designed to burn, persons may choose a traditional fuel that can be or is burned in the particular type of boiler, whether or not the combustion unit is permitted to burn that traditional fuel. In comparing contaminants between traditional fuel(s) and a non-hazardous secondary material, persons can use data for traditional fuel contaminant levels compiled from national surveys, as well as contaminant level data from the specific traditional fuel being replaced. To account for natural variability in contaminant levels, persons can use the full range of traditional fuel contaminant levels, provided such comparisons also consider variability in non-hazardous secondary material contaminant levels. Such comparisons are to be based on a direct comparison of the contaminant levels in both the non-hazardous secondary material and traditional fuel(s) prior to combustion.

* * * * *

■ 55. Add § 241.4 to read as follows:

§ 241.4 Non-Waste Determinations for Specific Non-Hazardous Secondary Materials When Used as a Fuel.

(a) The following non-hazardous secondary materials are not solid wastes when used as a fuel in a combustion unit:

(1) Scrap tires that are not discarded and are managed under the oversight of established tire collection programs, including tires removed from vehicles and off-specification tires.

(2) Resinated wood.

(3) Coal refuse that has been recovered from legacy piles and processed in the same manner as currently-generated coal refuse.

(4) Dewatered pulp and paper sludges that are not discarded and are generated and burned on-site by pulp and paper mills that burn a significant portion of such materials where such dewatered residuals are managed in a manner that preserves the meaningful heating value of the materials.

(b) Any person may submit a rulemaking petition to the Administrator to identify additional non-hazardous secondary materials to be listed in paragraph (a) of this section. Contents and procedures for the submittal of the petitions include the following:

(1) Each petition must be submitted to the Administrator by certified mail and must include:

(i) The petitioner's name and address;

(ii) A statement of the petitioner's interest in the proposed action;

(iii) A description of the proposed action, including (where appropriate) suggested regulatory language; and

(iv) A statement of the need and justification for the proposed action, including any supporting tests, studies, or other information. Where the non-hazardous secondary material does not meet the legitimacy criteria, the applicant must explain why such non-hazardous secondary material should be considered a non-waste fuel, balancing the legitimacy criteria with other relevant factors.

(2) The Administrator will make a tentative decision to grant or deny a petition and will publish notice of such tentative decision, either in the form of an advanced notice of proposed rulemaking, a proposed rule, or a tentative determination to deny the petition, in the **Federal Register** for written public comment.

(3) Upon the written request of any interested person, the Administrator may, at its discretion, hold an informal public hearing to consider oral comments on the tentative decision. A person requesting a hearing must state the issues to be raised and explain why written comments would not suffice to communicate the person's views. The Administrator may in any case decide on its own motion to hold an informal public hearing.

(4) After evaluating all public comments the Administrator will make a final decision by publishing in the **Federal Register** a regulatory amendment or a denial of the petition.

(5) The Administrator will grant or deny a petition based on the weight of evidence showing the following:

(i) The non-hazardous secondary material has not been discarded in the first instance and is legitimately used as a fuel in a combustion unit, or if discarded, has been sufficiently processed into a material that is legitimately used as a fuel.

(ii) Where any one of the legitimacy criteria in § 241.3(d)(1) is not met, that the use of the non-hazardous secondary material is integrally tied to the industrial production process, that the non-hazardous secondary material is functionally the same as the comparable traditional fuel, or other relevant factors as appropriate.

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Part III

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 416, 442, 482, et al.

Medicare and Medicaid Programs; Part II—Regulatory Provisions To Promote Program Efficiency, Transparency, and Burden Reduction; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 416, 442, 482, 483, 485, 486, 488, 491, and 493

[CMS–3267–P]

RIN 0938–AR49

Medicare and Medicaid Programs; Part II—Regulatory Provisions To Promote Program Efficiency, Transparency, and Burden Reduction

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

ACTION: Proposed rule.

SUMMARY: This proposed rule would reform Medicare regulations that CMS has identified as unnecessary, obsolete, or excessively burdensome on health care providers and suppliers, as well as certain regulations under the Clinical Laboratory Improvement Amendments of 1988 (CLIA). This proposed rule would increase the ability of health care professionals to devote resources to improving patient care, by eliminating or reducing requirements that impede quality patient care or that divert resources away from providing high quality patient care. This is one of several rules that we are proposing to achieve regulatory reforms under Executive Order 13563 on improving regulation and regulatory review and the Department's plan for retrospective review of existing rules.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on April 8, 2013.

ADDRESSES: In commenting, please refer to file code CMS–3267–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3267–P, P.O. Box 8010, Baltimore, MD 21244–8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3267–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* Alternatively, you may deliver (by hand or courier) your written comments ONLY to the following addresses prior to the close of the comment period:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, call telephone number (410) 786–9994 in advance to schedule your arrival with one of our staff members.

Comments erroneously mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Lauren Oviatt, (410) 786–4683. We have also included a subject matter expert and contact information under the ''Provisions of the Proposed Regulations'' section for each provision set out in this proposed rule.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

Executive Summary for This Proposed Rule

A. Purpose

In Executive Order 13563, ''Improving Regulations and Regulatory Review'', the President recognized the importance of a streamlined, effective, and efficient regulatory framework designed to promote economic growth, innovation, job-creation, and competitiveness. To achieve a more robust and effective regulatory framework, the President has directed each executive agency to establish a plan for ongoing retrospective review of existing significant regulations to identify those rules that can be eliminated as obsolete, unnecessary, burdensome, or counterproductive or that can be modified to be more effective, efficient, flexible, and streamlined. This proposed rule responds directly to the President's instructions in Executive Order 13563 by reducing outmoded or unnecessarily burdensome rules, and thereby increasing the ability of health care entities to devote resources to providing high quality patient care.

B. Summary of the Major Provisions

We are proposing to reduce regulatory burden on providers and suppliers by modifying, removing, or streamlining current regulations that we believe are excessively burdensome.

- *Radiology services in ambulatory surgical centers:* This proposed rule would reduce the requirements Ambulatory Surgical Centers (ASCs) must meet in order to provide radiological services to match those services they actually perform. ASCs are currently subject to the full hospital requirements for radiology services even though they are only permitted to provide limited radiologic services integral to the performance of certain surgical procedures.
- *Hospital registered dietitian privileges:* We propose to include qualified dietitians as practitioners who may be privileged to order patient diets under the hospital conditions of participation (CoPs).

• *Hospital supervision of radiopharmaceutical preparation:* We propose to revise the Nuclear medicine services CoP to remove the modifier ''direct'' from the in-house preparation supervision requirement. The presence of a pharmacist, MD, or DO would no longer be required during the delivery of off-hour nuclear medicine tests. These proposed changes are based on the Society of Nuclear Medicine and Molecular Imaging recommendations on this issue.

• *Hospital reclassification of swing-bed services:* We propose to revise the requirements by relocating the swing-bed CoPs to Subpart D, which would classify swing beds as an optional service. This revision would allow a hospital's compliance with ''swing bed'' requirements to be evaluated during routine accrediting organization surveys. This would reduce the burden on hospitals by not requiring an additional survey specifically for ''swing bed'' approval.

• *Transplant centers reports to CMS:* The CoPs require transplant programs to notify CMS of certain changes related to the center's transplant program. The current system for transplant center data analysis, in effect, requires the centers to submit data which CMS routinely receives through other sources. This creates unnecessary paperwork and burden on the transplant program and does not contribute to Federal oversight. We propose to eliminate this redundant data submission requirement.

• *Transplant center re-approval process:* The current transplant survey process and regulatory criteria require programs be subject to an automatic onsite review of compliance with key CoPs under a 3-year re-approval cycle under particular conditions. This leads some transplant programs to undergo an onsite survey that may not be necessary to ensure a proper level of federal oversight, and it also does not always provide for the most effective method to target survey resources where they are most needed. In addition, since we are already receiving the data we need to determine if a center is complying with outcome requirements, eliminating this automatic re-approval cycle would not result in any reduction in Federal oversight of the center. It would, however, enable us to more efficiently use our survey resources. In lieu of the automatic 3-year re-approval cycle, we propose to provide more flexibility in the re-approval cycle to be able to focus survey attention where it is most needed. We would also clarify the following—(1) the review of mitigating factors process could occur at any time there was non-compliance with the CoPs, and (2) that compliance with the CoPs would be a continuous requirement, as already specified in § 488.61(c).

• *Long term care sprinkler waiver:* All buildings containing long term care (LTC) facilities are required to have automatic sprinkler systems installed throughout the building by August 13, 2013 (§ 483.70(a)(8)). Based on recent public feedback, we believe that some facilities will not be able to meet the 2013 deadline. In order to maintain access to LTC facilities, and in recognition of financing difficulties faced by some providers, we are proposing a provision that would allow LTC facilities the opportunity to apply for a deadline extension, not to exceed 2 years, if certain conditions apply. An additional extension may be granted for up to 1 year, depending on the need and particular circumstances.

• *CAH provision of services:* Critical Access Hospital (CAH) CoPs require that a CAH must develop its patient care policies with the advice of ''at least one member who is not a member of the CAH staff.'' We believe that this provision is no longer necessary and that the original reasons for including this requirement (lack of local resources and in-house expertise) have been effectively addressed. Also, based on our experience with CAHs and input from the provider community, it is a challenge for facilities to comply with this requirement. These challenges include the amount of time it takes to familiarize the non-staff member with the CAH's operations, high turnover, and, in many cases, the expense of paying outside personnel.

• *CAH and RHC/FQHC physician responsibilities:* The regulations for CAHs, Rural Health Clinics (RHCs), and Federally Qualified Health Centers (FQHCs), require a physician to be present for sufficient periods of time, at least once in every 2 week period, except in extraordinary circumstances. Some providers in extremely remote areas or areas that have geographic barriers have indicated that they find it difficult to comply with the precise biweekly schedule requirement. Many rural populations suffer from limited access to care due to a shortage of health care professionals, especially physicians. Recent improvements in, and expansion of, telemedicine services allow for physicians to provide certain types of care to remote facilities at much less cost. We propose to revise the CAH and RHC/FQHC regulations to eliminate the requirement that a physician must be onsite at least once in every 2-week period.

Clinical Laboratory Improvement Amendments Revisions: This proposed rule would make a number of clarifications and changes pertaining to CMS regulations governing proficiency testing referrals under the Clinical Laboratory Improvement Amendments of 1988 (CLIA). These changes would prevent confusion on the part of laboratories, reduce the risk of noncompliance, and establish policies under which certain PT referrals by laboratories would not generally be subject to revocation of a CLIA certificate, or a two-year prohibition on laboratory ownership or operation that may be applied to an owner and an operator when a CLIA certificate is revoked.

• *Treatment of proficiency testing samples:* We are proposing to add a clarifying statement that explicitly notes that the requirement to treat proficiency testing (PT) samples in the same manner as patient specimens does not mean that it is acceptable to refer PT samples to another laboratory for testing even if that is the protocol for patient specimens.

• *Intentional referral carve-out:* We are proposing to carve out a narrow exception in our long-standing interpretation of what constitutes an ''intentional'' referral of PT samples. In these instances, the laboratory would be subject to alternate sanctions.

• *New definitions:* To clarify the stipulations of the intentional referral carve-out, we would also add the following terms, with their definitions, to the regulation: Reflex testing, Confirmatory testing, and repeat PT referral.

Proposals That Would Remove Obsolete or Duplicative Regulations or Provide Clarifying Information: We would remove regulations set out in the Code of Federal Regulations (CFR) that have become obsolete and are no longer needed or enforced and would clarify other provisions.

• *Hospital medical staff:* We propose to clarify the requirement that a hospital's medical staff must be generally composed of physicians but that it may also include, in accordance with State laws, including scope-of-practice laws, other categories of non-physician practitioners who are determined to be eligible for appointment by the governing body.

• *Transplant centers outcome review:* The transplant center CoPs state that, ''[e]xcept for lung transplants, CMS will review adult and pediatric outcomes separately when a center requests Medicare approval to perform both adult and pediatric transplants.'' Changes to the transplant center

reporting system have made the separate review for lung transplant data obsolete. Therefore, we are proposing to remove this language.

• *Transplant center volume and clinical experience requirements:* The transplant center CoPs state that ''[t]he required number of transplants must have been performed during the time frame reported in the most recent SRTR center-specific report.'' The Scientific Registry for Transplant Recipients (SRTR) provides statistical information about transplant outcomes and transplant programs nationwide. Under the current regulations, however, there is no requirement that a certain number of transplants be performed during a particular period that would be covered in a single SRTR center-specific report. This has resulted in transplant centers being confused about the volume of transplants they are required to perform during any particular period of time covered by the SRTR center-specific reports. We are proposing changes to clarify the transplant volume and clinical experience requirements.

• *RHC/FQHC definition of physician:* The definition of a ''physician'' in the RHC/FQHC regulations does not conform to the definition of a ''physician'' in the payment regulations. We propose to revise the regulation to conform to the definition in the payment regulations to eliminate possible confusion in the provider community.

Proposals that Respond to Stakeholder Concerns: We have identified changes that would improve clarity and respond to concerns raised by the public.

• *Hospital governing body:* We are proposing to add a new provision to the ''Medical staff'' standard of the governing body CoP. This new provision would require a hospital's governing body to directly consult at least periodically throughout the calendar year or fiscal year with the individual responsible for the organized medical staff of the hospital, or his or her designee. For a multi-hospital system using a single governing body to oversee multiple hospitals within its system, this provision would require the single governing body to consult directly with the individual responsible for the organized medical staff (or his or her designee) of each hospital within its system in addition to the other requirements proposed here. We are also proposing to remove the requirement for a medical staff member, or members, to be on a hospital's governing body.

• *Hospital medical staff:* We propose to revise § 482.22 to require that each hospital must have an organized and individual medical staff, distinct to that individual hospital, that operates under bylaws approved by the governing body, and which is responsible for the quality of medical care provided to patients by that individual hospital.

• *Practitioners permitted to order hospital outpatient services:* We propose to revise the Outpatient services CoP to allow for practitioners who are not on the hospital's medical staff to order hospital outpatient services for their patients when authorized by the medical staff and allowed by State law.

• *Hospital diet terminology:* We propose to update terminology related to ''diets'' and ''therapeutic diets'' in the CoPs.

• *Request for comment on RHC services:* In addition, this proposed regulation seeks comment on potential changes we could make to regulatory or other requirements that could reduce barriers to the provision of telehealth, hospice, or home health services in an RHC.

Technical Corrections: We are proposing technical corrections to some regulations.

• *Organ Procurement Organizations (OPOs):* We are proposing some technical corrections to the CoPs for OPOs.

• *Intermediate Care Facilities for Individuals who are Intellectually Disabled (ICF/IIDs):* We are proposing some technical corrections to clarify state survey agency certification survey requirements for ICF/IIDs.

• *Rural Health Clinics (RHCs):* We propose to correct a technical error in the regulations by amending § 491.8(a)(6) to conform to section 6213(a)(3) of OBRA '89 (Pub. L. 101–239),which requires that an NP, PA, or certified nurse-midwife (CNM) be available to furnish patient care at least 50 percent of the time the RHC operates.

C. Summary of Costs and Benefits

1. Overall Impact

This proposed rule would create savings and reduce burden in many areas. Several of the proposed changes would create measurable monetary savings for providers and suppliers, while others would create less tangible savings of time and administrative burden. We estimate one-time savings of $22 million, and annual recurring savings of $654 million.

2. Section-by-Section Economic Impact Estimates.

The following table summarizes the provisions, which we are able to provide specific estimates for savings or burden reductions (these estimates are uncertain and could be substantially higher or lower, as explained in the regulatory impact analysis section of this rule):

Issue	Frequency	Estimated first year savings or benefits ($ millions)
Ambulatory Surgical Centers:		
• Radiology Services	Recurring annually	≤41
Hospitals:		
• Food and dietetic services	Recurring annually	83 to 528
• Nuclear medicine services	Recurring annually	39
Transplant Centers:		
• Reports to CMS & Survey Changes	Recurring annually	<1
Long Term Care Facilities:		
• Sprinkler Deadline Extension	One-time	22
Rural Health:		
• CAH & RHC/FQHC Physician responsibilities	Recurring annually	42
• CAH Provision of services	Recurring annually	<1
CLIA:		
• PT Referral	Recurring annually	2
Total		231 to 676

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I. Background

In January 2011, the President issued Executive Order 13563, ''Improving Regulation and Regulatory Review.'' Section 6 of that order requires agencies to identify rules that may be ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' In accordance with the Executive Order, the Secretary of the Department of Health & Human Services (HHS) published on August 22, 2011, a Plan for Retrospective Review of Existing Rules (*http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system*). As shown in the plan, the Centers for Medicare & Medicaid Services (CMS) has identified many obsolete and burdensome regulations that could be eliminated or reformed to improve effectiveness or reduce unnecessary reporting requirements and other costs, with a particular focus on freeing up resources that health care providers, health plans, and States could use to improve or enhance patient health and safety. CMS has also examined policies and practices not codified in rules that could be changed or streamlined to achieve better outcomes for patients while reducing burden on providers of care. In addition, CMS has identified non-regulatory changes to increase transparency and to become a better business partner. For example:

- We have automated our review of Health Services Delivery tables, which gives Medicare Advantage (MA) applicants for participation as MA plans immediate feedback on their deficiencies before submitting applications so that they can address them up-front.
- We have changed the timeframes during which a Medicare durable medical equipment (DME) supplier may contact a beneficiary concerning refilling an order from 7 days to 15 days before the beneficiary's refill date.
- We have streamlined the Skilled Nursing Facility Discharge Assessment through Minimum Data Set (MDS) 3.0 which has been designed to improve the reliability, accuracy, and usefulness of the MDS. The change included the removal of data collections in the MDS that are not relevant to the measurement of quality or used for reimbursement purposes.

As explained in the plan, HHS is committed to the President's vision of creating an environment where agencies incorporate and integrate the ongoing retrospective review of regulations into Department operations to achieve a more streamlined and effective regulatory framework. The objectives are to improve the quality of existing regulations consistent with statutory requirements; streamline procedural solutions for businesses to enter and operate in the marketplace; maximize net benefits (including benefits that are difficult to quantify); and reduce costs and other burdens on businesses to comply with regulations. Consistent with the commitment to periodic review and to public participation, HHS will continue to assess its existing significant regulations in accordance with the requirements of Executive Order 13563.

In accordance with these goals, we published two final rules on May 16, 2012. The first rule, titled ''Reform of Hospital and Critical Access Hospital Conditions of Participation,'' finalizes updates to the Medicare CoPs and reduces regulatory burden for hospitals and CAHs. The second rule, titled ''Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction,'' addresses burdensome regulatory requirements for a broader range of healthcare providers and suppliers who provide care to Medicare and Medicaid beneficiaries. This proposed rule is a continuation of those efforts.

II. Provisions of the Proposed Regulations

A. Ambulatory Surgical Centers

Section 1832(a)(2)(F)(i) of the Act specifies that Ambulatory Surgical Centers (ASCs) must meet health, safety, and other requirements as specified by the Secretary in regulation in order to participate in Medicare. The Secretary is responsible for ensuring that the Conditions for Coverage (CfCs) and their enforcement protect the health and safety of all individuals treated by ASCs, whether they are Medicare beneficiaries or other patients.

To implement the CfCs, we determine compliance through State survey agencies that conduct onsite inspections using these requirements. ASCs also may be deemed to meet Medicare CfCs if they are accredited by one of the national accrediting organizations that have a CMS-approved Medicare ASC accreditation program.

The ASC CfCs were first published on August 5, 1982 (47 FR 34082), and were subsequently amended several times in the last four years: A final rule published on November 18, 2008 (73 FR 68502), revised four existing health and safety CfCs and created three new health and safety CfCs (42 CFR 416.41 through 416.43 and 416.49 through 416.52); a subsequent final rule amended the Patient rights CfC on October 24, 2011 (76 FR 65886); and most recently the final rule published on May 16, 2012, amended the requirements governing emergency equipment that ASCs must maintain (77 FR 29002).

Section 416.49(b) of Title 42 of the Code of Federal Regulations outlines the radiologic services requirements that ASCs must meet in order to be Medicare-certified. Since ASCs are facilities that operate exclusively to provide a specific range of approved procedures (see § 416.2), they may provide radiologic services only to the extent that such services are an integral part of the procedures they perform. It is important to emphasize that radiologic services are only permitted in an ASC when they are integral to the procedure being performed. Section 416.49(b)(1) states that the ASC must have procedures for obtaining radiological services from a Medicare-

approved facility to meet the needs of patients. Section 416.49(b)(2) requires that the ASC's radiologic services must meet the hospital CoPs for radiologic services specified in § 482.26. However, since adopting this rule in 2008, we have learned that some of the hospital CoP requirements are unduly burdensome for ASCs to meet. In particular, the hospital CoP requirement to have a radiologist supervise the provision of radiologic services is unduly burdensome, as many ASCs are having great difficulty locating a radiologist to supervise the ASC's radiologic services. In addition, we have discovered the inclusion of the radiologist supervision requirement from the overarching hospital radiologic services CoP appears to be an overly aggressive measure since ASCs do not provide radiologic services that require interpretation for diagnosis. The ASC CoPs were first published in 1982 and did not include a radiologist supervision requirement until the 2008 final rule. Moreover, the cost of privileging radiologists as members of an ASC's medical staff and paying radiologists fees for oversight of radiology studies that are limited to those which are integral to a surgical procedure, with the results applied immediately by the operating physician, is often needlessly burdensome. Supervision of radiologic services should be appropriate to the types of procedures conducted by the ASC. The ASC governing body, as set out at § 416.41, is responsible for the oversight and accountability for the quality assessment and performance improvement program, and is responsible for ensuring that all policies and services provide quality healthcare in a safe environment. The ASC governing body is responsible for determining if any procedures, now or in the future, require additional review by a radiologist. In addition, the Medical staff CfC at § 416.45 requires the governing body be accountable for the medical staff, and to ensure that such staff members are legally and professionally qualified for the positions to which they are appointed and for the performance of the privileges granted. It is important to note that the operating surgeon is expected, as part of his or her qualifications in order to be privileged to perform the procedure, to demonstrate competency in using imaging as an integral part of the procedure. If finalized, subsequent ASC interpretive guidance would include additional information that would assist surveyors in determining if the governing body has met these requirements. We believe that supervision of radiologic services used in an ASC by a doctor of medicine or osteopathy (MD/DO) on the ASC's medical staff with appropriate education and experience in radiologic services would be effective in assuring the quality and safety of the radiologic services provided currently in ASCs. We welcome your comments on whether these proposed changes would allow for appropriate oversight of radiologic procedures conducted in ASCs.

We propose to remove § 416.49(b)(1) and replace it with the requirement that radiologic services may only be provided when integral to procedures offered by the ASC and must meet the requirements specified in § 482.26(b), (c)(2), and (d)(2). We also propose to remove the existing language at § 416.49(b)(2) and replace it with the requirement that an MD/DO who is qualified by education and experience in accordance with State law and ASC policy must supervise the provision of radiologic services.

Also, we note that there is a technical error in § 416.42(b)(2) of the ASC CfCs and we are proposing to correct this error. Paragraph (b)(2) references ''paragraph (d) of this section'' but 42 CFR 416.42 does not have a paragraph (d). We propose to correct the error by referencing paragraph (c) of that section instead.

We believe these proposed changes to the ASC radiologic services requirements will assure the safety of these services while being less burdensome for Medicare-certified ASC facilities. We welcome comments from the public on these proposed changes.

Contact for ASC Topics: CAPT Jacqueline Leach, USPHS, 410–786–4282.

B. Intermediate Care Facilities for Individuals Who Are Intellectually Disabled

In the May 16, 2012, final rule ''Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction,'' (77 FR 29002) we eliminated the requirement for time-limited agreements for Intermediate Care Facilities for Individuals who are Intellectually Disabled (ICF/IID's) and replaced it with an open-ended agreement which, consistent with nursing facilities, would remain in effect until the Secretary or a State determined that the ICF/IID no longer met the ICF/IID CoPs. We also added a requirement that a certified ICF/IID would be surveyed, on average, every 12 months with a maximum 15-month survey interval. This requirement provides States with more flexibility relative to the current process. These changes were implemented by revising §§ 442.15, 442.109, and 442.110, and by the deletion of § 442.16.

The regulation at § 442.105 describes circumstances for when a state survey agency may provide an annual certification of a facility found out of compliance with standards for ICF/IID's. Since time-limited certification is no longer required for ICF/IID's, this section serves no purpose and is confusing. Therefore, we propose that this section be deleted. We also propose to make a corresponding change to § 442.101(d)(3) by deleting a reference to § 442.105.

A revision to § 442.110(b) made in the May 16, 2012 final rule extended the time for which a state may certify ICF/IID's with standard level deficiencies. However, the section inadvertently and incorrectly maintains time-limited certification for this sub-set of facilities. This is inconsistent with the revised survey regulation for ICF/IIDs put in place in the May 16, 2012 final rule, and will create confusion and barriers to its successful implementation. Therefore, we propose to delete § 442.110 in its entirety.

The language in § 442.105 and § 442.110 was deleted to make it consistent with the intent of the Burden Reduction I regulatory changes to standardize survey processes of ICF/IIDs with those of nursing facilities and other certified providers with open-ended certification periods.

Contact for ICF/IID Topics: Martin Kennedy, 410–786–0784.

C. Hospitals

1. Governing Body (§ 482.12)

On May 16, 2012, we published a final rule, entitled ''Reform of Hospital and Critical Access Hospital Conditions of Participation'' (77 FR 29034). In that rule, we finalized changes to the requirements of the Governing body CoP, § 482.12, and adopted a policy to allow one governing body to oversee multiple hospitals in a multi-hospital system. Additionally, we added a requirement for a medical staff member, or members, from at least one hospital in the system to be included on the governing body as a means of ensuring communication and coordination between a single governing body and the medicals staffs of individual hospitals in the system. After publication of the rule, we received considerable feedback that the mandate requiring medical staff representation on the governing body of a hospital could cause unanticipated complications for many hospitals,

especially public and government-owned institutions. We recognized that the provision to include a member of the medical staff on a hospital's governing body creates conflicts for some hospitals, particularly public and not-for-profit hospitals. Issues include, but are not limited to, potential conflicts with some State and local laws that require members of a public hospital's governing body to either be publicly elected or appointed by the State's governor or by some other State or local official(s).

Given the complexity of the issue, and in light of industry feedback, we reviewed this requirement and gathered the relevant background information on the issues raised by stakeholders. After consideration of the issues, we decided to use this proposed rule to rescind part of the new requirement and to propose an alternative. Therefore, we propose to remove the requirement for a medical staff member, or members, to serve on a hospital's governing body. While we believe that it is important that our requirements avoid any unnecessary conflicts for hospitals, we believe that it is essential that the requirements also ensure that the medical staff perspective on quality of care is heard by a hospital's governing body. Therefore, we propose to add a new provision to the ''Medical staff'' standard of the Governing body CoP at § 482.12(a)(10). This new provision would require a hospital's governing body to directly consult with the individual responsible for the organized medical staff of the hospital, or his or her designee. At a minimum, this direct consultation would require a discussion of matters related to the quality of medical care provided to patients of the hospital and must occur periodically throughout the fiscal or calendar year. While the proposed language reflects our intention to leave some degree of flexibility for a hospital's governing body (or a multi-hospital system's governing body) to determine how often during the year its consultations with the chief(s) of its medical staff(s) would occur, we would expect that these consultations would occur at least twice during either a fiscal or calendar year. Moreover, we would expect a hospital (or multi-hospital system) governing body to determine the number of consultations needed based on various factors specific to a particular hospital. These factors would include, but are not limited to, the scope and complexity of hospital services offered, specific patient populations served by a hospital, and any issues of patient safety and quality of care that a hospital's quality assessment and performance improvement program might periodically identify as needing the attention of the governing body in consultation with its medical staff. We would also expect to see evidence that the governing body is appropriately responsive to any periodic and/or urgent requests from the individual responsible for the organized medical staff of the hospital (or his or her designee) for timely consultation on issues regarding the quality of medical care provided to patients of the hospital.

Additionally, for a multi-hospital system using a single governing body to oversee multiple hospitals within its system, we are proposing to require the single governing body to consult directly with the individual responsible for the organized medical staff (or his or her designee) of *each* hospital within its system in addition to the other requirements proposed here. We believe that this proposal represents the best solution for those hospitals that were unintentionally burdened by the requirement finalized in the May 16, 2012, rule, while still addressing the concerns of many stakeholders who responded to the final rule, many of whom firmly stated their belief that medical staff input on a hospital's governing body is essential to the continuing quality of patient care delivered in the hospital.

1. Medical Staff (§ 482.22)

Similar to the issues regarding medical staff representation on the governing body that were discussed in the previous section, we also received a considerable amount of feedback regarding our responses in the May 16, 2012 final rule (77 FR 29061) where we discussed our long-standing interpretation of the Medical staff CoP at § 482.22 as requiring that each hospital have its own independent medical staff. We also confirmed in the final rule that we do not allow a single corporate medical staff to assume responsibility for the quality of medical care at multiple hospitals within a multi-hospital system. Despite the fact that over the years some members of the hospital industry have repeatedly requested a change to the prohibition in the CoPs against a single medical staff for multiple hospitals within a corporate system, CMS has maintained the importance of each hospital having its own medical staff at the local level and has maintained that this is the best model for overseeing care delivery and for moving forward with quality improvements.

Many of the comments that we received in response to the corresponding proposed rule (published October 24, 2011 (76 FR 65891)), indicated a clear awareness that we had considered a rule change that would allow for a single medical staff for multiple hospitals, had decided against it, and were nevertheless asking for comments on whether we should strengthen the language to more fully articulate our long-standing interpretation that each hospital have its own organized medical staff. While these commenters did not suggest clarifying changes to the regulatory language, a significant number expressed an understanding of, and support for, our decision to not propose a change and to continue to interpret the CoP as one that does not permit a multi-hospital system to have a single medical staff, but that instead requires that each individual hospital have its own medical staff. Other commenters interpreted our request for comments in the proposed rule as an indication that we were in some way proposing a change to the requirements or proposing a change in our historical interpretation of this CoP.

We continue to believe that it is important and in the best interest of patient care for each hospital to have its own medical staff. For example, a large multi-hospital, multi-regional system that only has a single medical staff may not appropriately be able to address the needs of each individual hospital in each local area. We did not receive public comments on the prior rule that would have adequately addressed this issue. The mixed response from public commenters regarding our confirmation of the requirement and its interpretation has led us to consider proposing changes to the regulatory language of § 482.22 that would more explicitly communicate our longstanding policy that each hospital must have its own medical staff. Therefore, we propose to clarify the introductory paragraph of § 482.22 to require that each hospital must have an organized and individual medical staff, distinct to that individual hospital, that operates under bylaws approved by the governing body, and which is responsible for the quality of medical care provided to patients by that individual hospital.

Shortly after publication of the May 2012 final rule, it was brought to our attention that some of the changes made to the hospital requirements at § 482.22(a), ''Medical staff,'' were not clear. Our intent in revising the provision was to provide the flexibility that hospitals need under federal law to maximize their medical staff opportunities for all practitioners, but within the regulatory boundaries of their State licensing and scope-of-

practice laws. We believe that the greater flexibility for hospitals and medical staffs to enlist the services of non-physician practitioners to carry out the patient care duties for which they are trained and licensed will allow them to meet the needs of their patients most efficiently and effectively.

Section 482.22(a) (Standard: Eligibility and process for appointment to medical staff) currently requires a hospital's medical staff to be composed of doctors of medicine or osteopathy. It also allows for a hospital's medical staff to include other categories of non-physician practitioners determined as eligible for appointment by the governing body, in accordance with State law, including scope-of-practice laws. With the substitution of the term ''non-physician practitioners'' in the final rule (which replaced the term ''other practitioners''), we might have unintentionally given the impression that the requirements now excluded other types of practitioners previously included among those eligible for appointment to the medical staff. In our guidance prior to the issuance of this final rule, we stated that a medical staff could include ''other practitioners'' such as doctors of dental surgery or of dental medicine, doctors of podiatric medicine, doctors of optometry, and chiropractors, as those terms are defined and specified as physicians under section 1861(r) of the Act. Because part of the provision states that a hospital's medical staff must include ''doctors of medicine or osteopathy,'' physicians such as those listed above are inadvertently excluded from the medical staff by the requirement. Similarly, the new term ''non-physician practitioner'' therefore might also seem to exclude these other types of physicians simply by its use of the modifier, ''non-physician,'' since by the definition described at section 1861(r) of the Act, the practitioners are ''physicians,'' they cannot also be considered to be ''non-physicians.'' Our intention was not to exclude these types of physicians from the definition described in our regulations. Therefore, we believe that it would be appropriate to propose revisions to 42 CFR 482.22(a) that would clarify that the medical staff requirements still allow for these types of physicians as well as other types of non-physician practitioners to be eligible for appointment to a hospital's medical staff.

At § 482.22(a), we propose to revise the current language to require that a hospital's medical staff must be composed of physicians and that it may also include, in accordance with State laws, including scope-of-practice laws, other categories of non-physician practitioners determined as eligible for appointment by the governing body. By the proposed substitution of the current terms, ''doctors of medicine or osteopathy,'' with the term ''physicians,'' we would be consistent with the statutory language. We also propose to substitute ''must include'' with ''must be composed of'' since we believe that this would more accurately reflect the fact that hospital medical staffs are predominantly made up of physicians and that this would also emphasize the vital positions that physicians hold on these medical staffs. The proposed regulatory language would require that the medical staff must be composed of physicians. Finally, we propose to retain the language allowing for other types of non-physician practitioners (such as APRNs, PAs, RDs, and PharmDs) to be included on the medical staff since we continue to believe that these practitioners, even though they are not included in the statutory definition of a physician, nevertheless have equally important roles to play on a medical staff and on the quality of medical care provided to patients in the hospital.

2. Food and Dietetic Services (§ 482.28)

We propose to revise the hospital requirements at § 482.28(b), ''Food and dietetic services,'' which currently requires that a therapeutic diet must be prescribed only by the practitioner or practitioners responsible for the care of the patient.

The Interpretive Guidelines (IGs) for this requirement, which are contained in the State Operations Manual (SOM) for surveyors, further states that ''[in] accordance with State law and hospital policy, a dietitian may assess a patient's nutritional needs and provide recommendations or consultations for patients, but the patient's diet must be prescribed by the practitioner responsible for the patient's care.'' State survey agencies have applied this requirement to mean that registered dietitians (RDs) cannot be granted privileges by the hospital to order patient diets (or to order necessary laboratory tests to monitor the effectiveness of dietary plans and orders, or to make subsequent modifications to those diets based on the laboratory tests) since these practitioners have never been considered to be among those in the hospital who are ''responsible for the care of the patient.'' The responsibility for the care of the patient, and the attendant hospital privileges that accompany this responsibility, have traditionally and exclusively been the provenance of the physician, more specifically the MD and DO, and, to a lesser extent, the APRN and PA. Understanding the regulatory language and its interpretation, most hospitals have taken a very conservative approach toward the granting of privileges, especially ordering privileges, to other types of non-physician practitioners, including RDs. Consequently, most hospitals have withheld ordering privileges from RDs absent a clear signal from CMS and the subsequent and necessary changes to the CoPs that would allow them to do so.

Through the publication of the October 2011 proposed rule and the May 2012 final rule that followed, it has come to our attention that the regulatory language and the IGs for § 482.28(b) are too restrictive and lack the reasonable flexibility to allow hospitals to extend these specific privileges to RDs in accordance with State laws. We believe that RDs are the professionals who are best qualified to assess a patient's nutritional status and to design and implement a nutritional treatment plan in consultation with the patient's interdisciplinary care team. In order for patients to receive timely nutritional care, the RD must be viewed as an integral member of the hospital interdisciplinary care team, one who, as the team's clinical nutrition expert, is responsible for a patient's nutritional diagnosis and treatment in light of the patient's medical diagnosis. Without the proposed regulatory changes allowing them to grant appropriate ordering privileges to RDs, hospitals would not be able to effectively realize the improved patient outcomes and overall cost savings that we believe would be possible with such changes. Please note, because a few States elect not to use the regulatory term ''registered'' and choose instead to use the term ''licensed'' (or no modifying term at all), we are proposing to use the term ''qualified dietitian.'' In those instances where we have used the most common abbreviation for dietitians, ''RD,'' throughout this preamble, our intention is to include all qualified dietitians, regardless of the modifying term (or lack thereof), as long as each qualified dietitian meets the requirements of his or her respective State laws.

A review of the literature (Kinn TJ. Clinical order writing privileges. Support Line. 2011; 33; 4; 3–10) supports that, in addition to providing safe patient care with improved outcomes, RDs with ordering privileges contribute to decreased patient lengths of stay and provide nutrition services more efficiently, resulting in lower costs for hospitals. A 2010 retrospective

cohort study of 1,965 patients at a 613-bed tertiary academic medical center looked at the influence of the RD with ordering privileges on appropriate parenteral nutrition (PN) usage (Peterson SJ, Chen Y, Sullivan CA, et al. Assessing the influence of registered dietician order-writing privileges on parenteral nutrition use. J AM Diet Assoc. 2010; 110; 1702–1711). The study showed that inappropriate PN usage decreased from 482 patients to 240 patients during the pre- and post-ordering privileges periods, respectively. The data from this study also demonstrated a 20 percent cost savings in PN usage, which translated to an approximately $300,000 savings to the hospital over the two-year period. Additionally, the changes proposed in this rule might also help hospitals to realize other significant quality and patient safety improvements as well as savings. A 2008 study indicates that patients whose PN regimens were ordered by RDs have significantly fewer days of hyperglycemia (57 percent versus 23 percent) and electrolyte abnormalities (72 percent versus 39 percent) compared with patients whose PN regimens were ordered by physicians (Duffy JK, Gray RL, Roberts S, Glanzer SR, Longoria SL. Independent nutrition order writing by registered dieticians reduces complications associated with nutrition support [abstract]. J Am Diet Assoc. 2008; 108 (suppl 1):A9).

A number of other studies have also shown the prevalence of malnutrition among hospital patients, estimating that anywhere between 20 and 50 percent of hospital inpatients are either malnourished or at risk for malnutrition, depending on the particular patient population and the criteria used to assess these patients (Barker LA, Gout BS, Crowe TC. Hospital malnutrition: prevalence, identification and impact on patients and the healthcare system. Int J Environ Res Public Health. 2011; 8(2); 514–527). Malnourished surgical patients are two to three times more likely to experience post-operative complications and increased mortality than their more well-nourished counterparts (Gallagher-Allred CR, Coble Voss A, Finn SC, McCamish MA. Malnutrition and clinical outcomes: the case for medical nutrition therapy. J Am Diet Assoc. 1996; 96; 361–369). Physicians, APRNs, and PAs often lack the training and educational background to manage the sometimes complex nutritional needs of patients with the same degree of efficiency and skill as RDs who have benefited from curriculums that devote a significant number of educational hours to this area of medicine. The addition of ordering privileges enhances the ability that RDs already have to provide timely, cost-effective, and evidence-based nutrition services as the recognized nutrition experts on a hospital interdisciplinary team and saves valuable time in the care and treatment of patients, time that is now often wasted as RDs must seek out physicians, APRNs, and PAs to write or co-sign dietary orders. A 2011 review article discusses a number of additional studies that provide further evidence for the extensive training and education in nutrition that RDs experience as opposed to the limited exposure that physicians receive to this area of medicine, along with several other studies supporting the cost-effectiveness and positive patient outcomes that hospitals might achieve by granting RDs ordering privileges (Kinn TJ. Clinical order writing privileges. Support Line. 2011; 33; 4; 3–10).

In order for patients to have access to the timely nutritional care that can be provided by RDs, a hospital must have the regulatory flexibility either to appoint RDs to the medical staff and grant them specific nutritional ordering privileges or to authorize the ordering privileges without appointment to the medical staff, all through the hospital's appropriate medical staff rules, regulations, and bylaws. In either instance, medical staff oversight of RDs and their ordering privileges would be ensured. Therefore, we are proposing revisions to § 482.28(b)(1) and (2) that would require that individual patient nutritional needs be met in accordance with recognized dietary practices. We would make further revisions that would allow for flexibility in this area by requiring that all patient diets, including therapeutic diets, must be ordered by a practitioner responsible for the care of the patient, or by a qualified dietician as authorized by the medical staff and in accordance with State law. We believe that hospitals that choose to grant these specific ordering privileges to RDs may achieve a higher quality of care for their patients by allowing these professionals to fully and efficiently function as important members of the hospital patient care team in the role for which they were trained. We also believe hospitals would realize significant cost savings in many of the areas affected by nutritional care. We welcome public comments on this proposed change.

3. Nuclear Medicine Services (§ 482.53)

The current requirement at § 482.53(b)(1) requires that the in-house preparation of radiopharmaceuticals be performed by, or under the direct supervision of, an appropriately trained registered pharmacist or a doctor of medicine or osteopathy. Direct supervision means that one of these professionals must be physically present in the hospital and immediately available during the preparation of all radiopharmaceuticals. Hospitals have reported to us that this requirement is extremely burdensome when the presence of a pharmacist or physician is required for the provision of off-hour nuclear medicine tests that require only minimal in-house preparation of radiopharmaceuticals. Information from stakeholders regarding this issue has revealed that minimal in-house preparation is required for most radiopharmaceuticals. Many are batch-prepared by the manufacturer for hospital use as a way of reducing radiation exposure of hospital personnel, ensuring that on-site hospital preparation of radiopharmaceuticals generally requires only a few final steps, if any.

We propose to revise the current requirement at § 482.53(b)(1) by removing the term ''direct.'' The revised requirement would then require that in-house preparation of radiopharmaceuticals be performed by, or under the supervision of, an appropriately trained registered pharmacist or doctor of medicine or osteopathy. The revision to ''supervision'' from ''direct supervision'' would allow for other appropriately trained hospital staff to prepare in-house radiopharmaceuticals under the oversight of a registered pharmacist or doctor of medicine or osteopathy, but it would not require that such oversight be exercised by the physical presence in the hospital at all times of one of these professionals, particularly during off-hours when such a professional would not be routinely present.

The proposed changes would allow hospitals to establish their own policies on supervision of nuclear medicine personnel and the in-house preparation of radiopharmaceuticals. Absent a requirement for ''direct'' supervision, we would expect most hospitals to follow the Society of Nuclear Medicine and Molecular Imaging recommendations on this issue and to no longer require a registered pharmacist or MD/DO to be on site for direct supervision when radiopharmaceuticals are prepared in-house by staff. The proposed change would directly reduce the burden of the current direct supervision requirement where it is most needed—in-house preparation of radiopharmaceuticals for after-hours/emergency performance of

nuclear medicine diagnostic procedures (for example, coronary artery disease, pulmonary emboli, stroke, and testicular torsion). Given that an estimated 16 million nuclear medicine imaging and therapeutic procedures are performed each year in the United States, we would expect hospitals to achieve significant cost reductions in this area if they take advantage of the proposed change. We welcome the public's comments on this proposed change.

4. Outpatient Services (§ 482.54)

We are proposing changes to the requirements at § 482.54, ''Outpatient services.'' Specifically, we are adding a new standard at § 482.54(c), entitled ''Orders for outpatient services.'' We are taking the opportunity to propose these revisions in this rule so that the regulations would codify Interpretive Guideline (IG) changes that we recently made regarding the ordering of outpatient services.

On May 13, 2011, CMS issued SC–11–28 (*http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/SCLetter11_28.pdf*). Among other things, this memorandum included preliminary guidance on who may order hospital rehabilitation (§ 482.56(b)) and respiratory care services (§ 482.57(b)(3)). On November 18, 2011, the final version of the revised IGs for these requirements was released. Subsequently, we received considerable feedback that this guidance, which was intended to expand the categories of practitioners who could order rehabilitation and respiratory care services beyond physicians and stated that all ordering practitioners had to hold medical staff privileges, was actually having the opposite effect and limiting practitioner orders for these services. In the area of outpatient rehabilitation services, in particular, stakeholders informed us that the revised guidance was posing a barrier to care because a substantial percentage of these services are provided in hospital outpatient rehabilitation facilities to patients referred by practitioners who are not on the hospital's medical staff and who do not hold medical staff privileges. We were advised that, in many cases, the referring practitioners are based in other States where patients have traveled to receive specialized services. Clearly, these practitioners do not provide care in the patient's local hospital and are not interested in seeking medical staff privileges merely to refer patients for outpatient services.

It was not our intention to create barriers to care or to limit the ability of practitioners, who are appropriately licensed, acting within their scope of practice, and authorized under hospital policies, to refer patients for outpatient services. We distinguish these outpatient referral cases from cases where a practitioner provides care in the hospital, either to inpatients or outpatients, and must have medical staff privileges to do so. We subsequently issued new guidance on this rule, which was preceded by discussions with the various stakeholders groups that first brought the issue to our attention. On February 17, 2012, CMS issued SC–12–17 (*http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/SCLetter12_17.pdf*), which clarified that outpatient services may be ordered by any practitioner responsible for the care of the patient, who is licensed and acting within his or her scope of practice in the State where he or she provides care to the patient, and who has been authorized by the medical staff and approved by the governing body to order specific outpatient services.

In light of the above, we believe it is appropriate to revise § 482.54, the CoP governing outpatient services, which is silent on the issue of who may order such services, in order to explicitly address this issue. We propose to revise the requirements to mean that orders for outpatient services may be made by any practitioner who is:

- Responsible for the care of the patient;
- Licensed in the State where he or she provides care to the patient;
- Acting within his or her scope of practice under State law; and
- Authorized in accordance with policies adopted by the medical staff, and approved by the governing body, to order the applicable outpatient services.

Further, these proposed requirements would apply to: all practitioners who are appointed to the hospital's medical staff and who have been granted privileges to order the applicable outpatient services; and all practitioners not appointed to the medical staff, but who satisfy the above criteria for authorization by the hospital for ordering the applicable outpatient services and for referring patients for such services. These requirements would also apply to all hospital services that may be offered on an outpatient basis, including services for which there is regulatory language that, in the absence of the clarifying language we propose herein, would appear to impose more stringent limits as to the practitioners who are permitted to order outpatient services. For example, § 482.53(c)(4) states, ''Nuclear medicine services must be ordered only by practitioner whose scope of Federal or State licensure and whose defined staff privileges allow such referrals.'' In practice, however, it is not unusual for physicians without medical staff privileges to refer their patients to the hospital for common outpatient nuclear medicine tests, such as myocardial perfusion scans used in conjunction with cardiac stress tests and hepatobiliary scans used in the detection of gallbladder disease. So long as the hospital's medical staff policies and procedures permit this, we do not believe our regulations should present a barrier. Another example concerns the administration of outpatient chemotherapy. In accordance with § 482.23(c), concerning preparation and administration of drugs, ''Drugs and biologicals must be prepared and administered in accordance with Federal and State laws, the orders of the practitioner or practitioners responsible for the patient's care as specified under § 482.12(c), and accepted standards of practice.'' In the absence of the clarification we propose herein, this language could be confusing, as some hospitals might read it to preclude providing outpatient chemotherapy on the orders of a practitioner without privileges, which may or may not be desirable to the hospital. We believe that it is more appropriate if the hospital's medical staff and governing body determine what types of outpatient services they are comfortable with providing on the basis of an order (which might commonly also be called a ''referral'') from a practitioner who does not hold medical staff privileges.

We expect these changes would be primarily neutral in terms of regulatory burden reduction for hospitals. Prior to the November 2011 revisions to the IGs, most, if not all, hospitals were already operating under what was considered standard industry practice with regard to the ordering of, and referral for, outpatient rehabilitation services by practitioners who were not on the hospital's medical staff. Since we moved quickly to clarify our outpatient services ordering policy through communications with stakeholders and further revisions to the IGs, we believe that most hospitals did not make changes to their policies and procedures that would have created burdens for them. We cannot rule out the possibility that some hospitals were deterred by the specific language of other CoPs, such as those governing nuclear medicine or administration of drugs, but we have not received information that would allow us to quantify this. This proposed change would clearly establish in

regulation CMS policy on the ordering and referral of all outpatient services. We welcome the public's comments on these proposed changes.

5. Special Requirements for Hospital Providers of Long-term Care Services (''swing-beds'') (§ 482.66)

Currently, these requirements are located in Subpart E of Part 482, Requirements for specialty hospitals. As such, the requirements fall outside of those requirements that can be surveyed by an Accreditation Organization (AO), such as TJC, AOA, or DNV, as part of its CMS-approved Medicare hospital accreditation program. We believe the requirements at § 482.66 would be more appropriately located under Subpart D of Part 482, Optional hospital services, since swing-bed services are optional hospital services for eligible rural hospitals.

Therefore, we are proposing to reassign all of the requirements for swing-bed services found currently at § 482.66, Subpart E, to § 482.58, Subpart D. This change would allow compliance with the swing-bed requirements to be evaluated during routine AO surveys. By no longer requiring a deemed hospital to undergo a separate survey by a State Survey Agency (SA) to determine continued compliance with the swing-bed requirements in addition to the AO survey for the other CoPs, this proposed change would likely reduce the burden on such a hospital. We welcome the public's comments on this proposed change.

Contact for all hospital topics: CDR Scott Cooper, USPHS, 410–786–9465.

D. Transplant Centers and Organ Procurement Organizations

1. Reports to CMS (§ 482.74)

On March 30, 2007, we published the ''Hospital Conditions of Participation: Requirements for Approval and Re-approval of Transplant Centers to Perform Transplants Final Rule'' (transplant center final rule, 72 FR 15198). In that rule, we required that transplant centers, among other things, report to CMS any significant changes related to the center's transplant program or changes that could affect its compliance with the CoPs. One of the instances in which transplant centers have to notify us, located at § 482.74(a)(2), is whenever there is a decrease in the center's number of transplants or survival rates that could result in the center being out of compliance with the clinical experience (number of required transplants) or outcome (survival) requirements at § 482.82.

We routinely receive the number of transplants a center performs and survival information for all of the transplant centers. All transplant centers are required to submit these data to the Organ Procurement and Transplantation Network (OPTN) national database for transplantation. These data are provided to the Scientific Registry of Transplant Recipients (SRTR), which publicly releases outcome (survival) information every six months, after the data have been risk-adjusted. CMS also receives more recent survival information via the Social Security Master Death File. CMS receives clinical experience data and the Social Security Master Death File quarterly, as well as the risk-adjusted outcomes from the SRTR data every six months. Thus, CMS is essentially receiving the same information from the transplant programs individually that we receive routinely from one or more of the resources cited above.

In addition to the above, this notification requirement has also resulted in confusion for the transplant centers. The requirement states that transplant centers should notify CMS when they are out of compliance with a 3-year average of 10 transplants per year. Since the clinical experience standard is based on an average, a transplant center may not know if a given year's volume would be low enough to have the average fall below 10 per year and trigger reporting to CMS, particularly when the number of transplants to be performed in a future year is unknown.

In addition, the requirement for notification of outcomes non-compliance is based on the difference between the observed and the expected outcomes exceeding certain thresholds. However, the expected outcomes are not calculated until at least one year later when the one-year post-transplant tracking period for patient and graft survival is complete. The transplant program would not always know whether a given death or graft failure would put them out of compliance and require notification to CMS. Eliminating this notification requirement will also remove this confusion for the transplant centers.

Thus, the requirement for transplant centers to report a decrease in the center's number of transplants or survival rates when those results could result in the center being out of compliance with the measures in § 482.82 is unnecessary, confusing, and burdensome for transplant centers. Therefore, we propose to eliminate the requirement at § 482.74(a)(2) that transplant centers notify us. The removal of this requirement would have no impact on the quality of care to transplant recipients, living donors, or potential donors as our identification and follow-up process for programs that do not meet § 482.82 would remain unchanged.

2. Transplant Outcome Review (§ 482.80(c) and § 482.82(c))

Subsections § 482.80(c) and 482.82(c) in the transplant center CoPs state that, ''[e]xcept for lung transplants, CMS will review adult and pediatric outcomes separately when a center requests Medicare approval to perform both adult and pediatric transplants.'' At the time the transplant center final rule was published (March 30, 2007), the adult data cohorts for lung transplants included transplant patients 12 years of age and older. As of June 2010, the adult data cohort includes only those transplant patients that are 18 years of age and older. The age categories for lung transplant patients are now the same as for all of the other transplants reported in the SRTR center-specific reports *(See OPTN/SRTR 2010 Annual Data Report, Rockville, MD: Department of Health and Human Services, Health Resources and Services Administration, Healthcare Systems Bureau, Division of Transplantation: 2011).* We are reviewing the adult and pediatric outcomes separately for all programs that request Medicare approval to perform both adult and pediatric transplants, including the lung transplant program. This language, ''except for lung transplants,'' is no longer necessary. Therefore, we are proposing to remove the exception language for lung transplants from §§ 482.80(c) and 482.82(c).

3. Volume and Clinical Experience Requirements (§§ 482.80(c)(2) and 482.82(c)(2))

Regulations at §§ 482.80(c)(2) and 482.82(c)(2) both state ''[t]he required number of transplants must have been performed during the time frame reported in the most recent SRTR center-specific report.'' We propose to modify this language to make it harmonize with other parts of the current rule. Under the current rule, transplant centers are generally required, with some exceptions, to perform either 10 transplants over a 12-month period for initial approval (§ 482.80(b)) or an average of 10 transplants each year during the approval period (§ 482.82(c)(2)). There is no requirement for a certain number of transplants to be performed during a particular period that would be covered in a single SRTR center-specific report.

Thus, this language has resulted in transplant centers being confused about the number of transplants they are required to perform during any particular period of time covered by the SRTR center-specific reports. Therefore, we are proposing to remove both §§ 482.80(c)(2) and 482.82(c)(2), and to redesignate the existing paragraph (c)(3) as (c)(2) to clarify the volume and clinical experience requirements.

4. Transplant Center Re-Approval Process

Since the effective date of the CoPs, June 28, 2007, we have completed the initial surveys of all transplant programs that participate or seek participation in Medicare (approximately 845 transplant centers in 245 transplant hospitals), and have started conducting re-approval surveys. The current process and regulatory criteria require, under particular conditions, an automatic onsite review of all CoPs under a 3-year re-approval cycle. Despite this requirement, we believe that onsite surveys for some of these transplant centers are not necessary to ensure the health and safety of the patients who receive a transplant in those centers. Moreover, the regulatory requirements described below for selecting the facilities that would undergo an onsite survey do not always effectively target survey resources where they are most needed.

We propose to remove the automatic 3-year re-approval process. We also propose to (1) clarify that the review of mitigating factors may occur at any time if there is non-compliance with the CoPs, and (2) remove language stating that a transplant program is approved for three years, which conflicts with language in § 488.61(c) specifying that compliance with the CoPs is a continuous requirement. The expectation that compliance with CMS requirements is continuous is an expectation that applies to all Medicare providers and suppliers.

Currently the regulations require that we review each transplant program's data before the end of 36 months after the program's prior approval. The regulations require a review of most other CoPs if we find that there is non-compliance with the requirements at § 482.82(a) for timeliness of data submission to the OPTN, or non-compliance with the requirements at § 482.82(b) for clinical experience, or at § 482.82(c) for patient and graft survival outcomes. An onsite survey is the most common method of conducting such a review, but we have found that an onsite review for deficiencies in these areas is not always necessary. We can enforce data submission requirements without conducting an onsite survey. In addition, we plan to maintain, via CMS policy, a maximum time interval within which we expect an onsite survey to occur with respect to individual transplant centers.

For instance, CMS regulations require that transplant programs submit 95 percent of their OPTN forms within 90 days of their due date. On a quarterly basis, we receive data from the OPTN that provides us with the number of forms due for each program and the number that were submitted within the required timeframe. Based on the 3-year period from mid-2008 through mid-2011, 73 transplant programs had data submission rates below 95 percent and, if due for re-approval, would have required an onsite survey. Of these 73, most (43 programs) had average data-submission rates between 90 and 95 percent. While remedial action is necessary in every case, it does not follow that these 43 programs required an automatic, onsite survey. We propose that we can take action to address the non-compliance while reserving for CMS's discretion the decision of whether or not to conduct an onsite survey.

We also receive data on a quarterly basis about the number of transplants performed at each center. Because of this data transfer, we are routinely aware of the average number of transplants being performed by or at a given transplant program. There are circumstances where it would not be in the public interest to spend the resources to perform a full onsite transplant center survey solely because the 3-year average volume is low. For example, if a transplant program had performed an average of 9.3 transplant surveys over the prior 3-year period (fewer than the current requirement of an average of 10 per year), and the most recent year indicated 14 transplants performed, sending a full team to do an onsite survey of all CoPs, for this reason alone, may not make the best use of limited resources for the hospital or for CMS.

Of the approximately 845 total transplant programs, 442 are required to meet clinical experience requirements (that is, volume requirements). Pediatric transplant programs and adult heart/lung and adult pancreas programs do not have to meet clinical experience requirements (§§ 482.80(d) and 482.82(d)). Using clinical experience data from October 1, 2008 through September 30, 2011, 30 transplant programs that were required to meet experience requirements had performed fewer than the required number of 10 transplants per year on average. If due for re-approval, these 30 programs would have required an onsite survey regardless of any other evidence CMS may have had from history, recent program improvements, or the most recent clinical experience.

We monitor and enforce Medicare's requirements for patient and graft survival rates every 6 months based on the most recent report from the SRTR. A program is out of compliance if its observed patient and graft survival is significantly lower than expected to such an extent that it crosses three thresholds outlined in the CoPs at § 482.82: the observed minus expected is greater than 3, the observed divided by expected is greater than 1.5, and the one-sided p-value is less than .05.

We follow up with these transplant programs through an offsite survey, an onsite complaint survey, or an onsite full re-approval survey. These follow-up activities are conducted by the CMS Regional Office, a federal contractor, or the State Survey Agency (acting on CMS's behalf). The follow-up occurs at the time of non-compliance and does not wait until the re-approval survey occurs. Following the citation of an outcomes deficiency and the establishment of a date for prospective termination from Medicare participation, programs may submit an application for mitigating factors (MF) based on non-compliance with the outcomes CoP. We provide ample time between the citation and the prospectively scheduled Medicare termination date for the program to provide evidence and, via conference call, discussion of the evidence that would support the mitigating factors request. If the MF request is approved, we specify the time period for the MF approval and remove the prospectively scheduled Medicare termination.

We also propose to provide at the new § 488.61(c)(3)(v) an example of a set of mitigating factors that we would consider. We have granted a very small number of MF requests on the basis of the categories currently used as examples in the regulation, such as natural disasters (one case) or access to care (one case). However, we have most frequently granted MF requests in cases where the transplant center has implemented substantial program improvements that address root causes of past graft failures and/or patient deaths, has institutionalized those improvements so they may be sustained over time, and has been able to demonstrate recent outcomes data with sufficient volume and with sufficient post-transplant survival periods such that we conclude that the program is in

present-day compliance with the outcomes requirements in the regulation, but for the data time lag inherent in the SRTR reports upon which we otherwise rely. CMS has approved an MF request for 35 transplant programs on this basis since the implementation of the regulation in 2007. In certain cases, the MF approval has been made possible pursuant to dialogue and agreement between CMS and the transplant center that the hospital will engage in a clear regimen of quality improvement and there is substantial completion of that regimen. We believe that the addition of this example in the body of the regulation will provide better guidance for transplant centers, offer encouragement for the productive application of hospital staff expertise in making program improvements that increase patient and graft survival, and promote government transparency.

We have a variety of sources we use to generate targeted quality information that can be used to determine the circumstances and frequency under which an onsite survey is best conducted. Examples include previous complaint surveys, prior onsite survey results, issues found during surveys of the broader hospital CoPs, data and information from the Health Resources and Services Administration (HRSA) and the SRTR, notifications of program inactivity, key personnel changes, articles from the press about quality issues, and information submitted by the program through the MF process.

5. Technical Corrections

On May 31, 2006, we published the Conditions for Coverage for Organ Procurement Organizations (OPOs) Final Rule (OPO final rule 71 FR 30982). We have discovered that there were some technical errors in that rule. Therefore, we are proposing to make the following technical corrections:

- Section 486.306 states, in paragraph (a), that ''An OPO must make available to CMS documentation verifying that the OPO meets the requirements of paragraphs (b) through (d) of this section * * *'' This section only contains paragraphs (a), (b), and (c). We propose to delete the reference to ''(d)'' in paragraph (a) and insert ''(c)'' in its place. This paragraph would then read, ''the OPO meets the requirements of paragraphs (b) and (c) of this section * * *.''
- Section 486.308(b)(1) reads, in part, ''if additional time is needed to select a successor OPO to an OPO that has been de-certified.'' We propose to remove the ''to'' between the two ''OPOs'' and replace it with ''for'' in this sentence. The paragraph would then read, ''if additional time is needed to select a successor OPO for an OPO that has been de-certified.''
- Section 486.344(d)(2)(ii) reads, in part, ''If the identify of the intended recipient is known * * *'' We intended to say the ''identity'' of the intended recipient. We propose to remove the word ''identify'' and replace it with ''identity.'' The clause would then read, ''If the identity of the intended recipient is known * * *''

Contact for all transplant center and OPO topics: Diane Corning, 410–786–8486.

E. Long-Term Care Facilities

On August 13, 2008, we published a final rule requiring all buildings containing long term care facilities to have automatic sprinkler systems installed throughout the building (73 FR 47075). The deadline for meeting this requirement is August 13, 2013. The final rule was based on a CMS analysis of fire safety in nursing homes, and the agency's conclusion that fire safety protections would clearly be improved by ensuring that all facilities be fully sprinklered within a reasonable period of time. The Government Accountability Office (GAO) also studied this issue and issued a report entitled ''Nursing Home Fire Safety: Recent Fires Highlight Weaknesses in Federal Standards and Oversight'' (GAO–04–660, July 16, 2004, *http://www.gao.gov/products/GAO-04-660*). The GAO analyzed two long term care facility fires in 2003 that resulted in 31 total resident deaths. The report examined Federal fire safety standards and enforcement procedures, as well as results from the fire investigations of these two incidents. The report recommended that fire safety standards for unsprinklered facilities be strengthened and cited sprinklers as the single most effective fire protection feature for long term care. Based on both CMS's analysis and the GAO's report, and under the Secretary's authority at sections 1819(d)(4)(B) and 1919(d)(4)(B) of the Act, to issue regulations that promote the health and safety of the residents of long-term care facilities, we finalized a requirement that all long term care facilities must be fully sprinklered by August 13, 2013.

Based on recent public comments and input, we believe that some facilities will not be able to meet the August 2013 deadline due to the magnitude of the enterprise they are undertaking (such as large scale construction of a replacement facility) combined with recent financial and construction constraints. We therefore propose to allow a long term care facility to apply for a temporary deadline extension of the sprinkler system requirement, under very limited circumstances, if they are unable to meet the deadline. An extension will avoid spending funds on structures that will be obsolete in the near future. Our intent is to establish a rigorous review process for all deadline extension requests.

We are proposing to add a provision at § 483.70(a)(8)(iii) that would allow long term care facilities the opportunity to apply for a deadline extension, not to exceed 2 years, if all of the following conditions apply:

- The facility is in the process of replacing its current building, or undergoing major modifications in all unsprinklered living areas and that requires the movement of corridor, room, partition, or structural walls or supports to improve the living conditions for residents, in addition to the installation of a sprinkler system;
- The facility demonstrates that it has made the necessary financial commitments to complete the building replacement or modification;
- The facility has submitted construction or modification plans to the State and local authorities that are necessary for approval of the replacement building or modification prior to applying for the deadline extension; and
- The facility agrees to complete interim steps to improve fire safety of the building while the construction is being completed, as determined by CMS. This could include a fire watch, installation of temporary exits and temporary smoke detection systems, or additional smoke detection systems in the area of construction, increased fire safety inspections, additional training and awareness by staff, and additional fire drills.

An extension may be granted for up to 2 years, depending on the need and particular circumstances. We would determine the length of the extension based on the information submitted by the facility.

Applications for the extension will only be considered if the delay in meeting the August 13, 2013 deadline is due to the plan for facility replacement or major modification, as described above. A number of facilities, for example, have had plans to replace an old structure with a new replacement nursing home, but have found that it is requiring more time to complete the necessary arrangements and construction. The nursing home's residents will benefit from the improved living environment of the new facility, and an extension of the deadline could avoid wasting funds on sprinklering an

old structure that will soon be replaced. Similarly, nursing home residents may benefit from a nursing home that is undertaking a major modification to improve living conditions, such as converting two-person or three-person rooms to single occupancy. If there is a delay due to such plans, and the construction is cost-effective if the sprinklering is done at the same time as the major modification of the unsprinklered area, then we would consider an extension of the deadline date. We are soliciting public comment as to whether the extension should be limited to just situations in which a replacement facility is being constructed. We are also soliciting public comment regarding these or other factors that may be important when determining whether to approve or deny an extension request, and when determining the appropriate length of the extension time period. However, it is our intent to fashion an extension that is very narrowly defined. The current rule has provided a five-year implementation period designed to ensure time for planning and resource mobilization. We propose to add the possibility of a time-limited extension in order to accommodate plans for major investments by a nursing home in a replacement facility or major modification where the investment, planning, and construction time involved may warrant a further extension and yield even better long term benefits for residents. We also propose to add a provision at § 483.70(a)(8)(iv) that would allow for a renewal of the deadline extension for an additional period, not to exceed 1 additional year. We propose that a facility could only apply for a single extension renewal. The facility may be granted the additional extension if CMS finds that there are extenuating circumstances beyond the control of the facility that will prevent the facility from being in compliance by the end of the first waiver period. An example is a situation where residents have not yet been able to move to a substantially completed replacement facility due to last minute construction delays outside the control of the facility. Additionally, the facility would be required to meet all other conditions in paragraph (a)(8)(iii) related to applying for the approval by CMS, submitting its plans to the State and local authorities, and taking the appropriate interim steps to improve safety of the building until the work is completed. We also welcome comments on this proposed provision.

Contact for long term care topics: Kristin Shifflett, 410–786–4133.

F. Rural Health and Primary Care

We have identified several priority areas in the CoPs for CAHs (42 CFR part 485), the CfCs for both RHCs and FQHCs (42 CFR part 491), and the payment provisions for RHCs (42 CFR part 405) for updates and revisions. We believe that these proposed revisions may eliminate or significantly reduce burden where CoPs and CfCs are duplicative, unnecessary and/or burdensome.

1. CAH Provision of Services (§ 485.635(a))

CAHs are currently required to develop their policies and procedures with the advice of a group of professional personnel that includes one or more doctors of medicine or osteopathy and one or more physician assistants, nurse practitioners, or clinical nurse specialists, if they are on staff. At least one member of the professional group must not be a staff member. We propose to remove the requirement that a CAH must develop its patient care policies with the advice of a non-CAH staff member and instead are proposing to allow CAHs flexibility in their approach to developing their patient care policies and procedures. That is, we are proposing that a CAH will no longer be required to include a non-staff member among the group of professional personnel to develop its patient care policies. We believe that this provision is no longer necessary and that the original reasons (lack of local resources and in-house expertise) for including this requirement have been effectively addressed. Also, based on our experience with CAHs and input from the provider community, we believe it is a challenge for facilities to comply with this requirement. These challenges include the amount of time it takes to familiarize the non-staff member with the CAH's operations, high turnover rates of the non-staff member, and, in many cases, the expense of paying outside personnel a consultation fee.

In 1993, when we finalized the rules on the predecessor to the current CAH program, Essential Access Community Hospitals (EACHs) and Rural Primary Care Hospitals (RPCHs) (58 FR 30630, May 26, 1993), we declined to expand the policy planning requirements at § 485.635 in a way that would have been more prescriptive and would have required additional sources of expertise and objectivity. At that time, we determined that it was not necessary to require the RPCHs to consult with rural health networks or to ensure alignment with their State's rural health plan when deciding which services to furnish. In responding to comments suggesting such coordination, we remarked that while such coordination was desirable, no statute actually mandated this, and clinics were already free to work out such arrangements without regulation.

Subsequently, changes were made to the law which responded exactly to those concerns. The Balanced Budget Act (BBA) of 1997 amended the Act at Section 1820 (42 U.S.C. 1395i–4) and replaced the EACH/RPCH program with the Medicare Rural Hospital Flexibility Program (MRHFP). These changes established the CAH program we know today, and, importantly, predicated a State's eligibility to participate in the program on its establishment of a State rural health plan providing for the creation of one or more rural health networks in that State. As set forth in the BBA of 1997, codified at § 1820(b) of the Act, a State's rural health plan must promote regionalization of rural health services and improved access to hospital and other health services for that State's rural residents. Moreover, it must be developed in consultation with the hospital association of the State, rural hospitals located in the State, and the State Office of Rural Health.

The plan must also provide for the creation of at least one rural health network. A rural health network is an organization consisting of at least one CAH and at least one acute care hospital, the members of which have entered into agreements regarding patient referral and transfer, the development and use of communications systems, and the provision of emergency and nonemergency transportation. In addition, each CAH in a network must have an agreement for credentialing and quality assurance with at least one hospital that is a member of the network, or with a QIO or equivalent entity, or with another appropriate and qualified entity identified in the rural health care plan for the State. Taken together, the statutory requirements for a State rural health plan and (at least one) rural network, these mechanisms set out specific processes that serve to promote and support the sound development of a CAHs' patient care policies, such as are required at § 485.635. The additional statutory framework, established in the years since these regulations were first set forth, provides further support for our proposal to set aside the regulatory requirement that a CAH's patient care policies require the input of at least one professional who is not a member of the CAH's staff. Therefore, we propose to remove the statement at the end of § 485.635(a)(2) that states, ''* * * at

least one member is not a member of the CAH staff.''

2. CAH and RHC/FQHC Physician Responsibilities (§§ 485.631(b)(2) and 491.8(b)(2))

Except in extraordinary circumstances, a physician is required under §§ 485.631(b)(2) and 491.8(b)(2) to be present in the CAH, RHC or FQHC for sufficient periods of time, meaning at a minimum at least once in every 2-week period, to provide medical direction, medical care services, consultation and supervision of other clinical staff. The regulation further requires a physician to be available through telecommunication for consultation, assistance with medical emergencies or patient referral. Section 1861(aa)(2)(B) of the Act requires supervision, guidance, and a periodic physician review of covered services furnished by physician assistants and nurse practitioners in an RHC or an FQHC but it does not prescribe the frequency of the physician visits nor does it require onsite supervision. Section 1820(c)(2)(B)(iv) of the Act requires a CAH to provide physician oversight by a doctor of medicine (MD) or a doctor of osteopathy (DO) for inpatient care that is provided by a physician assistant (PA), nurse practitioner (NP), or clinical nurse specialist (CNS). The statute does not require the physician to be physically present in the facility to provide the required oversight.

Some providers in extremely remote areas or areas that have geographic barriers have indicated that they find it difficult to comply with the precise biweekly schedule requirement. Many rural populations suffer from limited access to care due to a shortage of health care professionals, especially physicians. Oftentimes, non-physician practitioners provide these important care services to rural communities with physicians providing oversight. We believe that specifying a specific timeframe for a physician to visit the facility does not ensure better health care. With the development of technology that facilitates ''telemedicine,'' a physician should have the flexibility to utilize a variety of ways and timeframes to provide medical direction, consultation, supervision, and medical care services, including being on-site at the facility. For example, a physician supervising a RHC or FQHC might visit the facility more frequently than biweekly during peak seasons for certain illnesses and make less frequent visits during other times of the year.

Among CAHs there is great variation in the size of the populations they serve and the range and extent of services they offer. We do not believe that a one-size-fits-all requirement as found in the current regulation is appropriately responsive to this variation. In the case of very small CAHs in frontier areas that offer very limited services and have only one physician on staff, the requirement for an onsite visit at least every 2 weeks may be unduly burdensome. On the other hand, for CAHs that offer a wide range of complex services, have more than one physician on staff, and have busy emergency departments and/or extensive outpatient services, a visit by a physician only once every 2 weeks could well be grossly inadequate. By eliminating the required 2-week visit, we believe CAHs will have the flexibility to determine the appropriate frequency of physician visits.

We therefore propose to revise the CAH regulations at § 485.631(b)(2) and the RHC/FQHC regulations at § 491.8(b)(2) to eliminate the requirement that a physician must be onsite at least once in every 2-week period (except in extraordinary circumstances) to provide medical care services, medical direction, consultation and supervision. For CAHs, we propose that a doctor of medicine or osteopathy would be present for sufficient periods of time to provide medical direction, consultation and supervision for the services provided in the CAH, and is available through direct radio or telephone communication for consultation, assistance with medical emergencies, or patient referral. For RHCs and FQHCs, we propose that physicians would periodically review the clinic or center's patient records, provide medical orders, and provide medical care services to the patients of the clinic or center.

We believe that proposing language to remove these barriers will enhance patient access to care in rural and remote areas. We note that the present review requirements at § 485.631(b)(1)(v) can be fulfilled by a physician working from a remote location.

3. RHC/FQHC Definitions: Physician (§ 491.2)

We propose to expand the definition of ''physician'' at § 491.2 in a way that mirrors the definition of ''physician'' that appears under the rules governing payment and Medicare agreements in Part 405 at § 405.2401(b). We believe that this change will provide clarity to the supplier community with respect to the requirements for RHCs and FQHCs. We propose to revise the definition as follows: *Physician* means a practitioner who meets the requirements of sections 1861(r) and 1861(aa)(2)(B) and (aa)(3)(B) of the Act and includes (1) a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the function is performed; and (2) within limitations as to the specific services furnished, a doctor of dental surgery or of dental medicine, a doctor of optometry, a doctor of podiatry or surgical chiropody or a chiropractor (see section 1861(r) of the Act for specific limitations).

4. Technical Correction

We propose to correct a technical error in the regulations by amending § 491.8(a)(6) to conform to section 6213(a)(3) of OBRA '89 (Pub. L. 101–239) which requires that an NP, PA, or certified nurse-midwife (CNM) be available to furnish patient care at least 50 percent of the time the RHC operates. We welcome public comments on this correction and on the other changes proposed for rural health care providers and suppliers.

Contacts for rural health and primary care CoP/CfC issues: Mary Collins, 410–786–3189; Sarah Richardson Fahrendorf, 410–786–3112.

G. Solicitation of Comment on Reducing Barriers to Services in Rural Health Clinics (RHCs)

We are requesting comment on potential changes we could make to regulatory or other requirements to reduce barriers to the following services:

1. Telehealth Services

RHCs that are located in a rural Health Professional Shortage Area (HPSA) or in a county outside of a Metropolitan Statistical Area (MSA) are authorized by law to be telehealth originating sites (the location of an eligible Medicare beneficiary at the time the service being furnished via a telecommunications system occurs). However, RHCs are not authorized to be distant site providers (practitioners furnishing covered telehealth services). Authorized distant site providers include physicians, NPs, PAs, CNMs, clinical nurse specialists (CNSs), CPs, CSWs, and registered dietitians or nutrition professionals.

Although RHC practitioners are eligible to furnish and bill for telehealth distant site services when they are not working at the RHC, they cannot furnish and bill for telehealth services as an RHC practitioner because RHCs are not authorized distant site providers. Also, these practitioners cannot bill Medicare Part B while they are working for a Medicare RHC since Medicare is paying

the RHC through the Medicare RHC cost report an all-inclusive rate per visit that includes all direct and indirect costs, such as the practitioner's services, space to provide those services, support staff services, related supplies, records costs, and other services. To allow separate Medicare Part B physician fee schedule payment to a practitioner while that practitioner is working for the RHC would result in duplicate Medicare payment for the telehealth service; once through the Medicare RHC cost report and again through the Medicare Part B physician fee schedule payment.

We are interested in exploring ways to allow RHC practitioners to furnish distant site telehealth services in a way that will not result in duplicate payment, especially for services such as mental health services, which are particularly limited in rural areas. Therefore, we are requesting comments on potential changes we could make to Medicare Provider Reimbursement Principles contained in Health Insurance Manual 15–1, Medicare RHC cost report/instructions contained in Health Insurance Manual 15–2, and other Medicare policies that would allow RHCs to furnish telehealth services. Commenters should address how any suggestions for changes or exceptions would prevent duplicate payment—that is, ensure Medicare is not paying for the same costs to the RHC on the basis of allowable cost and the physician fee schedule under the telehealth benefit. We are particularly interested in comments that address these concerns without adding undue additional cost reporting and compliance burdens on RHCs to ''carve out'' or separate those costs that would otherwise be paid under the RHC benefit when Medicare is making physician fee schedule payments. Given the interest in encouraging the provision of mental health services in rural areas, we are interested in comments addressing whether changes should apply to all services that could potentially be provided through telehealth or only specific services such as mental health. If commenters believe these changes should only apply to specific services, we are interested in which services should be subject to these special rules and a policy justification for why these services are different than other services that could potentially be subject to special commingling rules.

2. Hospice Services

The hospice statute (section 1861(dd) of the Act) authorizes physicians and NPs to be attending physicians for Medicare beneficiaries that elect the Medicare hospice benefit. RHCs are not statutorily authorized to be hospice providers, and can only treat hospice beneficiaries for medical conditions not related to their terminal illness.

In some rural areas, the RHC may be the only source of health care in the community, and there may be no other providers available during RHC hours to provide services that are related to a beneficiary's terminal illness. While RHC practitioners are eligible to furnish and bill for hospice services when they are not working at the RHC, they cannot furnish and bill for hospice services as an RHC practitioner because RHCs are not authorized to be attending physicians for hospice. Also, these practitioners cannot bill Medicare Part B while they are working for a Medicare RHC since Medicare is paying the RHC through the Medicare RHC cost report an all-inclusive rate per visit that includes all direct and indirect costs, such as the practitioner's services, space to provide those services, support staff services, related supplies, records costs, and other services. To allow separate Medicare Part B physician fee schedule payment to a practitioner while that practitioner is working for the RHC would result in duplicate Medicare payment for the hospice service; once through the Medicare RHC cost report and again through the Medicare Part B physician fee schedule payment.

We are interested in exploring ways to allow RHC practitioners to furnish hospice services in a way that will not result in duplicate payment, especially in areas with limited hospice providers. Therefore, we are requesting comments on potential changes we could make to Medicare Provider Reimbursement Principles contained in Health Insurance Manual 15–1, Medicare RHC cost report/instructions contained in Health Insurance Manual 15–2, and other Medicare policies that would allow RHCs to furnish hospice services. Commenters should address how any suggestions for changes or exceptions would prevent duplicate payment—that is, ensure Medicare is not paying for the same costs to the RHC on the basis of allowable cost and the physician fee schedule under the hospice benefit. We are particularly interested in comments that address these concerns without adding undue additional cost reporting and compliance burdens on RHCs to ''carve out'' or separate those costs that would otherwise be paid under the RHC benefit when Medicare is making hospice payments.

3. Home Health Services

RHCs that are located in an area in which there exists a shortage of home health agencies are authorized to provide nursing care furnished by a registered nurse or a licensed practical nurse to a homebound individual. The care must be provided under a written treatment plan that is established and periodically reviewed by a physician, NP, or PA.

Despite the authority for RHCs to provide home health services, there are relatively few RHCs that provide this service. We are seeking data and comments on (a) The need for home health services in communities served by RHCs; (b) barriers to providing these services, (c) data regarding any difficulties beneficiaries face in accessing home health services in those communities or any shortages in home health agencies; and (d) possible strategies to reduce or eliminate the identified barriers that comply with our legislative authority and the need for administrative accountability.

4. Other Services

We welcome comments on other services that RHCs would like to provide but are not able to do so. Please include an explanation of why the service is needed, the barriers to providing the service, and possible solutions that comply with our legislative authority and the need for administrative accountability.

Contact for RHC Comments: Corinne Axelrod, (410) 786–5620.

H. Clinical Laboratory Improvement Amendments of 1988 (CLIA)

On October 31, 1988, Congress enacted the Clinical Laboratory Improvement Amendments of 1988 (CLIA), Public Law 100–578. The purpose of CLIA is to provide quality standards for laboratory testing to ensure the accuracy and reliability of laboratory test results for all Americans. Under the authority of 42 U.S.C. 263a(f), the Secretary issued regulations implementing CLIA on February 28, 1992 at 42 CFR part 493 (57 FR 7002). The regulations specify the standards and specific conditions that must be met to achieve and maintain CLIA certification. CLIA certification is required for all laboratories, including but not limited to those that participate in Medicare and Medicaid, which test human specimens for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment, or the assessment of health, of human beings.

The regulations also require laboratories conducting moderate or high-complexity testing to enroll in an approved proficiency testing (PT) program that covers all of the specialties

and sub-specialties for which the laboratory seeks certification. There are currently 229,815 CLIA certified laboratories. Of these laboratories, 35,084 are required to enroll in an HHS-approved PT program and are subject to all PT regulations.

Congress emphasized the importance of PT when it drafted the CLIA legislation. For example, the Committee on Energy and Commerce report from Sept. 9, 1988 (100th Congress 2nd Session, House of Representatives, Report 100–899, page 15, Identified Problems and Concerns) noted that ''The Committee's investigation focused particularly on proficiency testing because it is considered one of the best measures of laboratory performance. It is arguably the most important measure, since it reviews actual test results rather than merely gauging the potential for good results.'' The Committee surmised that, left to their own devices, some laboratories would be inclined to treat PT samples differently than their patient specimens, as they would know that the laboratory would be judged on its performance. For example, such laboratories might be expected to perform repeated tests on the PT sample, use more highly qualified personnel than are routinely used for such testing, or send the samples out to another laboratory for analysis. As such practices would undermine the purpose of PT, the Committee noted that the CLIA statute was drafted to bar laboratories from such practices, and to impose significant penalties on those who elected to violate those bars (H.R.Rep. No. 100–899, 100th Congress, 2d Session, at 16 and 24, 1988 U.S.C.C.A.N. 3828).

We propose to make a number of clarifications and changes to the regulations governing PT under CLIA. PT is a valuable tool the laboratory can use to verify the accuracy and reliability of its testing. During PT, an HHS-approved PT program sends samples to be tested by a laboratory on a scheduled basis. After testing the PT samples, the laboratory reports its results back to the PT program for scoring. Review and analysis of PT reports by the laboratory director will alert the director to areas of testing that are not performing as expected and may also indicate subtle shifts or trends that, over time, could affect patient results. As there is no on-site, external proctor for PT testing in a laboratory, the testing relies in large part on an honor system. The PT program places heavy reliance on each laboratory and laboratory director to self-police their analysis of PT samples to ensure that the testing is performed in accordance with the CLIA requirements. For each PT event, laboratories are required to attest that PT samples are tested in the same manner as patient specimens are tested. PT samples are to be assessed by integrating them into the laboratory's routine patient workload, and the testing itself is to be conducted by the personnel who routinely perform such testing, using the laboratory's routine methods. The laboratory is barred from engaging in inter-laboratory communication pertaining to results prior to the PT program's event cut-off date and must not send the PT samples or any portion of the PT samples to another laboratory for testing, even if it would send a patient specimen to another laboratory for reflex or confirmatory testing.

By ''reflex testing'' we mean confirmatory or additional laboratory testing that is automatically requested by a laboratory under its standard operating procedures for patient specimens when the laboratory's findings indicate test results that are abnormal, are outside a predetermined range, or meet other pre-established criteria for additional testing. For patient specimen testing, reflex testing may be legitimately performed by the same laboratory that performed the initial testing or may be performed by referral of the patient specimen for testing at a laboratory operating under a different CLIA certificate. For PT, reflex testing is prohibited unless it is performed by the same laboratory that performed the initial testing, is included in its standard operating procedure, and the results are reported as part of the proficiency testing program.

By ''confirmatory testing'', we mean testing performed by a second analytical procedure that could be used to substantiate or bring into question the result of an initial laboratory test. For patient specimen testing, confirmatory testing may legitimately be performed by the same laboratory that performs the initial test or by a second laboratory operating under a different CLIA certificate than the laboratory performing the initial testing. For PT, confirmatory testing is prohibited unless it is performed by the same laboratory that performed the initial test, is included in its standard operating procedure, and the results are reported as part of the proficiency testing program.

Any laboratory that we determine intentionally referred its PT samples to another laboratory for analysis may have its certification revoked for at least one year. The phrase ''intentionally referred'' has not been defined by the statute or regulations, but we have consistently interpreted this phrase from the onset of the program to mean general intent, as in intention to act. Whether or not acts are authorized or even known by the laboratory's management, a laboratory is responsible for the acts of its employees. Among other things, laboratories need to have procedures in place and train employees on those procedures to prevent staff from forwarding PT samples to other laboratories even in instances in which they would normally forward a patient specimen for reflex or confirmatory testing.

PT samples are not to be referred to another laboratory under any circumstances. However, despite the issuance of considerable guidance and the near universal inclusion of instructions in laboratory operations manuals, there continue to be cases where PT samples are forwarded to another laboratory for analysis. Laboratory staff are either not being made aware that the prohibition applies even in instances where they would normally forward a patient specimen for additional testing, or, due to failures in training or the clarity of laboratory operating manuals, they fail to abide by the laboratory's written policies prohibiting the referral of PT samples to another laboratory.

For example, some laboratories have indicated that they have been confused by the requirement at § 493.801(b) that laboratories treat PT samples in the same manner as patient specimens. If their standard operating procedure is for some types of patient specimens to be sent to another laboratory for reflex or confirmatory testing, they have erroneously believed that there would be a basis for also referring a PT sample. They have strenuously argued that their mistaken interpretation was innocent, and that we should find an improper, but not intentional, referral of a PT sample in those instances.

We disagree with any assertions that such referrals are ''improper'' but not ''intentional'' under our longstanding interpretation of ''intentional''. As noted above, we have consistently interpreted ''intentional'' to mean general intent, as in intention to act, and expansive case law has supported this interpretation. That said, we recognize that, in cases of a PT referral involving reflex or confirmatory testing under standard operating procedures, the revocation of a CLIA certificate, combined with the resulting potential prohibition on the owner and operator to own or operate a laboratory for 2 years, may create access issues for patients in need of laboratory services. We also note that laboratory testing protocols have changed over time and reflex or confirmatory testing

has become more prevalent, resulting in an increased risk of PT referral.

We are mindful that all healthcare beneficiaries depend on a functioning PT program conducted in accordance with the regulations and statute to ensure that laboratories provide accurate and reliable test results; however, we recognize that human error can and does occur. For these reasons, we believe it would be appropriate to afford an infrequent and narrowly crafted carve-out from the long-standing interpretation of ''intentional'' to allow for the imposition of alternative sanctions when there is a single instance of PT referral related to reflex or confirmatory testing. Laboratories would still be obligated to provide staff with clear standard operating procedures and effective training for all current and newly hired employees, and must ensure continued compliance with those procedures to prevent PT referral. Repeat referrals, even if related to reflex or confirmatory testing, would be considered ''intentional'' and may be subject to the sanctions of revocation and ban against the owner and operator. A PT referral is a prohibited act and will always involve consequences.

In addition to the already extensive campaign to highlight the bar on PT referrals, we have considered what more we could possibly do to further ensure laboratory awareness of this prohibition. We believe it would be appropriate to insert, into that part of the regulation that discusses the treatment of PT samples in the same manner as the laboratory would treat a patient specimen, a cross reference reminding laboratories that such treatment must not include referral of a PT sample to another laboratory.

We therefore propose to make two changes to the CLIA regulations relevant to PT referral. The first would be to add a statement to § 493.801(b) to explicitly note that the requirement to treat PT samples in the same manner as patient specimens does not mean that it is acceptable to refer PT samples to another laboratory for testing even if that is the standard operating procedure for patient specimens. This means that in instances where the laboratory's patient testing standard operating procedures would normally require reflex or confirmatory testing at another laboratory, the laboratory should treat the PT sample as they would a patient specimen up until the point they would typically refer a patient specimen to a second laboratory for any form of further testing. A PT sample must never be sent to another laboratory under any circumstances.

The second proposed change would be to carve out a narrow exception in our longstanding interpretation of what constitutes an ''intentional'' referral. We note, however, that for all other instances in which a PT sample is referred, the standard for ''intentional'' would continue to be a general intent to act—that is, to send a PT sample to another laboratory for analysis. For the narrow exception to this general rule, we propose that when CMS determines that a PT sample was referred to another laboratory for analysis, but the requested testing was limited to reflex or confirmatory testing, then we would consider the referral to be improper and subject to alternative sanctions in accordance with § 493.1804(c), but not intentional, provided that, if the specimen were a patient specimen, the referral would have been in full conformance with written, legally accurate, and adequate standard operating procedures for the laboratory's testing of patient specimens, and the PT referral is not a repeat PT referral. Alternative sanctions may include any combination of civil money penalties, directed plan of correction (such as required remedial training of staff), temporary suspension of Medicare or Medicaid payments, or other sanctions specified in accordance with regulation.

By ''full conformance'' with the laboratory's written, legally accurate and adequate standard operating procedures we mean that the procedures adequately describe what is to be done, and that what is to be done is in conformance with applicable laws (such as the ban on referring PT samples to another laboratory for analysis). Furthermore, we mean that the referral policy does not afford any discretion to staff as to whether a patient specimen would be forwarded or not. For example, standard operating procedures do not allow for selectivity on the part of the laboratory staff. Rather, they require the application of pre-established criteria that result in a mandate to forward a patient specimen to another laboratory for further analysis. For example, if standard laboratory protocols dictate that all specimens showing HIV-positive test results be sent to a second laboratory for confirmatory testing, but we find that the individual referred only 1 of the 2 positive HIV PT samples, we would consider the referral to be not in conformance with the laboratory's own standard operating procedure. In this instance, the laboratory may be subject to the sanctions of revocation and ban against the owner and operator as opposed to alternative sanctions.

By providing that the referral is not a repeat PT referral, we mean that there has not been an instance of identified PT referral in the two survey cycles prior to the time of the PT referral in question. Two survey cycles generally equates to a four-year period on average. This is not a precise calendar time period but is carefully recorded as a matter of actual and documented survey event dates. Both CMS and accrediting organizations perform initial surveys at least 3 months but no later than 12 months from the effective date of CLIA certification. Subsequent routine recertification surveys are performed biennially. A survey cycle means the time between an initial survey and recertification survey or the time between a recertification survey and the next recertification survey, and is approximately two years. The time interval from the effective date of the CLIA certificate until the initial certification is also included as part of the initial certification survey cycle. Complaint and validation surveys are performed on a non-routine basis, and are considered to be separate from survey cycles for the purpose of determining the timeframe for two survey cycles.

In other words, a referral would not be considered ''intentional'' if the CMS investigation reveals PT samples were sent to another laboratory for reflex or confirmatory testing, it is not a repeat PT referral, and it occurred while acting in full conformance with the laboratory's written, legally accurate and adequate standard operating procedure as outlined in this preamble. The key to this carve-out is the expectation that laboratories will ensure that improper referrals are addressed and eliminated, or we will find that future referrals are intentional. The carve-out is meant to be a one-time exception to a finding of an intentional referral by virtue of a general intent to forward a PT sample to another laboratory. Upon learning that the laboratory's training materials, training, or staff capabilities are inadequate to ensure compliance with the PT referral requirements, we expect the laboratory to correct the problems, and will treat subsequent referrals as ''intentional'' in keeping with our longstanding practices. We believe that it is reasonable to expect laboratories to maintain a heightened vigilance for this time-frame to ensure that they do not have any repeated difficulties. We welcome public comments on these proposed changes.

Furthermore, we note that the ''Taking Essential Steps for Testing Act of 2012'' (Pub. L. 112–202), enacted on

December 4, 2012, amends section 353 of the Public Health Service Act to provide the Secretary with the discretion to substitute intermediate sanctions in lieu of the 2-year prohibition on the owner and operator when a CLIA certificate is revoked due to intentional PT referral, and to consider imposing alternative sanctions in lieu of revocation in such cases as well. We generally intend to undertake further rule-making to implement the Taking Essential Steps for Testing Act of 2012, and invite comment on such action. In the meantime, since we are already proposing changes in this rule to § 493.801, we are proposing at this time to change the ''will'' to ''may'' in the second sentence of § 493.801(b)(4) to ensure that this section is in compliance with the Taking Essential Steps for Testing Act of 2012.

Contact for CLIA issues: Melissa Singer, (410) 786–0365.

III. Collection of Information Requirements

This proposed rule does not impose any new information collection, recordkeeping or third-party disclosure requirements. However, this proposed rule would create certain savings related to information collection, recordkeeping or third-party disclosure requirements. While we detail all of the estimated savings of this proposed rule in the regulatory impact analysis, the following paragraph provides a brief summary of the estimated savings associated with the information collection request (ICR) approved under OMB control number 0938–1069.

This proposed rule would reduce the reporting requirements for transplant centers and organ procurement organizations. As stated later in the regulatory impact analysis, we are proposing to eliminate the reporting requirement at 42 CFR 482.74(a)(2). The requirement is redundant as it is a duplication of data submission under the Paperwork Reduction Act. The same information is currently being collected by the Health Services and Resources Administration (HRSA). After the requisite notice and comment periods, we will submit a revision of the currently approved ICR for OMB review and approval.

IV. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

V. Regulatory Impact Analysis

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999) and the Congressional Review Act (5 U.S.C. 804(2).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). We estimate that this rulemaking is ''economically significant'' as measured by the $100 million threshold, and hence also a major rule under the Congressional Review Act. Accordingly, we have prepared a Regulatory Impact Analysis (RIA) that, to the best of our ability, presents the costs and benefits of the rulemaking.

A. Statement of Need

In Executive Order 13563, the President recognized the importance of a streamlined, effective, efficient regulatory framework designed to promote economic growth, innovation, job creation, and competitiveness. To achieve a more robust and effective regulatory framework, the President has directed each executive agency to establish a plan for ongoing retrospective review of existing significant regulations to identify those rules that can be eliminated as obsolete, unnecessary, burdensome, or counterproductive or that can be modified to be more effective, efficient, flexible, and streamlined. This proposed rule continues our direct response to the President's instructions in Executive Order 13563 by reducing outmoded or unnecessarily burdensome rules, and thereby increasing the ability of health care entities to devote resources to providing high quality patient care.

B. Overall Impact

This proposed rule would create ongoing cost savings to providers and suppliers in many areas. Other changes we have proposed would clarify existing policy and relieve some administrative burdens. We have identified other kinds of savings that providers and patients will realize throughout this preamble. The financial savings are summarized in the table that follows. We welcome public comments on all of our burden assumptions and estimates. As discussed later in this regulatory impact analysis, substantial uncertainty surrounds these estimates and we especially solicit comments on either our estimates of likely savings or the specific regulatory changes that drive these estimates.

TABLE 1—SECTION-BY-SECTION ECONOMIC IMPACT ESTIMATES*

Issue	Frequency	Number of affected entities	Likely savings or benefits ($ millions)
Ambulatory Surgical Centers:			
• Radiology Services	Recurring Annually.	2544	≤ 41
Hospitals:			
• Food and dietetic services	Recurring Annually.	4,900	83 to 528
• Nuclear medicine services	Recurring Annually.		39
Transplant Centers:			

TABLE 1—SECTION-BY-SECTION ECONOMIC IMPACT ESTIMATES*—Continued

Issue	Frequency	Number of affected entities	Likely savings or benefits ($ millions)
• Reports to CMS & Survey Changes	Recurring Annually.	60	< 1
Long Term Care Facilities:			
• Sprinkler Deadline Extension	One-time	125	22
Rural Health:			
• CAH & RHC/FQHC Physician responsibilities	Recurring Annually.	9311	42
• CAH Provision of services	Recurring Annually.	665	<1
CLIA:			
• PT Referral	Recurring Annually.	3	2
Total			231 to 676

*This table includes entries only for those proposed reforms that we think would have a measurable economic effect

C. Anticipated Effects

1. Effects on Ambulatory Surgical Centers

The potential cost savings from the reduced ASC radiology services requirements are discussed in the preamble section of this rule addressing those reforms. We have calculated the savings based on the elimination of ASC requirements that are inappropriate and unnecessary in the ASC setting, primarily because some of the requirements are intended for inpatient hospital patients, which would not be applicable in the outpatient ASC setting. We estimate that assuming the average cost for affected facilities to meet the radiology services requirements would have been $16,000 annually ($4,000 × 4 quarters), the total savings would be $40.7 million ($16,000 × 2544 ASCs).

The assumption for this estimate is based on using ASC facilities across the country that provide orthopedic or pain management procedures, which are the facilities most likely to require a radiologist on staff. We reached out to the Ambulatory Surgery Center Association for assistance on the average cost and usage of radiologists in ASCs across the United States. Based on a survey of ASCs and depending on the market, location of the ASC and frequency of the visits, we utilized a $4,000 average cost per quarter that ASCs are paying for radiologist fees. In addition, we considered the total number of ASCs affected by the current radiology services requirements at an average 48 percent, or 2544 ASCs, based on current data and the total number of Medicare certified ASCs (5300 as of December 2011).

We note that the $40.7 million estimated savings to ASCs may represent an overstatement of the provision's net social benefits. To the extent that radiologists are putting forth effort (for example, transporting themselves to ASCs) to perform radiology supervision, society's resources would indeed be freed for other uses by the proposed change. However, because the radiologic services in question do not involve any diagnostic activity, some portion of the radiology supervision fees may not represent actual labor costs, but would instead involve a transfer of value from radiologists (who currently receive supervision fees without having any diagnostics to supervise) to ASCs (which, if the proposed rule is finalized, would no longer pay those fees). We lack data to estimate how much of the $40.7 million total is a transfer of this type, rather than a net social benefit. We welcome your comments on these estimates.

2. Effects on Intermediate Care Facilities for Individuals who are Intellectually Disabled

Because we are proposing only technical corrections, we do not estimate any costs or savings for ICF/IIDs based on this proposed rule.

3. Effects on Hospitals

There are about 4,900 hospitals that are certified by Medicare and/or Medicaid. We use these figures to estimate the potential impacts of this proposed rule. We use the following average hourly wages for registered dietitians, advanced practice registered nurses, physician assistants, pharmacists, and physicians respectively: $35, $57, $57, $69, and $124 (BLS Wage Data by Area and Occupation, including both hourly wages and fringe benefits, at *http://www.bls.gov/bls/blswage.htm* and *http://www.bls.gov/ncs/ect/*).

Ordering Privileges for Registered Dietitians (RDs) (Food and Dietetic Services § 482.28)

We propose to revise the hospital requirements at 42 CFR 482.28 (b), ''Food and dietetic services,'' which currently requires that therapeutic diets must be prescribed by the practitioner or practitioners responsible for the care of the patients. Specifically, we are proposing revisions to § 482.28(b)(1) and (2) that would change the CMS requirements to allow for flexibility in this area by requiring that all patient diets, including therapeutic diets, must be ordered by a practitioner responsible for the care of the patient, or a qualified dietitian as authorized by the medical staff and in accordance with State law. With these proposed changes to the current requirements, a hospital would have the regulatory flexibility either to appoint RDs to the medical staff and grant them specific dietary ordering privileges (including the capacity to order specific laboratory tests to monitor nutritional interventions and then modify those interventions as needed) or to authorize the ordering privileges without appointment to the medical staff, all done through the hospital's medical staff and its rules, regulations, and bylaws. In either instance, medical staff oversight of RDs and their ordering privileges would be ensured.

As we discussed previously in this rule, a 2010 retrospective cohort study[1] of 1,965 patients at an academic medical center looked at the influence of RDs with ordering privileges on appropriate

[1] Peterson SJ, Chen Y, Sullivan CA, et al. Assessing the influence of registered dietician order-writing privileges on parenteral nutrition use. J AM Diet Assoc. 2010; 110; 1702 1711.

parenteral nutrition (PN) usage and showed a reduction in medically inappropriate PN usage, which translated to an approximately $135,233 annual savings to the hospital after RDs were granted ordering privileges; included in this savings estimate were solution, materials and pharmacy labor costs specifically related to PN. In order to estimate the reduced costs that our proposed changes to § 482.28 might bring to hospitals, we based our calculations on this study and its finding of $135,233 savings for a single hospital that granted ordering privileges to RDs. The study presented its figures in 2003 dollars, and to adjust to a comparable figure in 2012 dollars we used the increase in the Consumer Price Index (CPI–U) over this period. Since that index is up about 25 percent, our savings estimate, rounded, is $169,000.

We estimate that possibly 5 percent (that is, 245) of all hospitals are out of compliance with the CoPs and already granting RDs ordering privileges through appointment to the medical staff or other mechanisms and have already realized these savings (included in this estimate would also be those hospitals who might decide against granting these privileges and therefore would also not realize these savings). Additionally, an October 2008 study[2] surveyed 1,500 clinical nutrition managers in acute healthcare facilities nationwide in an attempt to describe the level of RD independent prescriptive authority and to explore the barriers to obtaining that authority. The authors of the study found that roughly 15 percent of the respondents cited ''regulatory agencies'' as a barrier to obtaining independent prescriptive authority (or dietary ordering privileges as we refer to it in this rule). However, several limitations inherent in this study led us to question how heavily we should rely on it for the purposes of estimating how many hospitals would take advantage of this proposed allowance under the CoPs. The survey only looked at the perceptions of clinical nutrition managers regarding barriers to RD ordering privileges and did not survey hospital administrators or governing body members on the reasons why hospitals were unable to grant these privileges to RDs at this time. We believe that such a study, had it been performed, would have been much more meaningful and reliable for our purposes in estimating how many hospitals would possibly implement the granting of ordering privileges to RDs. The authors of the study also state that ''* * * the limitations of this study must be considered and a major limitation was the small response rate (23.4 percent) * * *'' (or only 351 respondents from the 1,500 clinical nutrition managers surveyed). Weil et al. also reference current CMS requirements and policy regarding RD ordering privileges in their study's discussion where they state, ''* * * independent prescriptive authority via clinical privileges would not be a CMS-accepted pathway for RDs to write orders * * *'' Mention of the CMS requirements here leads us to believe that our requirements (included in the survey response ''regulatory agencies'' as used in the study) might present a more significant barrier than the results of the survey indicate.

Because there is still some degree of uncertainty involved in estimating how many hospitals would actually take advantage of this proposed allowance under the CoPs, we have chosen to present a range of savings estimates, using 4,655 (or 95 percent) as both our most likely estimate and as the upper bound of affected hospitals and 15 percent (from the survey cited above), or 735 hospitals, as the lower bound. However, our extensive experience with hospitals, hospital organizations, and RD professional organizations leads us to believe that if the change proposed here is finalized, a significant number of hospitals would move to grant RDs ordering privileges. Therefore, we believe that the upper bound estimate of potential hospital savings provided here is the more realistic and reliable end of the range.

We also based our savings estimates on the following assumptions:

- The Peterson et al study was conducted at a 613-bed tertiary academic medical center; hospitals smaller than the one studied would have lower PN usage due to lower patient censuses and would thus have lower savings;
- We adjusted the savings relative to average bed size for hospitals of 164 beds (from AHA Hospital Statistics), meaning that average annual savings would be $36,513 per hospital using the 2003 figure, but $45,641 after adjusting for inflation; and
- The savings are based on the impact that RD ordering privileges had on reducing inappropriate PN usage alone and do not include other positive impacts that RD ordering privileges might have on reducing costs to hospitals.

Based on the studies and these assumptions, we estimate savings ranging from $33,546,135 (735 hospitals × $45,641 in savings from reduced inappropriate PN usage = $33,546,135) to $212,458,855 (4,655 hospitals × $45,641 in savings from reduced inappropriate PN usage = $212,458,855).

As noted above, the proposed changes might also help hospitals to realize other significant savings. One 2008 study[3] indicates that patients whose PN regimens were ordered by RDs have significantly fewer days of hyperglycemia (57 percent versus 23 percent) and electrolyte abnormalities (72 percent versus 39 percent) compared with patients whose PN regimens were ordered by physicians. This would most likely translate into decreased length of stays for these patients as well as quicker recovery times and reduced incidents of readmissions after discharge from the hospital. However, we do not have any reasonable means for estimating these potential cost savings at this time.

More obviously, RDs with ordering privileges would also be able to provide medical nutrition therapy (MNT) and other nutrition services at lower costs than physicians (as well as APRNs and PAs, two categories of non-physician practitioners that have traditionally also devised and written patient dietary plans and orders). This cost savings stems in some part from significant differences in the average salaries between the professions and the time savings achieved by allowing RDs to autonomously plan, order, monitor, and modify services as needed and in a more complete and timely manner than they are currently allowed. While we can estimate with reasonable certainty the savings that might be realized by hospitals through our proposed changes in terms of the physician/APRN/PA time and salaries saved, it would be more difficult to reasonably estimate the potential savings and benefits that would result from these professionals now having potentially more time to devote their attentions to those aspects of patient care for which they are trained and qualified. Physicians, APRNs, and PAs often lack the training and educational background to manage the nutritional needs of patients with the same efficiency and skill as RDs. The addition of ordering privileges enhances the ability that RDs already have to provide timely, cost-effective, and evidence-based nutrition services as the recognized nutrition experts on a hospital interdisciplinary team. A 2011

[2] Weil, Sharon D., Linda Lafferty, Kathryn S. Keim, Diane Sowa and Rebecca Dowling. Registered Dietitian Prescriptive Practices in Hospitals. J AM Diet Assoc. 2008; 108; 1688–1692.

[3] Duffy JK, Gray RL, Roberts S, Glanzer SR, Longoria SL. Independent nutrition order writing by registered dieticians reduces complications associated with nutrition support [abstract]. J Am Diet Assoc. 2008; 108 (suppl 1):A9

review article[4] discusses a number of additional studies that provide further evidence for the significant differences in nutrition education that exist between physicians and RDs, along with several other studies supporting the cost-effectiveness and positive patient outcomes that hospitals might achieve by granting RDs ordering privileges.

To calculate these cost savings for hospitals, we based our savings estimates on the following assumptions:

- Using the wide range of estimates established above, between 735 and 4,655 hospitals would realize these savings;
- There is an average hourly salary difference of $44 between RDs on one side ($35 per hour) and the hourly salary average for physicians, APRNs, and PAs ($79 per hour) on the other;
- There are on average 7,000 inpatient hospital stays per hospital per year (from AHA Hospital Statistics) with each of these stays requiring at least one dietary plan and orders;
- The average hospital stay is about 5 days (from AHA Hospital Statistics);
- On average, each non-complex dietary order, including ordering and monitoring of laboratory tests, subsequent modifications to orders, and dietary orders for discharge/transfer/outpatient follow-up as needed, would take 10 minutes (0.17 hours) of a physician's/APRN's/PA's/RD's time per patient during an average 5-day stay;
- On average, MNT or more complex dietary orders (for example, PN, tube feedings, patients with multiple co-morbidities, transition of patient from parenteral to enteral feeding, etc.), including ordering and monitoring of laboratory tests, subsequent modifications to orders, and dietary plans and orders for discharge/transfer/outpatient follow-up as needed, would take 25 minutes (0.42 hours) of a physician's/APRN's/PA's/RD's time per patient during an average 5-day stay; and
- The average number of hospital inpatient stays where the patient is determined to be either ''at risk for malnutrition'' or ''malnourished'' and/or requires MNT or a more complex dietary plan and orders for other clinical reasons is 1,400 (or 20 percent of inpatient hospital stays)[5] per hospital per year, with a remaining average of 5,600 (or 80 percent) of hospital inpatient stays per hospital per year where the patient is determined to be ''not at risk for malnutrition'' and/or requires a less complex dietary plan and orders.

The resulting savings estimate ranges from $49,803,600 ((735 hospitals × 5,600 inpatient hospital stays × 0.17 hours of a physician's/APRN's/PA's/RD's time × $44 per hourly wage difference) + (735 hospitals × 1,400 inpatient hospital stays × 0.42 hours of a physician's/APRN's/PA's/RD's time × $44 per hourly wage difference)) to $315,422,800 annually ((4,655 hospitals × 5,600 inpatient hospital stays × 0.17 hours of a physician's/APRN's/PA's/RD's time × $44 per hourly wage difference) + (4,655 hospitals × 1,400 inpatient hospital stays × 0.42 hours of a physician's/APRN's/PA's/RD's time × $44 per hourly wage difference)). When combined with the savings estimate of $33,546,135 to $212,458,855 from reduced inappropriate PN usage, this brings the total savings estimate from the proposed CoP changes $83,349,735 to $527,881,655 (or approximately $528 million) annually.

We acknowledge several additional kinds of uncertainty in our estimates of the proposed provision's savings. For instance, we have assumed that the time physicians, APRNs or PAs save due to being relieved of diet-ordering duties would equal the time spent by RDs on those duties. RDs, being the experts in this area and more proficient in evaluating and treating the nutritional needs of patients, might actually need less time than physicians, PAs, or APRNs. As we have stated previously, we have based many of our assumptions and estimates on what we believe is the conservative side of the best available evidence we have from our review of the literature in this area. We have also based our overall assumptions and best estimates on our practical, ongoing experiences with hospitals and prevailing conventional wisdom in these matters. Finally, we have restricted our estimates to inpatient hospital stays and we did not include a discussion of hospital outpatient visits for nutritional services and the impact that these proposed changes might have on hospital costs in this area. We welcome public comments on the assumptions and estimates we have put forth in this analysis.

Nuclear Medicine Services (§ 482.53)

We propose a change to the current requirement at § 482.53(b)(1), which requires that the in-house preparation of radiopharmaceuticals be performed by, or under the direct supervision of, an appropriately trained registered pharmacist or a doctor of medicine or osteopathy. We propose to remove the term ''direct'' from the current requirement. This revision would allow for other appropriately trained hospital staff to prepare in-house radiopharmaceuticals under the supervision or oversight of a registered pharmacist or doctor of medicine or osteopathy, but it would not require that such supervision or oversight be exercised by the physical presence in the hospital of one of these professionals, particularly during off-hours when such a professional would not be routinely present. The proposed change would directly reduce the burden of the current direct supervision requirement where it is most needed—in-house preparation of radiopharmaceuticals for after-hours/emergency performance of nuclear medicine diagnostic procedures.

Based on statistics from the Society of Nuclear Medicine and Molecular Imaging, an estimated 16 million nuclear medicine imaging and therapeutic procedures are performed each year in the United States. We based our estimated savings for this change on the conservative assumptions that:

- Most hospitals would take advantage of this proposed allowance on supervision since it is consistent with the Society of Nuclear Medicine and Molecular Imaging recommendations on this issue;
- The percentage of nuclear medicine procedures performed off-hours (7 p.m.–7 a.m.) is only 10 percent of all procedures performed (or 1.6 million);
- It would require 15 minutes of an MD/DO/PharmD's time for direct supervision; and
- The average hourly salary for these two categories of practitioners is $97.

Therefore, we estimate hospitals savings would be $38.8 million for the change proposed (1.6 million off-hour procedures × $97 hourly salary for MD/DO/PharmD × 15 minutes for direct supervision).

We proposed other revisions to the Hospital CoPs, but we do not believe those provisions would create tangible savings for hospitals. We welcome public comments on these assumptions and estimates.

4. Effects on Transplant Centers and Organ Procurement Organizations

Existing section 482.74(a)(2) requires transplant centers to notify CMS whenever there was a decrease in the center's number of transplants or survival rates that could result in the center being out of compliance with the clinical experience (number of required transplants) or outcome (survival) requirements at § 482.82. We are proposing to eliminate this requirement,

[4] Kinn TJ. Clinical order writing privileges. Support Line. 2011; 33; 4; 3–10.

[5] Barker LA, Gout BS, Crowe TC. Hospital malnutrition: prevalence, identification and impact on patients and the healthcare system. Int J Environ Res Public Health. 2011; 8(2); 514–527.

which would reduce the burden to any transplant center that must currently report this information to CMS. This requirement functionally duplicates the data reporting and analysis requirements administered through the Health Resources and Services Administration (HRSA) of HHS, HRSA's contractor for the Scientific Registry for Transplant Recipients (SRTR), and a CMS-funded analysis of these SRTR data. These data (hereafter the SRTR data) are equally if not more timely, and equal if not better at identifying transplant center performance problems, than the data we currently collect directly.

We estimate that transplant centers make about 60 notifications each year to CMS according to § 482.74(a)(2). We believe that a staff member, probably the transplant center administrator, who would be responsible for this notification would need to review the data and notify the medical director of the possibility that the center's volume and/or survival statistics may result in failure to comply with the requirements in § 482.82 of the CoPs. Then the transplant center administrator would need to make the actual submission to CMS. We believe this would require 15 minutes, or .25 hours, of the medical director's time at an hourly wage of $140 and 30 minutes, or .5 hours, of the transplant center administrator's time at an average hourly wage of $70 ($140 hourly wage for medical director × .25 hours = $35 (+) $70 hourly wage for administrator × .5 hours = $35 for a total of $70) for each notification to CMS. Based on our experience with transplant centers, we estimate that transplant centers make about 60 of these notifications each year. Thus, the annual savings to transplant centers from eliminating this requirement for all transplant centers would be about $4,200 ($70 for each notification × 60 notifications = $4,200).

In addition to the savings for transplant centers, the federal government would also sustain a savings due to federal staff not having to review and maintain these 60 notifications. Based on our experience with these notifications, we estimate that federal staff spend 20 minutes or .33 hours for each notification. The federal staff involved in reviewing and maintaining these notifications earn an average of $55 an hour. Thus, we estimate that the federal government would realize a savings of $18 ($55 × .33 = $18.15 or about $18) for each notification. For all 60 notifications, the federal government would realize an annual savings of $1,080 ($18 for each notification × 60 notifications = $1,080).

We expect that the changes proposed to the transplant center survey process would improve federal oversight of organ transplant programs by allowing more effective targeting of survey and enforcement activities to those programs that most need such attention, and would reduce the burden of hospitals undergoing surveys that may not be necessary. We estimate that the cost of an onsite survey is $10,400 per survey multiplied by a reduction of 10 surveys per year for a total of $104,000 per year. The per survey cost represents an estimate of the cost of personnel time spent during the onsite survey (hourly rate multiplied by the amount of time spent during a one-week onsite survey). This is consistent with costs reported by several transplant administrators which ranged between $7,334 and $15,000.

The reduction of 10 surveys each year out of the approximately 80 annual surveys completed each year represents a 12.5 percent reduction in the number of surveys. We estimate that these 10 surveys could have follow-up through alternative methods (for example, conference calls, plans of correction, etc.). This estimate is based on recent information that 43 programs that had non-compliance with data submission (that would require an onsite survey, if due for re-approval), were only slightly below the compliance threshold of 95 percent and effective follow-up could occur in some cases without an onsite survey. In addition, as part of our follow-up process every six months for non-compliance with patient and graft outcomes, we review about 15 programs every 6 months (approximately 30 programs per year). We estimate $104,000 in total savings for transplant hospitals each year.

In addition to the savings realized by the transplant centers, the federal government would realize savings from both the cost of conducting the surveys and the cost of federal staff time in reviewing and maintaining the survey results. The surveys of the organ transplant facilities are usually conducted by both state surveyors and contractors paid by the Federal government. A survey requires an average of 182 hours to complete. We estimate that the combined average hourly salary for the surveyors is $146. Thus, to conduct a survey costs about $26,572 (182 hours × $146 hourly wage = $26,572). By reducing the number of surveys by 10, the federal government would sustain an annual savings of $265,720 ($26,572 for each survey × 10 surveys = $265,720).

The federal government would also realize a savings due to the staff time required to review and maintain the results of these 10 surveys. We estimate that federal staff spend about 5 hours on each survey reviewing survey results and maintaining those results. Thus, for each survey, we estimate that the federal government would realize a savings of $275 (5 hours for each survey × $55 hourly wage = $275). For all 10 surveys, we estimate the annual savings would be $2,750 ($275 for each survey × 10 surveys = $2,750).

We believe that the other changes we have proposed for transplant centers and OPOs (at §§ 482.80(c), 482.82(c), 486.306, 486.308(b)(1), and 486.344(d)(2)(ii)) would be burden neutral.

These reforms will enable all three types of affected organizations—hospitals, State survey agencies, and Federal oversight staff—to focus resources more effectively and efficiently on detecting and dealing with genuine and important problems in transplant center performance.

5. Effects on Long Term Care Facilities

In issuing the original 2008 rule, we anticipated that the cost of the sprinkler requirement would be substantially reduced by allowing a 5-year transition period (2008–2013). The extended transition period would permit the cost of new sprinkler systems to be subsumed (at much less expense) under a facility's normal (or accelerated) capital replacement schedule. Due to the financial recession of 2008 and problems in the real estate market, however, the plans for replacement or major modification for some nursing homes have been delayed.

We recently received communications from a number of owners who plan to replace or substantially improve an existing structure, but are unable to do so by the August 13, 2013 deadline. In such a case, the owner is faced with the prospect of investing significant resources to install a system of automatic sprinklers in the old structure by August 13, 2013, only to have those improvements soon superseded by the superior environment of the new structure. We wish to avoid the unnecessary costs involved in sprinklering an old structure that will soon be replaced. We therefore propose to permit time-limited extensions of the due date for achieving full sprinkler status. Each case-specific extension would then enable more time for full sprinkler systems to be implemented through the capital replacement or renovation schedule that is feasible for the facility.

Out of approximately 15,800 nursing homes nationwide, our information system indicates that there were 169

facilities as of January 2012 that were not sprinklered, and another 1386 that were partially sprinklered for a total of 1555 facilities. Nursing homes have made steady progress in sprinkler installation, and we expect these numbers to decline considerably as August 13, 2013 approaches. We therefore project that 50 unsprinklered facilities will request and qualify for a deadline extension because they are building a full replacement facility that will not be ready by the deadline date, and an additional 75 partially-sprinklered nursing homes will request and qualify for an extension. These estimates are based on our examination of requests we have received from nursing homes in one large State, and generalized to the nation. We invite public comment on these estimates and on the fiscal savings estimates, described below.

In the case of a deadline extension for replacement of a nursing home, the unsprinklered facilities that are being replaced would still incur the cost of installing sprinklers in the new facility, but they would not need to pay twice for such installation (once in the old facility to meet the August 13, 2013 deadline, and again in the new facility). At an average estimated installation cost of $7.95 per square foot and an average space of 50,000 square feet, the avoided cost would be approximately $19,875,000 (50 facilities times 50,000 S.F. times $7.95). The partially sprinklered facilities may save some expense since they are combining the sprinkler installation with major modifications. We assume that the partially sprinklered facilities would avoid $1.00 per square foot in savings through such economies, and assume that the average unsprinklered area is 25,000 square feet. For the partially sprinklered facilities, we therefore project that the aggregate savings is approximately $1,875,000. The combined aggregate, one-time savings would total $21,750,000.

6. Effects on Rural Health and Primary Care Providers and Suppliers

CAH and RHC/FQHC Physician Responsibilities (§§ 485.631(b)(2) and 491.8(b)(2))

We propose to revise the CAH regulations at § 485.631(b)(2) and the RHC/FQHC regulations at § 491.8(b)(2) to eliminate the requirement that a physician must be on-site at least once in every 2-week period (except in extraordinary circumstances) to provide medical care services, medical direction, consultation, and supervision. Based on our experience with CAHs, we estimate that about 15 percent of the 1,330 CAHs (that is, 200 CAHs) would be affected by the removal of this provision and that its removal would produce estimated annual savings of nearly $1.6 million for CAHs.

We estimate that the majority of CAHs do not incur a burden due to the relatively large volume of services they provide. For these higher-volume CAHs, physicians are regularly onsite to supervise and provide consultation. We believe that these facilities will continue to have frequent physician visits (biweekly or more often), simply as a matter of operation. Therefore, for the majority of CAHs, we do not believe that eliminating the requirement for a biweekly physician visit will significantly reduce their financial and administrative expenses. For about 15 percent of CAHs, roughly 200 CAHs, we estimate the current burden as follows. First, we estimate that a physician, at an hourly salary of $95, spends 6 hours each visit and makes approximately two visits per month (26 visits per year) in a facility to perform the duties required at § 485.631(b)(2). We estimate these annual visits alone cost $14,820 per CAH per year (6 hours per visit × 26 visits × $95 an hour = $14,820 per CAH per year).

Next, we estimate current travel expenses associated with the biweekly requirement. Based on our experience with CAHs, we estimate that they spend approximately $780 for physician travel expenses each year. We estimate that, for each visit, a physician drives an average of 50 miles round trip and is reimbursed for gas at a rate of $0.55 (the IRS mileage reimbursement rate) per mile. Thus, each visit costs approximately $30 (50 miles per visit × $0.55 per mile) for a total annual burden of $780 per CAH ($30 per visit × 26 visits = $780 annual cost per CAH). We understand that a small number of CAHs, such as those in Hawaii and Alaska, most likely incur significant additional cost for airfare and overnight accommodations. However, we do not have enough data to estimate these various costs and request comment in this area.

We believe that, in the absence of a requirement for biweekly physician visits, about half of all CAHs will increase their use of telemedicine, where appropriate, and will be able to reduce the total number of visits as a result of following efficient, site-specific planning efforts prompted by real-time needs. These changes would result in savings in both hourly and travel expenses for CAHs that choose to increase their use of telemedicine. We believe that eliminating the on-site, bi-weekly physician supervision would produce an annual estimated savings of half of all current physician supervision costs for approximately 200 CAHs. We estimate the savings as follows: $1.5 million for on-site visits ($14,820/2 × 200 CAHs=$1,482,000) and $78,000 in travel costs ($780/2 × 200 = $78,000).

Since CAHs are required to document the events in which an extraordinary circumstance would prevent a doctor from visiting the CAH, at a minimum, once in a 2-week period, we estimate the administrative expenses associated with the documentation requirements at § 485.631(b)(2) to be $2,699.84 per year. Based on sample data from the Health Resources and Services Administration (HRSA), we estimate that such circumstances may impact about 11 percent of all presently required visits for this subset of 200 CAHs. We estimate that a clerical worker earning $18.88 per hour would be responsible for completing the paperwork, with each incident taking about 0.25 hours to record. Assuming 26 visits per year per CAH, with approximately 11 percent of the required visits being prevented, we estimate that the yearly cost of compliance for these 200 CAHs would be $2,670 (26 visits per year per CAH × 11 percent × 200 CAHs × 0.25 hour × $18.88 per hour =$2,699.84 per year).

Thus, we estimate a total annual savings for CAHs of nearly $1.6 million ($2,670 + $1,482,000 + $78,000 = $1,562,670). For RHCs and FQHCs, we believe our proposal would reduce burden on all such facilities. We estimate that, presently, to perform the duties required at § 491.8(b)(2), each month a physician spends approximately 8 hours (4 hours each visit, twice a month) on-site at an RHC or FQHC and that these visits require an additional 4 hours of travel time. We estimate a 2-hour round-trip travel time for visits to most RHCs and FQHCs, thus approximately 4 hours per month, and we note that many RHCs and FQHCs require special means of transport which may be more expensive than traveling by car. We estimate travel costs at $1,950 per clinic annually ($75 travel cost per visit × 26 visits per year = $1,950 per clinic per year). We estimate the costs for time spent for on-site visits to be $9,880 per RHC or FQHC per year (4 hours/visit × $95 an hour × 26 visits per year = $9,880 per year).

By eliminating the provision, for each RHC or FQHC we estimate travel expenses would drop by about two-thirds (by $1,287, or from $1,950 to $663, per year); we further estimate that the time spent on biweekly visits would decrease by a third (by $3,260), thus from $9,880 to $6,620 per year. Just as with CAHs, we believe clinics' and

centers' travel expenses would decrease in conjunction with an increase in the use of telemedicine, where appropriate, and as a result of site-specific planning efforts prompted by real-time needs rather than routine. For RHCs (3,977 total), we estimate an annual savings of $5.1 million on travel ($1,287 per year × 3,977 = $5,118,399). For FQHCs (5,134 total), we estimate they would realize $6.6 million in annual savings on travel expenses ($1,287 per year × 5,134 = $6,607,458).

RHCs would realize $12.9 million, and FQHCs $16.7 million, in annual savings from fewer hours for on-site clinician visits ($3,260 per year per RHC or FQHC per year). For RHCs, ($3,260 × 3,977 = $12,965,020); for FQHCs, this means $16.7 million in annual savings ($3,260 × 5,134 = $16,736,840).

We also estimate the administrative expenses associated with the documentation requirements at § 491.8(b)(2), which are triggered in the event of any ''extraordinary circumstances'' preventing any of the required bi-weekly physician visits. By comparison to travel and hourly visit costs, these expenses are relatively small. As we estimated for CAHs, we similarly estimate that such circumstances impact about 11 percent of the presently required visits for all RHCs and FQHCs. We estimate that a clerical worker earning $18.88 per hour would be responsible for completing the paperwork, with each incident taking about 0.25 hours to record. Assuming 26 visits per year, with approximately 11 percent of these being prevented, we estimate the yearly cost of compliance for RHCs and FQHCs to be $122,991 (26 visits × 11 percent × [3977 RHCs +5134 FQHCs] × 0.25/hour × $18.88 per hour = $122,991 per year for RHCs and FQHCs). Eliminating the biweekly requirement would eliminate this particular administrative cost entirely for all RHCs and FQHCs, producing a total annual savings of $53,686 for RHCs and $69,305 for FQHCs, respectively.

In total, we believe that eliminating the provision would produce annual estimated savings of $18.1 million for RHCs in travel, hourly, and administrative costs ($5,118,399 travel + $12,965,020 hourly + $53,686 administrative = $18, 137,105). For FQHCs, we estimate that eliminating the provision would produce $23.4 million in annual savings. ($6,607,458 travel + $16,736,840 hourly + $69,305 administrative = $23,413,603 per year). We note that a portion of these savings may be offset by equipment or other costs associated with increased use of telemedicine; however, we lack data with which to reliably estimate such costs.

We welcome public comments on these assumptions and estimates.

Provision of Services (§ 485.635(a))

We propose to remove the requirement that CAHs consult an individual who is not a member of the CAH staff in the development of its patient care policies; instead, we would allow CAHs greater flexibility in their approach. We estimate that removing this requirement would result in a total annual savings of $266,000 for CAHs which are not part of a rural health network and therefore, in the absence of this proposed rule, would need to provide orientation for a volunteer to be able to serve in this capacity. No original estimates were made regarding this requirement, which was in fact initially developed for another provider type (43 FR 30520 and 43 FR 5373), but later assumed as a requirement for CAHs in 1997 (62 FR 46037).

Based on our experience, we are aware that many CAHs use volunteers, such as current board members, community residents with a medical background, or others, to fulfill the current requirements at § 485.635(a)(2). That is, many CAHs use a volunteer as the non-CAH staff person who provides advice and assists in the development of the CAH's patient care policies. In some cases, the CAH must also invest time to make such an individual familiar with the CAH's policies and procedures. Based on our experience, we estimate that a CAH typically spends about $50 an hour for eight hours, annually, including any time required for orientation, to involve an outside individual in the development of its patient care policies. We also estimate that 665 of about 1,330 CAHs are part of a rural health network and can utilize a non-staff individual that is part of the network to fulfill this requirement. Thus, we estimate the savings based on the CAHs that are not in a network and are therefore required to pay an individual to assist with developing the policies and procedures. Thus, we estimate a total annual savings of $266,000 ($50 × 8 hours = $400 per CAH × 665 CAHs = $266,000). We welcome public comments on these assumptions and estimates.

RHC/FQHC Definition of a Physician (§ 491.2)

The definition of a physician in the RHC/FQHC CoP regulations does not conform to the definition of a physician in the payment and Medicare agreement regulations in Part 405 for these types of suppliers. We propose to revise the regulation at § 491.2 to more closely conform with the physician definition in the Part 405 regulations to eliminate possible confusion in the supplier community and to facilitate the development of more specialized primary care clinics, such as those providing dental services. We believe that this change will allow for an expansion of patient services and for additional health benefits for which we do not have a basis to estimate.

7. Effects on Laboratories

In this proposed rule, we would make a number of clarifications and changes pertaining to the regulations governing PT referral under CLIA. The first would be to add a statement to § 493.801(b) to explicitly note that the requirement to treat PT samples in the same manner as patient specimens does not mean that it is acceptable to refer PT samples to another laboratory for testing even if that is the protocol for patient specimens. The second proposed change would carve out a narrow exception in our longstanding interpretation of what constitutes an ''intentional'' referral. In these instances, the laboratory would be subject to alternative sanctions in lieu of potential principal sanctions. Alternative sanctions may include any combination of civil money penalties, directed plan of correction (such as required remedial training of staff), temporary suspension of Medicare or Medicaid payments, or other sanctions specified in accordance with CMS regulations. Finally, we propose that definitions for the following three terms would be added to the regulation: Reflex testing, Confirmatory testing, and repeat PT referral.

From 2007 through 2011 there were 41 cases of cited, intentional PT referral. Of these 41 cases, we estimate that 13 would have fit the terms of this proposed rule, ranging from a low of 1 in any year (in 2009) to a high of 5 (in 2011). Based on discussions with the most recently affected laboratories, we estimate that the average cost of the sanctions applicable under current regulations is approximately $578,400 per laboratory. The largest single type of cost is the expense to the laboratory or hospital to contract out for management of the laboratory, and to pay laboratory director fees, due to the 2-year ban of the owner and operator pursuant to revocation of the CLIA certificate. We have not included legal expenses in this cost estimate, as it is not possible to estimate the extent to which laboratories may still appeal the imposition of the alternative sanctions in this proposed rule. We therefore estimate the annual

fiscal savings of the proposed changes to range from a low of $578,400 (1 laboratory) to a high of $2.9 million (5 laboratories), with an annual average estimated savings of $1.7 million (about 3 laboratories per year on average). While the macro savings may not be large, the costs to the individual laboratory or hospital that is affected can be significant.

We note, however, that the $1.7 million estimated savings to laboratories may overstate or understate the provision's net benefits. For example, if the prior management is fired instead of being reassigned to other duties for the two year period, some of the costs of paying for the new management's salaries, benefits and training may be able to be drawn from funding that had previously been earmarked to pay those expenses for their predecessors. That is, the costs associated with the new employee could be offset by the savings gained when the former employee is terminated. Any such offset would result in lower savings than is estimated above. There are also, however, unknowns that may result in larger savings than estimated above. For example, we have no data on whether terminated management historically received severance packages. If they did, those costs would have to be added to the costs we noted above. While we recognize these potential inaccuracies in our estimates, we lack data to account for these considerations. We welcome comments on this issue.

8. Effects on Small Entities

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, we estimate that the great majority of the providers that would be affected by CMS rules are small entities as that term is used in the RFA. The great majority of hospitals and most other health care providers and suppliers are small entities, either by being nonprofit organizations or by meeting the SBA definition of a small business. Accordingly, the usual practice of HHS is to treat all providers and suppliers as small entities in analyzing the effects of our rules.

This proposed rule would save affected entities almost $700 million a year. Most of these savings would accrue to hospitals. While this is a large amount in total, the average saving per affected hospital is less than one half million dollars per year. Although the overall magnitude of the paperwork, staffing, and related cost reductions to hospitals and CAHs under this rule is economically significant, these savings are likely to be a fraction of one percent of total hospital costs. Total national inpatient hospital spending is approximately nine hundred billion dollars a year, or an average of about $150 million per hospital, and our primary estimate of the net effect of these proposals on reducing hospital costs is less than $700 million annually. This is an average of about $90,000 in savings for the 6,200 hospitals (including CAHs) that are regulated through the CoPs and is well under one percent of annual spending. It would be higher in larger hospitals, and lower in smaller hospitals, since these savings would be roughly proportional to patient volume.

Under HHS guidelines for RFA, actions that do not negatively affect costs or revenues by more than 3 percent a year are not economically significant. We believe that no hospitals of any size will be negatively affected. Accordingly, we have determined that this proposed rule would not have a significant economic impact on a substantial number of small entities, and certify that an Initial RFA is not required. Notwithstanding this conclusion, we believe that this RIA and the preamble as a whole meet the requirements of the RFA for such an analysis.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. For the preceding reasons, we have determined that this proposed rule will reduce costs and will therefore not have a significant negative impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2012, that is approximately $139 million. This proposed rule does not contain any mandates.

Executive Order 13132 establishes certain requirements that an agency must meet when it issues a proposed rule (and subsequent final rule) that would impose substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This rule would not have a substantial direct effect on State or local governments, preempt States, or otherwise have a Federalism implication.

D. Alternatives Considered

From within the entire body of CoPs and CfCs, the most viable candidates for reform were those identified by stakeholders, by recent research, or by experts as unusually burdensome if not unchanged. This subset of the universe of standards is the focus of this proposed rule. For all of the proposed provisions, we considered not making these changes. Ultimately, we saw no good reasons not to propose these burden reducing changes. We welcome comments on whether we properly selected the best candidates for change, and welcome suggestions for additional reform candidates from the entire body of CoPs.

For LTC facilities, we considered the option of not making any changes to the rule. However, we were persuaded by the contacts we received that bona fide efforts were being made by the nursing homes in question to achieve the best results for residents. We believe that the benefits to residents of having new, modern and fully-equipped facilities are substantial, and that the public interest is served by avoiding wastage of funds spent on retrofitting an older structure when that structure is soon to be replaced or substantially improved. We also considered the option of granting extensions of the due date when a replacement or substantial renovation is not contemplated. However, we believe that an approach that limits extensions to situations where a replacement facility or substantial renovation is involved would best balance the advisability of timely achievement to full sprinkler status and the special challenges involved in large-scale construction projects.

Regarding the proposed revisions to the CLIA regulations, we focused our proposals exclusively on reflex or confirmatory testing. Such cases, where the laboratory has followed its standard operating procedure in full, provide a reasonable basis for the Secretary to determine that the referral was not intentional.

E. Uncertainty

Our estimates of the effects of this regulation are subject to significant uncertainty. While the Department is confident that these reforms will provide flexibilities to facilities that will yield major cost savings, there are

uncertainties about the magnitude of these effects. In addition, as we previously explained, there may be significant additional health benefits. Thus, we are confident that the rule will yield substantial net benefits. In this analysis we have provided estimates to suggest the potential savings these reforms could achieve under certain assumptions. We appreciate that those assumptions are simplified, and that actual results could be substantially higher or lower. Although there is uncertainty concerning the magnitude of all of our estimates, we do not have the data to provide probable estimates as to the range of possibilities, or to estimate all categories of possible benefits, including health effects. We have illustratively presented one possible lower bound—for food and dietetic services—in the preceding analysis and in the Accounting Statement that follows. We welcome comments addressing this lower bound estimate, as well as the missing or uncertain effects of other provisions, by professional societies, individual providers, provider associations, academics, and others.

F. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*), we have prepared an accounting statement. As previously explained, achieving the full scope of potential savings will depend on future decisions by hospitals, by State regulators and others. Many other factors will influence long-term results. We estimate the overall cost savings that this rule would create would be approximately $231 million to $676 million in the first year, and $209 million to $654 million per year thereafter, or about $214 million to $659 million annualized over the next 5 years. Over a 5-year period, our primary estimate is that cost savings would be approximately $3.3 billion, though they could be as low as about $1 billion.

TABLE 2—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED COSTS AND SAVINGS

($ In millions)

Category	Primary estimate and upper bound	Lower bound	Units		
			Year dollars	Discount rate	Period covered
Benefits	None				
Costs:					
Annualized Monetized reductions in Costs	−$659	−$214	2012	7%	2013–17
	−$659	−$214	2012	3%	2013–17
Transfers	None				

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

List of Subjects

42 CFR Part 416

Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements

42 CFR Part 442

Administrative practice and procedure, Health facilities, Health maintenance organizations (HMO), Medicare, Penalties, Privacy, Reporting and recordkeeping requirements

42 CFR Part 482

Grant programs—health, Hospitals, Medicaid, Medicare, Reporting and recordkeeping requirements

42 CFR Part 483

Grant programs—health, Health facilities, Health professions, Health records, Medicaid, Medicare, Nursing homes, Nutrition, Reporting and recordkeeping requirements, Safety

42 CFR Part 485

Grant programs—health, Health facilities, Medicaid, Medicare, Reporting and recordkeeping requirements

42 CFR Part 486

Grant programs—health, Health facilities, Medicare, Reporting and recordkeeping requirements, X-rays

42 CFR Part 488

Administrative practice and procedure, Health facilities, Medicare, Reporting and recordkeeping requirements

42 CFR Part 491

Grant programs—health, Health facilities, Medicaid, Medicare, Reporting and recordkeeping requirements, Rural areas

42 CFR Part 493

Administrative practice and procedure, Grant programs-health, Health facilities, Laboratories, Medicaid, Medicare, Penalties, Reporting and recordkeeping requirements

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR as set forth below:

PART 416—AMBULATORY SURGICAL SERVICES

■ 1. The authority citation for part 416 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

Subpart C—Specific Conditions for Coverage

■ 2. Section 416.42 is amended by revising paragraph (b)(2) to read as follows:

§ 416.42 Condition for coverage—Surgical services.

* * * * *

(b) * * *

(2) A physician qualified to administer anesthesia, a certified registered nurse anesthetist (CRNA), or an anesthesiologist's assistant as defined in § 410.69(b) of this chapter, or a supervised trainee in an approved educational program. In those cases in which a non-physician administers the anesthesia, unless exempted in accordance with paragraph (c) of this section, the anesthetist must be under the supervision of the operating physician, and in the case of an

anesthesiologist's assistant, under the supervision of an anesthesiologist.

* * * * *

■ 3. Section 416.49 is amended by revising paragraph (b) to read as follows:

§ 416.49 Condition for coverage—Laboratory and radiologic services.

* * * * *

(b) *Standard: Radiologic services.* (1) Radiologic services may only be provided when integral to procedures offered by the ASC and must meet the requirements specified in § 482.26(b), (c)(2), and (d)(2) of this chapter.

(2) A doctor of medicine or osteopathy who is qualified by education and experience in accordance with State law and ASC policy must supervise the provision of radiologic services.

PART 442—STANDARDS FOR PAYMENT TO NURSING FACILITIES AND INTERMEDIATE CARE FACILITIES FOR INDIVIDUALS WITH INTELLECTUAL DISABILITIES

■ 4. The authority citation for part 442 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302), unless otherwise noted.

Subpart C—Certification of ICF/IIDs

■ 5. Section 442.101(d)(3)(ii) is revised to read as follows:

§ 442.101 Obtaining certification

* * * * *

(d) * * *

(3) * * *

(ii) The facility submits an acceptable plan of correction covering the remaining deficiencies.

* * * * *

§ 442.105 [Removed and Reserved]

■ 6. Section 442.105 is removed and reserved.

§ 442.110 [Removed and Reserved]

■ 7. Section 442.110 is removed and reserved.

PART 482—CONDITIONS OF PARTICIPATION FOR HOSPITALS

■ 8. The authority citation for part 482 continues to read as follows:

Authority: Secs. 1102, 1871 and 1881 of the Social Security Act (42 U.S.C. 1302, 1395hh, and 1395rr), unless otherwise noted.

Subpart C—Basic Hospital Functions

■ 9. Section 482.12 is amended by revising the introductory text and adding paragraph (a)(10) to read as follows:

§ 482.12 Condition of participation: Governing body.

There must be an effective governing body that is legally responsible for the conduct of the hospital. If a hospital does not have an organized governing body, the persons legally responsible for the conduct of the hospital must carry out the functions specified in this part that pertain to the governing body.

(a) * * *

(10) Consult directly with the individual assigned the responsibility for the organization and conduct of the hospital's medical staff, or his or her designee. At a minimum, this direct consultation must occur periodically throughout the fiscal or calendar year and include discussion of matters related to the quality of medical care provided to patients of the hospital. For a multi-hospital system using a single governing body, the single multi-hospital system governing body must consult directly with the individual responsible for the organized medical staff (or his or her designee) of each hospital within its system in addition to the other requirements of this paragraph.

* * * * *

■ 10. Section 482.22 is amended by revising the introductory text and paragraph (a) introductory text to read as follows:

§ 482.22 Condition of participation: Medical staff.

Each hospital must have an organized and individual medical staff, distinct to that individual hospital, that operates under bylaws approved by the governing body, and which is responsible for the quality of medical care provided to patients by that individual hospital.

(a) *Standard: Eligibility and process for appointment to medical staff.* The medical staff must be composed of physicians. In accordance with State law, including scope-of-practice laws, the medical staff may also include other categories of non-physician practitioners who are determined to be eligible for appointment by the governing body.

* * * * *

■ 11. Section 482.28 is amended by revising paragraphs (b)(1) and (2) to read as follows:

§ 482.28 Condition of participation: Food and dietetic services.

* * * * *

(b) * * *

(1) Individual patient nutritional needs must be met in accordance with recognized dietary practices.

(2) All patient diets, including therapeutic diets, must be ordered by a practitioner responsible for the care of the patient, or by a qualified dietician as authorized by the medical staff and in accordance with State law.

* * * * *

Subpart D—Optional Hospital Services

■ 12. Section 482.53 is amended by revising paragraph (b)(1) to read as follows:

§ 482.53 Condition of participation: Nuclear medicine services.

* * * * *

(b) * * *

(1) In-house preparation of radiopharmaceuticals is by, or under the supervision of, an appropriately trained registered pharmacist or a doctor of medicine or osteopathy.

* * * * *

■ 13. Section 482.54 is amended by adding paragraph (c) to read as follows:

§ 482.54 Condition of participation: Outpatient services.

* * * * *

(c) *Standard: Orders for outpatient services.* Outpatient services must be ordered by a practitioner who meets the following conditions:

(1) Is responsible for the care of the patient.

(2) Is licensed in the State where he or she provides care to the patient.

(3) Is acting within his or her scope of practice under State law.

(4) Is authorized in accordance with policies adopted by the medical staff, and approved by the governing body, to order the applicable outpatient services. This applies to the following:

(i) All practitioners who are appointed to the hospital's medical staff and who have been granted privileges to order the applicable outpatient services.

(ii) All practitioners not appointed to the medical staff, but who satisfy the above criteria for authorization by the hospital for ordering the applicable outpatient services for their patients.

Subpart E—Requirements for Specialty Hospitals

§ 482.66 [Redesignated as § 482.58]

■ 14. Redesignate § 482.66 in Subpart E as § 482.58 in Subpart D.

§ 482.74 [Amended]

■ 15. Section 482.74 is amended by removing paragraph (a)(2) and redesignating paragraphs (a)(3) and (4) as paragraphs (a)(2) and (3) respectively.

■ 16. Section 482.80 is amended by—

■ a. Revising paragraph (c) introductory text.

■ b. Removing paragraph (c)(2).
■ c. Redesignating paragraph (c)(3) as paragraph (c)(2).

The revision reads as follows:

§ 482.80 Condition of participation: Data submission, clinical experience, and outcome requirements for initial approval of transplant centers.

* * * * *

(c) *Standard: Outcome requirements.* CMS will review outcomes for all transplants performed at a center, including outcomes for living donor transplants, if applicable. CMS will review adult and pediatric outcomes separately when a center requests Medicare approval to perform both adult and pediatric transplants.

* * * * *

■ 17. Section 482.82 is amended by—
■ a. Revising paragraphs (a) and (b).
■ b. Revising paragraph (c) introductory text.
■ c. Removing paragraph (c)(2).
■ d. Redesignating paragraph (c)(3) as paragraph (c)(2).

The revisions read as follows:

§ 482.82 Condition of participation: Data submission, clinical experience, and outcome requirements for re-approval of transplant centers.

* * * * *

(a) *Standard: Data submission.* No later than 90 days after the due date established by the OPTN, a transplant center must submit to the OPTN at least 95 percent of the required data submissions on all transplants (deceased and living donors) performed during the prior 3 years. Required data submissions include, but are not limited to, submission of the appropriate OPTN forms for transplant candidate registration, transplant recipient registration and follow-up, and living donor registration and follow-up.

(b) *Standard: Clinical experience.* To be considered for re-approval, an organ-specific transplant center must generally perform an average of 10 transplants per year during the prior 3 years.

(c) *Standard: Outcome requirements.* CMS will review outcomes for all transplants performed at a center, including outcomes for living donor transplants, if applicable. CMS will review adult and pediatric outcomes separately when a center requests Medicare approval to perform both adult and pediatric transplants.

* * * * *

PART 483—REQUIREMENTS FOR STATES AND LONG TERM CARE FACILITIES

■ 18. The authority citation for part 483 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

Subpart B—Requirements for Long-Term Care Facilities

■ 19. Section 483.5 is amended by adding paragraph (f) to read as follows:

§ 483.5 Definitions

* * * * *

(f) *Major modification* means the modification of more than 50 percent, or more than 4,500 square feet, of the smoke compartment.

■ 20. Section 483.70 is amended by adding paragraphs (a)(8)(iii) and (iv) to read as follows:

§ 483.70 Physical environment.

* * * * *

(a) * * *

(8) * * *

(iii) Subject to approval by CMS, a long term care facility may be granted an extension of the sprinkler installation deadline for a time period not to exceed 2 years from August 13, 2013, if the facility meets all of the following conditions:

(A) It is in the process of replacing its current building, or undergoing major modifications to improve the living conditions for residents in all unsprinklered living areas that requires the movement of corridor, room, partition, or structural walls or supports, in addition to the installation of a sprinkler system.

(B) It demonstrates that it has made the necessary financial commitments to complete the building replacement or modification.

(C) Before applying for the deadline extension, it has submitted plans to State and local authorities that are necessary for approval of the replacement building or major modification that includes the required sprinkler installation, and has received approval of the plans from State and local authorities.

(D) It agrees to complete interim steps to improve fire safety, as determined by CMS.

(iv) An extension granted under paragraph (a)(8)(iii) of this section may be renewed once, for an additional period not to exceed 1 year, if the following conditions are met:

(A) CMS finds that extenuating circumstances beyond the control of the facility will prevent full compliance with the provisions in paragraph (a)(8)(i) of this section by the end of the first waiver period.

(B) All other conditions of paragraph (a)(8)(iii) of this section are met.

* * * * *

PART 485—CONDITIONS OF PARTICIPATION: SPECIALIZED PROVIDERS

■ 21. The authority citation for Part 485 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395(hh)).

Subpart F—Conditions of Participation: Critical Access Hospitals (CAHs)

■ 22. Section 485.631 is amended by revising paragraph (b)(2) to read as follows:

§ 485.631 Condition of participation: Staffing and staff responsibilities.

* * * * *

(b) * * *

(2) A doctor of medicine or osteopathy is present for sufficient periods of time to provide medical direction, consultation, and supervision for the services provided in the CAH, and is available through direct radio or telephone communication or electronic communication for consultation, assistance with medical emergencies, or patient referral.

* * * * *

■ 23. Section 485.635 is amended by revising paragraph (a)(2) to read as follows:

§ 485.635 Condition of participation: Provision of services.

(a) * * *

(2) The policies are developed with the advice of members of the CAH's professional healthcare staff, including one or more doctors of medicine or osteopathy and one or more physician assistants, nurse practitioners, or clinical nurse specialists, if they are on staff under the provisions of § 485.631(a)(1).

* * * * *

PART 486—CONDITIONS FOR COVERAGE OF SPECIALIZED SERVICES FURNISHED BY SUPPLIERS

■ 24. The authority citation for Part 486 continues to read as follows:

Authority: Secs. 1102, 1138, and 1871 of the Social Security Act (42 U.S.C. 1302, 1320b-8, and 1395hh) and section 371 of the Public Health Service Act (42 U.S.C 273).

Subpart G—Requirements for Certification and Designation and Conditions for Coverage: Organ Procurement Organizations

■ 25. Section 486.306 is amended by revising paragraph (a) to read as follows:

§ 486.306 OPO service area size designation and documentation requirements.

(a) *General documentation requirement.* An OPO must make available to CMS documentation verifying that the OPO meets the requirements of paragraphs (b) and (c) of this section at the time of application and throughout the period of its designation.

* * * * *

■ 26. Section 486.308 is amended by revising paragraph (b)(1) to read as follows:

§ 486.308 Designation of one OPO for each service area.

* * * * *

(b) * * *

(1) *General.* An OPO is normally designated for a 4-year agreement cycle. The period may be shorter, for example, if an OPO has voluntarily terminated its agreement with CMS and CMS selects a successor OPO for the balance of the 4-year agreement cycle. In rare situations, a designation period may be longer, for example, a designation may be extended if additional time is needed to select a successor OPO to replace an OPO that has been de-certified.

* * * * *

■ 27. Section 486.344 is amended by revising paragraph (d)(2)(ii) to read as follows:

§ 486.344 Condition: Evaluation and management of potential donors and organ placement and recovery.

* * * * *

(d) * * *

(2) * * *

(ii) If the identity of the intended recipient is known, the OPO has a procedure to ensure that prior to organ recovery, an individual from the OPO's staff compares the blood type of the donor with the blood type of the intended recipient, and the accuracy of the comparison is verified by a different individual;

* * * * *

PART 488—SURVEY, CERTIFICATION, AND ENFORCEMENT PROCEDURES

■ 28. The authority citation for part 488 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act, unless otherwise noted (42 U.S.C. 1302 and 1395(hh)); Section 6111 of the Patient Protection and Affordable Care Act (Pub. L. 111–148)

Subpart A—General Provisions

■ 29. Section 488.61 is amended by—

■ a. Removing paragraph (a)(7).

■ b. Revising paragraphs (c) introductory text, (c)(1) introductory text, and (c)(1)(ii).

■ c. Removing paragraph (c)(2) and redesignating paragraphs (c)(3), (4), and (5) as paragraphs (c)(2), (3) and (4), respectively.

■ d. Revising newly designated paragraph (c)(2).

■ e. Adding paragraph (c)(3)(v).

■ f. Revising paragraph (e).

The revisions and addition read as follows:

§ 488.61 Special procedures for approval and re-approval of organ transplant centers.

* * * * **

(c) *Re-approval procedures.* Once Medicare-approved, transplant centers, including kidney transplant centers, must be in continuous compliance with all the conditions of participation for transplant centers at §§ 482.72 through 482.104 of this chapter, except for § 482.80 (initial approval requirements).

(1) CMS will review the transplant center's data on an on-going basis and in making re-approval determinations.

* * * * *

(ii) To determine compliance with the clinical experience and outcome requirements at § 482.82(b) and § 482.82(c) of this chapter, CMS will review the data contained in the most recent OPTN Data Report for the previous 3 years and 1-year patient and graft survival data contained in the most recent SRTR center-specific reports.

(2) CMS may choose to review the transplant center for compliance with §§ 482.72 through 482.76 and 482.90 through 482.104 of this chapter, using the procedures described at 42 CFR part 488, subpart A.

(3) * * *

(v) Program improvements that substantially address root causes of graft failures or patient deaths, have been implemented and institutionalized on a sustainable basis, and that are supported by recent outcomes data demonstrating compliance with the requirement at § 482.82(c)(2)(ii)(C) that the number of observed events divided by the number of expected events not be greater than 1.5.

* * * * *

(e) *Transplant Center Inactivity.* A transplant center may remain inactive and retain its Medicare approval for a period not to exceed 12 months. A transplant center must notify CMS upon its voluntary inactivation as required by § 482.74(a)(3) of this chapter.

PART 491—CERTIFICATION OF CERTAIN HEALTH FACILITIES

■ 30. The authority citation for Part 491 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302); and sec. 353 of the Public Health Service Act (42 U.S.C. 263a).

Subpart A—Rural Health Clinics: Conditions for Certification; and FQHCs Conditions for Coverage

■ 31. Section 491.2 is amended by revising the definition of ''physician'' to read as follows:

§ 491.2 Definitions.

* * * * *

Physician means a practitioner who meets the requirements of sections 1861(r) and 1861(aa)(2)(B) and (aa)(3)(B) of the Act and includes:

(1) A doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the function is performed; and

(2) Within limitations as to the specific services furnished, a doctor of dental surgery or of dental medicine, a doctor of optometry, a doctor of podiatry or surgical chiropody or a chiropractor (see section 1861(r) of the Act for specific limitations).

* * * * *

■ 32. Section § 491.8 is amended by revising paragraphs (a)(6) and (b) to read as follows:

§ 491.8 Staffing and staff responsibilities.

(a) * * *

(6) A physician, nurse practitioner, physician assistant, certified nurse-midwife, clinical social worker, or clinical psychologist is available to furnish patient care services at all times the clinic or center operates. In addition, for RHCs, a nurse practitioner, physician assistant, or certified nurse-midwife is available to furnish patient care services at least 50 percent of the time the RHC operates.

(b) *Physician responsibilities.* The physician performs the following:

(1) Except for services furnished by a clinical psychologist in an FQHC, which State law permits to be provided without physician supervision, provides medical direction for the clinic's or center's health care activities and consultation for, and medical supervision of, the health care staff.

(2) In conjunction with the physician assistant and/or nurse practitioner member(s), participates in developing, executing, and periodically reviewing the clinic's or center's written policies and the services provided to Federal program patients.

(3) Periodically reviews the clinic's or center's patient records, provides medical orders, and provides medical care services to the patients of the clinic or center.

* * * * *

PART 493—LABORATORY REQUIREMENTS

■ 33. The authority citation for Part 493 continues to read as follows:

Authority: Sec. 353 of the Public Health Service Act, secs. 1102, 1861(e), the sentence following sections 1861(s)(11) through 1861(s)(16) of the Social Security Act (42 U.S.C. 263a, 1302, 1395x(e), the sentence following 1395x(s)(11) through 1395x(s)(16)).

Subpart A—General Provisions

■ 34. Section 493.2 is amended by adding the definitions of ''confirmatory testing'', ''reflex testing'', and ''repeat *proficiency testing* referral,'' in alphabetical order to read as follows:

§ 493.2 Definitions

* * * * *

Confirmatory testing means testing performed by a second analytical procedure that could be used to substantiate or bring into question the result of an initial laboratory test.

* * * * *

Reflex testing means confirmatory or additional laboratory testing that is automatically requested by a laboratory under its standard operating procedures for patient specimens when the laboratory's findings indicate test results that are abnormal, are outside a predetermined range, or meet other pre-established criteria for additional testing.

Repeat proficiency testing referral means a second instance in which a proficiency testing sample, or a portion of a sample, is referred, for any reason, to another laboratory for analysis prior to the laboratory's proficiency testing program event cut-off date within the period of time encompassing the two prior survey cycles (including initial certification, recertification, or the equivalent for laboratories surveyed by an approved accreditation organizations).

* * * * *

Subpart H—Participation in Proficiency Testing for Laboratories Performing Nonwaived Testing

■ 35. Section 493.801 is amended by revising paragraphs (b) introductory text and (b)(4) to read as follows:

§ 493.801 Condition: Enrollment and testing of samples.

* * * * *

(b) Standard: *Testing of proficiency testing samples.* The laboratory must examine or test, as applicable, the proficiency testing samples it receives from the proficiency testing program in the same manner as it tests patient specimens. This testing must be conducted in conformance with paragraph (b)(4) of this section. If the laboratory's patient specimen testing procedures would normally require reflex or confirmatory testing at another laboratory, the laboratory should treat the proficiency testing sample as it would a patient specimen up until the point it would refer a patient specimen to a second laboratory for any form of further testing.

* * * * *

(4) The laboratory must not send proficiency testing samples or portions of proficiency testing samples to another laboratory for any analysis for which it is certified to perform in its own laboratory. Any laboratory that CMS determines intentionally referred a proficiency testing sample to another laboratory for analysis may have its certification revoked for at least 1 year. If CMS determines that a proficiency testing sample was referred to another laboratory for analysis, but the requested testing was limited to reflex or confirmatory testing that, if the sample were a patient specimen, would have been in full conformance with written, legally accurate and adequate standard operating procedures for the laboratory's testing of patient specimens, and if the proficiency testing referral is not a repeat proficiency testing referral, CMS will consider the referral to be improper and subject to alternative sanctions in accordance with § 493.1804(c), but not intentional. Any laboratory that receives a proficiency testing sample from another laboratory for testing must notify CMS of the receipt of that sample regardless of whether the referral was made for reflex or confirmatory testing, or any other reason.

* * * * *

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

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: August 1, 2012.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: December 26, 2012.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2013–02421 Filed 2–4–13; 11:15 am]

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Part IV

Department of Agriculture

Agricultural Marketing Service

7 CFR Part 1000

Milk in the Northeast and Other Marketing Areas; Final Decision on Proposed Amendments to Marketing Agreements and Orders and Termination of a Portion of the Proceeding; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1000

[Doc. No. AMS–DA–07–0026; AO–14–A77 et al.; DA–07–02]

Milk in the Northeast and Other Marketing Areas; Final Decision on Proposed Amendments to Marketing Agreements and Orders and Termination of a Portion of the Proceeding

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This document is the final decision proposing to permanently adopt changes to the manufacturing cost allowances and the butterfat yield factor used in Class III and Class IV product-price formulas applicable to all Federal milk marketing orders. These amendments were adopted by an interim final rule issued on, July 25, 2008, that became effective on October 1, 2008. This document also terminates the proceeding with regard to additional proposals that addressed the collection of manufacturing cost information, the use of an energy cost adjustor and providing for a cost add-on feature to Class III and Class IV product-price formulas. The orders amended by this decision require producer approval. Referenda will be conducted in three markets and dairy farmer cooperatives will be polled in the other seven markets to determine whether dairy farmers approve the issuance of the orders as amended.

FOR FURTHER INFORMATION CONTACT: William Francis, Director, Order Formulation and Enforcement Division, USDA/AMS/Dairy Programs, Order Formulation and Enforcement, Stop 0231—Room 2971–S, 1400 Independence Avenue SW., Washington, DC 20250–0231, (202) 720–7183, email address: *william.francis@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This final decision proposes to permanently adopt amendments to the manufacturing (make) allowances for cheese, butter, nonfat dry milk (NFDM) and dry whey contained in the Class III and Class IV product price formulas (Proposal 1). Specifically, this decision proposes to permanently adopt the following make allowances: $0.2003 per pound of cheese; $0.1715 per pound of butter; $0.1678 per pound of nonfat dry milk (NFDM); and $0.1991 per pound of dry whey. This decision also proposed to permanently increase the butterfat yield factor in the butterfat price formula from 1.20 to 1.211 (Proposal 6). These make-allowances and butterfat yield factor have been in use since October 1, 2008, following producer approval of the tentative final decision (73 FR 51352).

This decision also addresses proposals published in the hearing notice as Proposals 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 18 that seek to change various features of the Class III and Class IV product-price formulas. This document also terminates the proceeding with regard to Proposals 2, 17 and 20.

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

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. The amendments would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937 (Act), as amended (7 U.S.C. 604–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the U.S. Department of Agriculture (USDA) a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the USDA's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a small business if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a small business if it has fewer than 500 employees.

For the purposes of determining which dairy farms are small businesses, the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy farms, it should be an inclusive standard for most small dairy farms. For purposes of determining a handler's size of operation, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

For the month of February 2007, the month the initial public hearing was held, the milk of 49,712 dairy farms was pooled on the Federal order system. Of the total, 46,729 dairy farms, or 94 percent, were considered small businesses. During the same month, 352 plants were regulated by or reported their milk receipts to be pooled and priced on a Federal order. Of the total, 186 plants, or 53 percent, were considered small businesses.

This decision proposes to permanently amend the make allowances contained in the formulas used to compute component prices and the minimum class prices in all Federal milk orders that were implemented October 1, 2008, on an interim basis, without change. Specifically, the make allowance for cheese continues to be $0.1715 per pound (initially increased from $0.1682 per pound); the make allowance for NFDM continues to be $0.1678 per pound (initially increased from $0.1570); the make allowance for butter continues to be $0.1715 per pound (initially increased from $0.1202); and the make allowance for dry whey continues to be $0.1991 (initially increased from $0.1956). The butterfat yield factor in the butterfat price formulas continues to be 1.211 (initially increased from 1.20).

The make allowances serve to approximate the average cost of producing cheese, butter, NFDM and dry whey for manufacturing plants located in Federal milk marketing areas. The established criteria for the make allowance changes are applied in an identical fashion to both large and small businesses and will not have any different impact on those businesses producing manufactured milk products.

An economic analysis has been performed that discusses impacts of the

proposed amendments on industry participants including producers and manufacturers. It can be found on the AMS Web site at *www.ams.usda.gov/dairy*. Based on that economic analysis, the proposed amendments will not have a significant economic impact on a substantial number of small entities.

The Agricultural Marketing Service (AMS) is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

This decision does not require additional information collection that needs clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the forms are routinely used in most business transactions. The forms require only a minimal amount of information that can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

Economic Analysis

In order to assess the impact of the proposed changes in Federal order product price formulas, the Department conducted an economic analysis. This analysis was discussed in the tentative partial final decision (73 FR 35306) and remains unchanged. The complete analysis is available on the Dairy Programs Web site which can be accessed at *www.ams.usda.gov/dairy*.

Prior documents in this proceeding

Notice of Hearing: Issued February 5, 2007; published February 9, 2007 (72 FR 6179).

Supplemental Notice of Hearing: Issued February 14, 2007; published February 20, 2007 (72 FR 7753).

Notice to Reconvene Hearing: Issued March 15, 2007; published March 21, 2007 (72 FR 13219).

Notice to Reconvene Hearing: Issued May 2, 2007; published May 8, 2007 (72 FR 25986).

Tentative Partial Final Decision: Issued June 16, 2008; published June 20, 2008 (73 FR 35306).

Interim Final Rule: Issued July 25, 2008; published July 31, 2008 (73 FR 44617).

Delay of Effective Date: Issued August 28, 2008; published September 3, 2008 (73 FR 51352).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this final decision and termination of proceeding with respect to the proposed adopted amendments to the tentative marketing agreements and the orders regulating the handling of milk in the Northeast and other marketing areas. This notice is issued pursuant to the provisions of the Act and applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

A public hearing was held upon proposed amendments to the marketing agreements and the orders regulating the handling of milk in the Northeast and other marketing areas. The hearing was held, pursuant to the provisions of the Act, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900.)

The proposed amendments set forth below are based on the record of the first session of a public hearing held in Strongsville, Ohio, on February 26–March 2, 2007, pursuant to a notice of hearing issued February 5, 2007, published February 9, 2007 (72 FR 6179); a second session of a public hearing held in Indianapolis, Indiana, on April 9–13, 2007, pursuant to a reconvened hearing notice issued March 15, 2007, published March 21, 2007 (72 FR 13219); and a third session of a public hearing held in Pittsburgh, Pennsylvania, on July 9–11, 2007, pursuant to a reconvened hearing notice issued May 2, 2007, published May 8, 2007 (72 FR 25986).

The material issues on the record of the hearing relate to:

A. Amending the product-price formulas used to compute Class III and Class IV prices.

B. Terminating the proceeding with respect to proposals 2, 17 and 20.

Findings and Conclusions

A. Amending the Product-Price Formulas Used To Compute Class III and Class IV Prices

This final decision proposes to adopt a proposal published in the hearing notice as Proposal 1 which seeks to amend the manufacturing allowances for butter, cheese, NFDM and dry whey using the most currently available data, and a portion of Proposal 6 that increases the butterfat yield in the butterfat price formula. The provisions contained herein were adopted on an interim basis and became effective October 1, 2008. Specifically, this decision finalizes the following manufacturing allowances: Cheese—$0.2003 per pound, butter—$0.1715 per pound, NFDM—$0.1678 per pound and dry whey—$0.1991 per pound. This decision also increases the butterfat yield factor in the butterfat price formula from 1.20 to 1.211.

The Federal Milk Marketing Order (FMMO) program uses wholesale product-price formulas to compute prices handlers must account for in the marketwide pooling of milk used in the four classes of products. These formulas rely on the price of finished products to determine the minimum classified prices handlers pay for raw milk. In addition, the Class III and Class IV prices form the base from which Class I and Class II prices are determined. This end-product pricing system was implemented on January 1, 2000 (published February 12, 1999; 64 FR 70868).

The product-price formulas are computed by using component values from Agricultural Marketing Service (AMS) surveyed prices of manufactured dairy products.[1] The pricing system determines butterfat prices for milk used in products in each of the four classes from a surveyed butter price; protein and other solids prices for milk used in Class III products from surveyed cheese and dry whey prices; and a nonfat solids price for milk used in Class II and Class IV products from surveyed nonfat dry milk product prices.[2] The skim milk portion of the Class I price may be derived from either the protein and other solids price, or from the nonfat dry milk price depending on the relationship between the Class III and IV price. The butterfat, protein, other solids and nonfat solids prices are all derived in a similar manner: Average AMS survey price minus a manufacturing (make) allowance times a yield factor. The yield factor is an approximation of the quantity of a specific product that can be made from a hundredweight (cwt) of milk. The yield factors were last amended on April 1, 2003 (published February 12, 2003; 68 FR 7063).

The make allowance factor represents the cost manufacturers incur in processing raw milk into one pound of product. Federal milk order pricing

[1] Official Notice is taken of a Final Rule (77 FR 8717) published February 15, 2012. Effective April 1, 2012, USDA's AMS began collecting and reporting wholesale dairy product prices. This was previously managed by the National Agricultural Statistic Service (NASS).

[2] Official Notice is taken of a Notice (77 FR 2282) published April 13, 2012. Effective April 18, 2012, AMS surveyed prices are used in the price discovery mechanism for the component values of raw milk. These component prices are then used to determine FMMO minimum classified prices.

formulas currently contain the following make allowances: Cheese—$0.2003 per pound, butter—$0.1715 per pound, NFDM—$0.1678 per pound and dry whey—$0.1991 per pound. These make allowances were adopted on July 25, 2008, (73 FR 44617) and became effective on October 1, 2008, on an interim basis as a result of this proceeding. The make allowances were determined on the basis of California Department of Food and Agriculture (CDFA) and Cornell Program on Dairy Markets and Policy (CPDMP) surveys of product manufacturing costs. The current make allowances for butter and nonfat dry milk were determined by using a weighted average of the CDFA and CPDMP surveys over national production volumes. The cheese make allowance was determined by relying on the CDFA 2006 survey average cheese manufacturing cost and the dry whey make allowance was determined by relying on the CPDMP 2006 survey. All make allowances were adjusted for marketing costs.

Nineteen proposals were published in the hearing notice for this proceeding. Proposals 4, 5 and 11 were withdrawn at the hearing by proponents in support of other noticed proposals. No further reference to these proposals will be made.

A proposal published in the hearing notice as Proposal 1, offered by Agri-Mark Cooperative (Agri-Mark), seeks to amend the Class III and Class IV make allowances by using the most current plant cost survey data available. Agri-Mark is a Capper-Volstead cooperative with approximately 1,400 member-owners throughout New England and New York, and operates 4 manufacturing plants.

Agri-Mark was also the proponent of Proposal 2 that seeks to amend the Class III and Class IV product price formulas to annually update the manufacturing allowances using an annual manufacturing cost survey of cheese, whey powder, butter, and nonfat dry milk plants (located outside of California). The proposed amendments would grant authority to Market Administrators to administer the survey, select the sample plants, and collect, audit, and assemble cost information.

A proposal published in the hearing notice as Proposal 3, offered by Dairy Producers of New Mexico (DPNM), seeks to amend the manufacturing allowances contained in the Class III and Class IV product price formulas. Specifically, this proposal seeks to set the make allowances at the following levels: $0.1108 per pound for butter; $0.1638 per pound for cheese; $0.1410 per pound for NFDM; and $0.1500 per pound for dry whey. DPNM is an association of dairy producers located in New Mexico and West Texas.

DPNM was the proponent of Proposals 6, 7 and 8 that seek to amend the yield factors and the butterfat recovery rate of the Class III and Class IV product price formulas. Proposal 6 seeks to amend the butter price formula by increasing the butterfat yield factor from 1.20 to 1.211 and to amend the protein price formula by increasing the butterfat recovery rate from 90 percent to 94 percent. Proposal 7 seeks to eliminate the farm-to-plant shrinkage and butterfat shrinkage adjustments of all yield factors. Proposal 8 seeks to increase the nonfat solids yield factor from 0.99 to 1.02, and increase the protein price yield factor for cheese from 1.383 to 1.405 and for butterfat from 1.572 to 1.653.

Proposal 9 was offered by the International Dairy Foods Association (IDFA). Proposal 9 seeks to amend the Class III and Class IV product-price formulas by adjusting the protein price formula to reflect the lower value and reduced volume of butterfat recoverable as whey cream. IDFA is a trade association with 530 members representing manufacturers, marketers, distributors, and suppliers of fluid milk and related products.

Proposal 10 was submitted on behalf of Agri-Mark. Proposal 10 seeks to amend the Class III and Class IV product-price formulas by reducing the protein price to reflect the lower selling price of whey butter.

Proposal 12 was offered by IDFA. Proposal 12 seeks to amend the Class III and Class IV product price formulas by eliminating the 3-cent cost adjustment for cheese manufacturing of 500-pound barrels contained in the protein price formula.

Proposal 13 was offered by Dairy Farmers of America, Inc. (DFA) and the Northwest Dairy Association (NDA). Proposal 13 seeks to amend the Class III and Class IV product-price formulas by removing the barrel cheese price as a cost component of the protein price formula. DFA is a Capper-Volstead cooperative with 13,500 member-owners producing milk in 49 states. NDA is a Capper-Volstead cooperative with approximately 610 member-owners, and operates 6 manufacturing plants and 4 distributing plants in the western United States.

Proposal 14 was advanced by Agri-Mark. Proposal 14 seeks to amend the Class III and Class IV product price formulas by using a combination of the weekly NASS and Chicago Mercantile Exchange (CME) cheese price series to determine the cheese price contained in the Class III and Class IV product-price formulas.

Proposal 15 was offered by DPNM. This proposal seeks to replace the NASS commodity price surveys with CME commodity prices in each of the price formulas except for the other solids formula. The dry whey price in the other solids formulas would continue to be derived from the NASS dry whey price survey.

Proposal 16 was offered by National All-Jersey, Inc. (NAJ). Proposal 16 seeks to amend the Class III and Class IV product-price formulas by eliminating the other solids price and adding the equivalent value of dry whey to the protein price formula. NAJ is a breed organization with more than 1,000 members.

Proposal 17 was offered by the National Milk Producers Federation (NMPF). The proposal seeks to amend the Class III and Class IV product-price formulas to incorporate a monthly energy cost adjustment based on monthly changes in the manufacturing price indices for industrial natural gas and industrial electricity as published by the Bureau of Labor Statistics. NMPF is an association consisting of 33 dairy-farmer cooperative members representing nearly three-quarters of U.S. dairy farmers.

Proposal 18 was offered by the Maine Dairy Industry Association (MDIA). Proposal 18 seeks to amend the Class III and Class IV product-price formulas by incorporating a factor to account for any monthly spread between component price calculations for milk and a competitive pay price for equivalent Grade A milk. MDIA is an association that represents all of Maine's 350 dairy farmers.

A proposal published in a supplemental hearing notice as Proposal 20 was submitted on behalf of Dairylea Cooperative, Inc. (Dairylea). Proposal 20 seeks to amend the Class III and Class IV price formulas by establishing cost-of-production add-ons that manufacturers could include in the selling price of their products but would not be included in the determination of the NASS survey prices. Dairylea is a Capper-Volstead cooperative with 2,400 member-owners located in seven northeastern states.

To provide order to the hearing testimony, post-hearing briefs and comments and exceptions to the tentative final decision, the summary of testimony is organized as follows:

1. Make Allowances: Proposals 1, 2 and 3
2. Product Yields and Butterfat Recovery Percentage: Proposals 6, 7 and 8
3. Value of Butterfat in Whey: Proposals 9 and 10

4. Barrel Cheese Price: Proposals 12 and 13
5. Product Price Series: Proposals 14, 15 and 18
6. Other Solids Price: Proposal 16
7. Energy Cost Adjuster; Proposal 17
8. Cost-of-Production Add-on; Proposal 20

1. Make Allowances

A witness from Cornell University (Cornell witness) testified regarding the 2006 manufacturing cost survey (2006 survey) conducted by the Cornell Program on Dairy Markets and Policy (CPDMP), to assess the manufacturing costs of plants producing cheddar cheese, dry whey, butter and NFDM. The witness did not testify in support of or in opposition to any proposal presented at the hearing. The witness explained that an earlier study, the CPDMP 2005 manufacturing cost survey (2005 survey), was contracted in part by USDA and was presented at a 2006 rulemaking hearing (71 FR 52502), and was a factor considered by USDA in developing the make allowances that became effective March 1, 2007, (71 FR 78333). The witness said that some manufacturing plants that participated in the 2005 survey requested a new survey to reflect more current cost information.

The Cornell witness said that the plants that participated in the 2005 survey were asked to participate in the 2006 survey. The witness stated that 21 plants agreed to participate and of those plants, 19 were deemed to have acceptable data to be included in the 2006 survey. Plants submitted data corresponding to their most recent fiscal year; most of the data observations occurred in calendar year 2006, the witness said. The data was not audited by the witness. The witness explained that if a plant produced multiple products they were asked to allocate manufacturing costs for each product. However, if they failed to do so the witness allocated costs on a per pound of solids basis in the finished product. The average manufacturing costs detailed in the study were on a per pound of finished product basis and were not adjusted for moisture content, the witness said.

The Cornell witness said that 11 cheese plants participated in the 2006 survey compared with 16 cheese plants in the 2005 survey. Eight of those plants (one classified as a large plant and the other seven as small plants) also participated in the 2005 survey; the three remaining plants that participated in the 2006 survey were asked to participate in 2005 but submitted data too late for inclusion. The witness testified that five small cheese plants that were included in the 2005 survey opted not to participate in the 2006 survey. Of the 11 plants, the witness classified 7 as small plants and the remaining 4 as large volume plants. The witness testified that the weighted average manufacturing cost of the 2006 cheese plant sample was $0.1584 per pound, a decrease of $0.0054 per pound from 2005. The witness said that comparing the costs for the 8 plants that participated in both surveys revealed a weighted average cost increase of $0.017 per pound between the 2005 and 2006 surveys. The total pounds covered by the 2006 survey increased from approximately 60 million pounds in 2005 to nearly 119 million pounds in 2006. The Cornell witness asserted that the 2005 survey over-sampled small plants while the 2006 survey over-sampled large plants. The witness noted that the average packaging cost for cheese in the 2006 survey was only for 40-pound block production. If a plant produced barrel cheese the witness assigned it an average 40-pound block packaging cost before computing the average manufacturing costs for the entire sample.

The Cornell witness said that 7 whey plants participated in the 2006 survey and their weighted average cost was $0.1976 per pound—an increase of $0.0035 per pound from the 2005 survey. According to the witness, the 7 participating whey plants were associated with cheese plants that were also included in the 2006 survey. The witness noted that 12 whey plants participated in the 2005 survey.

The Cornell witness said that 4 butter plants participated in the 2006 survey; 3 of the plants also participated in the 2005 survey. The weighted average cost of the 4 plants was $0.1846 per pound, an increase of $0.0738 per pound over the 2005 survey. The survey accounted for 57.6 million pounds of butter. The witness testified that significant cost allocation problems and data quality problems with the 2005 butter data were major reasons for the large increase in the weighted average cost from 2005 to 2006. The witness testified that the 2005 survey butter data was not accurate, but asserted that the allocation problems were corrected in the 2006 survey. While maintaining that the 2006 survey data was reliable, the witness said that a larger sample size would have been preferred. The witness also noted that the manufacturing costs submitted by one of the butter plants in the 2006 survey did include the cost of transporting cream from its drying plant to its butter plant.

The Cornell witness said that the 2006 survey for NFDM consisted of 7 of the 8 NFDM plants that participated in the 2005 survey. According to the witness, the weighted average cost of the 7 plants was $0.1662 per pound, an increase of $0.0239 per pound from 2005. The witness explained that the weighted average cost increase is partially explained by increases in real costs (labor, packaging, etc.), but also partly because of a change in the methodology of indirectly allocating costs between butter and NFDM. According to the witness, there were flaws in the method used to indirectly allocate costs for NFDM in the 2005 study that resulted in understating the cost of processing NFDM. The witness claimed that an attempt was made in the 2006 survey to correct this understated processing cost. The witness did not explain the reported flawed methodology in the 2005 survey or the methodological changes for the 2006 survey. According to the witness, the 2006 survey accounted for 70.1 million pounds of NFDM, an increase of 15 million pounds.

A witness appearing on behalf of Agri-Mark testified in support of Proposals 1 and 2. The witness explained that Proposal 1 seeks to update the make allowances adopted on an interim final basis (71 FR 78333), effective March 1, 2007, using 2005 CDFA data. The witness asserted that this update would increase the butter, NFDM and cheese make allowances by $0.0014, $0.0092 and $0.0029 per pound, respectively. The witness was of the opinion that the dry whey make allowance should incorporate the 2005 CDFA data which reflects an average cost of $0.2851 per pound.

The witness reiterated Agri-Mark's position expressed in comments to a previous tentative final decision (71 FR 67467) that proposed adoption of the make allowances that were adopted in 2006. The witness concluded that using this weighting methodology (including a $0.0015 per pound marketing cost factor) the resulting make allowances should be: $0.1780 per pound for cheese, $0.1351 per pound for butter, $0.1510 for NFDM and $0.2090 per pound for dry whey.

The Agri-Mark witness conceded that increasing the make allowances would assist high-cost plants in covering their costs while creating a financial windfall for low-cost plants. In turn, the witness said, the low cost plants could use the additional revenue to sell products at a lower cost, pay producers a higher price, or increase their financial returns. The witness said that any financial gains low-cost plants in the southwestern region earn from a high make allowance would not harm high-cost plants in the Northeast because it

is too costly to transport milk from the southwestern U.S. to the northeast region. The witness believed that competitive issues resulting from high make allowances would only arise if a low-cost plant was located next door to a high-cost plant that competes for the same milk supply.

The Agri-Mark witness advanced Proposal 2 seeking to establish an annual manufacturing cost survey, administered by USDA that would automatically update make allowances without requiring a rulemaking proceeding. On brief, Agri-Mark withdrew the automatic updating portion of this proposal. The witness explained that manufacturing input prices fluctuate in the short-run and an annual survey would ensure more timely recognition of these fluctuations in make allowances. The witness said that the CPDMP survey should provide the basic methodology needed to conduct the survey and that any changes to the methodology should be done through the formal rulemaking process. The witness asserted that the survey should be administered by Market Administrator audit personnel and the plant sample, preferably larger than the CPDMP sample, should be selected by random sampling. The witness also supported auditing surveyed plants and asserted that this function should be funded by payments from the Market Administrator's administrative assessment funds. The witness said that if the survey was audited, the use of CDFA cost data would no longer be necessary in determining make allowances. The witness also supported addressing the proposed manufacturing cost survey in a recommended decision to allow for public comments.

The Agri-Mark witness was of the opinion that based on the CPDMP 2006 survey the make allowances should be set at the higher of: (1) A level that would allow a minimum of 80 percent of the producer milk used by Class III and Class IV plants to cover their costs; or (2) A level that would allow a minimum of 25 percent of the producer milk volume used by Class III and Class IV plants in any specific Federal order annually pooling at least 4 billion pounds of milk to cover their costs. The Agri-Mark witness opposed Proposal 3.

A witness appearing on behalf of Land O'Lakes (LOL) testified in support of Proposals 1 and 2. According to the witness, LOL is a Capper-Volstead cooperative with over 3,000 members that owns 4 manufacturing plants in the United States. The witness supported updating the current make allowances with CDFA manufacturing cost data as advanced in Proposal 1. The witness advocated that the audited CDFA whey manufacturing cost data be included in the whey make allowance computation. The witness asserted that the make allowances should be recalculated by weighting the CDFA and CPDMP data by the survey sample volumes, not national product volumes which the witness argued was not statistically valid. The witness concluded that the new make allowances (using LOL's proposed weighting) should be as follows: $0.1780 for cheese; $0.2090 for dry whey; $0.1560 for NFDM; and $0.1351 for butter.

The LOL witness supported the annual cost survey offered in Proposal 2, with technical modifications. The witness stated that the authority for collecting plant cost data should be granted to the AMS Administrator, that the plant sample be limited to plants located outside of California that receive pooled (producer) milk, and that the survey results be combined with the CDFA data to determine appropriate Federal order make allowance levels. The witness opposed the portion of Proposal 2 that would set make allowances at a level that would cover the cost of manufacturing for the highest cost Federal order marketing area. The witness said that classified prices are determined on a national, not a regional basis, and therefore relying on regional costs is inappropriate. The witness was of the opinion that USDA should clearly identify the target product volume and percentage of plants that should be covered by new make allowances that result from this proceeding.

The LOL witness opposed Proposal 3 seeking to exclude CDFA manufacturing cost data when computing new make allowances. The witness argued that since 2000 the Department has continuously considered CDFA manufacturing cost data when determining new make allowance levels and asserted that there is no justification to modify that policy. The witness elaborated that classified prices are determined using a national survey that includes California plants and therefore including California plant costs when determining make allowance levels is appropriate.

A witness testifying on behalf of Michigan Milk Producers Association (MMPA) testified in support of Proposals 1 and 2, and in opposition to Proposal 3. According to the witness, MMPA is a Capper-Volstead cooperative with approximately 2,400 members that markets 3.5 billion pounds of milk annually and operates 2 manufacturing plants. The witness offered support for Proposal 1 to update the make allowances based on the most currently available data. The MMPA witness stressed support for Proposal 2's annual survey of manufacturing costs that would be administered by AMS through its Market Administrators.

A witness appearing on behalf of NDA testified regarding the CPDMP 2005 survey that was used to determine 2006 make allowance levels. The witness said that NDA participated in the study and that costs for its NFDM plants were incorrectly allocated. The witness estimated that NDA's NFDM production represented approximately 54 percent of the total volume contained in the CPDMP 2005 survey for NFDM. In the survey, cream costs were allocated on a butterfat solids basis rather than as a percent of total solids, the witness said. However, according to the witness NDA's NFDM plants separate the cream that is stored in silos to be sold or transported to its butter manufacturing plant resulting in an over-allocation of costs to cream in the CPDMP 2005 survey. According to the witness, this misallocation inaccurately lowered NDA's NFDM manufacturing costs by $0.036 per pound. The witness asserted that after correcting for this error, the CPDMP 2005 survey for NFDM weighted average cost should have been $0.019 per pound higher. The witness urged USDA to issue an emergency decision addressing make allowances because of the errors contained in the CPDMP 2005 survey.

A post-hearing brief was filed on behalf of Agri-Mark, Foremost Farms USA, LOL, MMPA, NDA and Associated Milk Producers, Inc. (Agri-Mark et al.). The members of Agri-Mark et al. are all Capper-Volstead cooperatives who market their members' milk in the Federal order system and operate manufacturing plants.

The Agri-Mark et al. brief emphasized support for product-price formulas because, in their opinion, no truly independent competitive price series exists to determine milk prices. The brief summarized the evolution of the Federal order pricing system and asserted that USDA's past policy has been to set make allowances at levels that cover the processing costs for most Federal order plants. The brief expressed the opinion that USDA deviated from this policy when determining current make allowance levels.

The Agri-Mark et al. brief supported adoption of Proposal 1 and argued that make allowances should be updated using the 2005 CDFA and the CPDMP 2006 surveys. Agri-Mark et al. was of the opinion that USDA should continue to use the same national product

volume weighting methodology that determined the current make allowances, incorporate CDFA whey cost data, use the CPDMP 2005 survey cheese plant population average cost instead of the sample average cost and continue to include a marketing cost factor of $0.0015 per pound in each make allowance.

In their post-hearing brief, Agri-Mark et al. proposed that the cheese make allowance be set at $0.2154 per pound. Agri-Mark et al. wrote that the CPDMP 2005 survey cheese plant population average of $0.2028 per pound was most representative of average size plants and is therefore the best available information to determine an appropriate cheese make allowance. Agri-Mark et al. endorsed the methodology explained in the IDFA brief that derived a cheese make allowance of $0.2154 per pound.

The Agri-Mark et al. brief proposed a dry whey make allowance of $0.2080 per pound by combining the 2005 CDFA and 2006 CPDMP surveys. Using this same methodology, the brief proposed a butter make allowance of $0.1725 per pound and the NFDM make allowance of $0.1782 per pound (though stipulating that the CDFA medium-sized plant cost should be used for NFDM.) The brief summarized the Cornell witness' testimony regarding the errors with the 2005 butter and NFDM survey methodology and concluded that the current make allowances that were determined with this data are unrepresentative of actual costs. Agri-Mark et al. requested that Proposal 1 be adopted on an emergency basis to rectify the current unrepresentative make allowances.

In their brief, Agri-Mark et al. expressed support for the portion of Proposal 2 that would authorize USDA to develop and conduct periodic manufacturing cost surveys of plants located outside of California. The brief explained that this data could then be relied upon in future rulemaking proceedings to amend the product price formulas.

Comments and exceptions to the tentative partial final decision submitted on behalf of Agri-Mark et al. expressed support for the proposed make allowances. According to Agri-Mark et al. the proposed make allowances reasonably reflect the record evidence of 2006 surveyed plant cost data. However, they argued that the make allowances should incorporate a one-time adjustment for energy costs because energy costs have significantly increased from 2006 through June 2008. Based on energy cost data from the Bureau of Labor Statistics, Agri-Mark et al. proposed that the following adjustment should be added to the make allowances: $0.0036 for cheese, $0.0029 for butter, $0.0114 for NFDM and $0.0105 for dry whey.

In its exceptions, Agri-Mark et al. also stated that USDA had shifted policy from adopting make allowances that allow most manufacturing plants receiving pooled milk to recover their manufacturing costs to make allowances that allow the manufacturing plants receiving most of the pooled milk to cover their manufacturing costs. Such a policy shift, from covering ''most plants'' to covering ''most milk'' noted Agri-Mark et al. should be explained in the final decision. Agri-Mark et al. also requested that in the final decision USDA reaffirm the exclusion of balancing costs as a make allowance factor.

A witness testified on behalf of DPNM, Select Milk Producers, Inc., and Continental Dairy Producers, Inc. (DPNM et al.). The witness said that Select and Continental are Capper-Volstead cooperatives whose members are located in New Mexico, Texas, Kansas, Ohio, Michigan and Indiana. According to the witness, the DPNM et al. testimony was endorsed by Lone Star Milk Producers and Zia Milk Producers, Inc., who are also Capper-Volstead cooperatives.

The DPNM et al. witness testified in support of Proposal 3. The witness was of the opinion that CDFA cost data should not be used to determine new make allowance levels because the data are only representative of California manufacturing plants which the witness asserted have higher manufacturing costs than the rest of the country. The witness testified that CDFA data had been utilized in the past when make allowances were determined using Rural Business Cooperative Service (RBCS) cost data because the audited CDFA data broadened the available data and was used to verify the information contained in the RBCS study. However, the witness insisted that the CPDMP cost surveys are far more representative of the population of manufacturing plants and should now be relied upon as the sole determinant of make allowances.

The DPNM et al. witness testified that make allowances should be set at the following levels: $0.1108 per pound for butter; $0.1638 per pound for cheese; $0.1410 per pound for NFDM; and $0.1500 per pound for dry whey. The witness stated that, except for dry whey, the proposed make allowances are identical to the weighted average costs contained in the CPDMP 2005 survey. The witness proposed that the dry whey make allowance be determined by adding $0.0090 per pound to the NFDM make allowance to account for the additional energy needed to produce dry whey. The witness estimated that if the make allowances proposed by DPNM et al. were adopted, blend prices would increase by $0.22 per cwt.

A second witness, a dairy accountant and dairy farmer appearing on behalf of DPNM et al. testified regarding dairy farm operating costs, accounting and business analysis of large modern dairy farm operations. According to the witness, the firm provides accounting and other business services to dairy producer operations in 27 states whose production volume represents about 10 percent of the milk produced in the United States. The witness testified that based on data collected during the 1990's, large dairy farms in six Western states had an average annual net profit per cwt of $1.31. The witness testified that based on 10 years' worth of client data, dairy farms in the west and eastern states must earn a net income of $1.50 and $2.00 per cwt, respectively, for a dairy farmer to collect a salary and retire debt. The witness predicted that, for 2007, producer client gross income would average $15.51 per cwt. At an average cost of production of $15.17, the witness went on to predict that their clients would face a net profit of $0.34 per cwt. The witness said that this amount is far from the $1.50 per cwt net profit needed for their clients to reduce debt or cover living expenses.

The second DPNM et al. witness stated that low milk prices in 2005 reduced dairy farm client income to an average of $206 per cow. The witness noted that during the 1990's, average production cost per cwt in western states was $11.87 but this has risen to $13.50 for 2004–2005. The witness testified that rising input costs combined with lower milk prices in 2004–2005 made large-scale, highly efficient dairy farming unprofitable, even in low-cost operating areas such as western Texas and New Mexico. The witness provided additional testimony to show that increasing make allowances depressed dairy farmer income during a period of increasing costs and reduced opportunities for profitability. The witness supported this testimony with 2006 client data showing that a farm milking 1,800 cows would have lost $284,000. The witness provided detailed client data showing that the major higher-cost milk production factors during 2005 and 2006 were increased energy and feed costs.

A third witness, a dairy farmer, appearing on behalf of DPNM et al. testified in support of Proposal 3. The

witness operates a farm in New Mexico that milks approximately 3,800 cows and testified that they have been receiving $1.50 cwt below the Southwest order's blend price because of hauling costs. The witness said that over the last few years any increase in producer milk prices have been consumed by rapidly increasing production costs. The witness supported all proposals submitted by DPNM and articulated opposition to adoption of Proposals 1 and 2.

The DPNM et al. post-hearing brief explained that its opposition to all other proposals included in the hearing to adjust the make allowances was based on three principles: (1) The data used to determine the appropriate level of manufacturing allowances for establishing Federal order prices should be drawn from plants operating within the Federal order system; (2) adjustments to Federal order pricing regulations should always be subject to formal rulemaking; and (3) make allowances should be set at a level deemed appropriate by USDA, after taking into consideration all statutorily required factors and current milk marketing conditions, rather than prescribed geographic or volumetric factors. The brief explained why the CPDMP 2005 survey is the best data available and met their criteria for use in establishing Federal order make allowances and why the 2006 survey is flawed and should not be relied upon in determining make allowances.

Exceptions filed by DPNM et al. in response to the tentative partial final decision argued that in proposing new make allowances the Department failed to consider producer costs of feed and fuel in each marketing area as mandated by the Food, Conservation and Energy Act of 2008 (2008 Farm Bill). DPNM et al. took exception with the Department's national Economic Analysis of the proposed changes. It argued that Federal orders do not encompass the entire national market and therefore regional economic analyses should also be conducted.

DPNM et al. also took exception with the use of 2006 CDFA manufacturing cost data (released October 3, 2007) to compute the make allowances without input from interested parties about the applicability of the new data. It specifically took exception with the use of the weighted average cheese manufacturing cost and argued that the record did not indicate if the number of high-cost versus low-cost plants in the California survey is similar to the plant make-up of the rest of the country.

DPNM et al. also stated in their comments that the Department has denied dairy farmers due process and provided a list of examples. They also took exception to the notion advanced in the tentative partial final decision that milk production costs are reflected in the supply and demand conditions for dairy products. Instead, DPNM et al. argued that the cost of producing milk is reflected in the supply and demand conditions of the various inputs, such as feed, labor and fuel. DPNM et al. stated that contrary to the Department's findings, the increase in the number of manufacturing plants from 2005 to 2007 indicates that make allowances were not too low, and that only CPDMP 2005 data (released in 2006) should be used to determine new make allowance levels.

A witness appearing on behalf of IDFA testified in support of Proposal 1 and the annual manufacturing cost survey advanced in Proposal 2. However, the witness did not support adoption of the portion of Proposal 2 that would result in the automatic update of make allowances. The witness requested emergency adoption of Proposal 1 and this request was reiterated in IDFA's post-hearing brief.

The IDFA witness testified that the product-price formulas determine the minimum prices manufacturers must pay for their raw milk and that those whose costs exceed the fixed make allowances in the price formulas are unable to recoup their higher costs. The witness asserted that any increase in the manufacturer's end product prices would only result in an increase in the minimum raw milk price they must pay. According to the witness, manufacturers also face financial problems if any of the product-price formula factors are incorrect. The witness illustrated by example the impacts of both inaccurate product prices and inaccurate make allowances on manufacturers.

The IDFA witness testified that before January 1, 2000, the Federal order system utilized a market-based pricing system which automatically reflected current market conditions. However, under the end product pricing system, market factors (e.g. yields, butterfat retention) are set at a point in time and can only be changed through the formal rulemaking process, the witness said.

The IDFA witness espoused that setting make allowances too high or yield factors too low may result in low milk prices but that should not be of concern to USDA. In this regard, the witness was of the opinion that the Federal order system should only determine minimum prices and allow market responses through over-order premiums to remedy any regulated prices that are too low. However, the witness conceded that if a plant can manufacture products at costs lower than those reflected by the make allowance levels then the difference could be used to make plant investments, secure a larger milk supply to the detriment of higher-cost plants or return higher margins to plant owners.

The IDFA witness testified in support of updating the current make allowances with the most current cost data available (Proposal 1). The witness was of the opinion that the CDFA dry whey cost data should be a factor in determining a new dry whey make allowance for Federal orders. The witness asserted that the CDFA average dry whey plant size more closely resembled the NASS average dry whey plant size than did the CPDMP survey. Furthermore, the witness asserted that the CDFA dry whey data was skewed toward low-cost plants, not high-cost plants as asserted by USDA. The witness maintained that using the CDFA data in determining the dry whey make allowance would not cause the make allowance to be set too high. The witness concluded that both the CDFA and CPDMP dry whey weighted average costs should be used to determine the dry whey make allowance. This position was reiterated in the IDFA post-hearing brief.

Also in its post-hearing brief, IDFA stated that any decision made by USDA on the Class III and Class IV pricing formulas should not directly consider hearing testimony regarding dairy farmer cost-of-production. The brief asserted that it is already captured indirectly through the supply and demand for manufactured dairy products and therefore should not be given additional consideration in this proceeding.

The IDFA witness testified that USDA needs to correct for CPDMP's stratified cheese plant sampling which in IDFA's opinion over-represents low-cost cheese plants. The witness highlighted the testimony of the Cornell witness which compared the 8 cheese plants that participated in both surveys revealing an average manufacturing cost increase of 1.7 cents per pound. IDFA was of the opinion that since the same cheese plant sample was not used in the two CPDMP surveys, the most appropriate method for determining a new cheese make allowance would be to use the weighted average cost from the 2005 survey ($0.2028) plus 1.7 cents for a total of $0.2198 per pound. In its brief, IDFA concluded that the new make allowances should be set no lower than the following: $0.2154 per pound for cheese; $0.1725 per pound for butter; $0.1782 for NFDM; and $0.2080 for dry whey.

The IDFA witness supported adopting an annual manufacturing cost survey as contained in Proposal 2 but opposed any automatic updating of make allowances. The witness said that an annual survey would provide industry participants information regarding trends in plant costs and such information could be used in future hearings to adjust make allowances. However, the witness did not support automatically updating make allowances outside of the hearing process because it would prohibit industry input regarding how the data should be utilized. IDFA reiterated these views in its post-hearing brief.

The IDFA witness testified in opposition to Proposal 3. The witness argued that audited CDFA data should continue to be included when determining new make allowance levels. The witness asserted that the elimination of the CDFA data would result in lower make allowances that, in their opinion, are already too low. In its post-hearing brief, IDFA asserted that the proponents of Proposal 3 had presented no evidence that manufacturing costs have decreased to levels similar to the manufacturing costs reflected in make allowances that were effective prior to February 1, 2007.

Comments and exceptions filed by IDFA expressed support for the proposed make allowances contained in the tentative partial final decision. IDFA also indicated support for comments filed by Agri-Mark et al. requesting that the make allowances be adjusted to reflect increased energy costs through June 2008. IDFA also continued to support adoption of a manufacturing cost survey (Proposal 2) as a means to provide accurate and timely manufacturing cost data for use at future rulemaking proceedings, and expressed continued support for the denial of Proposal 3.

A witness appearing on behalf of Lactalis American Group, Inc. (Lactalis) testified in support of Proposal 1 and in opposition to Proposal 3. According to the witness, Lactalis operates six cheese plants in the United States. The witness expressed support for IDFA's positions. The witness said that the Class III and Class IV product-price formulas should be amended to give more flexibility to market participants in establishing market prices. The witness was of the opinion that increasing make allowances by adopting Proposal 1 would give processors the flexibility to make short-term adjustments in response to changing market conditions. The witness argued that the increasing milk supply, not make allowances which are too high, is the cause of low milk prices received by dairy farmers. Therefore, the witness opposed any proposals that would result in lower make allowances.

A witness appearing on behalf of Leprino testified in opposition to Proposal 3 stating that there is no basis to set make allowances below current levels. According to the witness, Leprino operates nine manufacturing plants throughout the United States that produce Italian style cheeses. The post-hearing brief filed by Leprino expressed support for the make allowances proposed in IDFA's post-hearing brief. Leprino was of the opinion that make allowances should be set no lower than the following: $0.2154 for cheese; $0.2080 for dry whey; $0.1725 for butter; and $0.1782 for NFDM.

A witness appearing on behalf of Saputo Cheese USA (Saputo), a dairy product manufacturer, testified in support of IDFA's positions. The witness testified that Saputo opposed any proposal which would add complexity to the Federal milk order system. The witness supported updating the current make allowances to reflect the most current available data as sought in Proposal 1 and that updated make allowances for dry whey should use CDFA data.

A post-hearing brief filed on behalf of Twin County Dairy (Twin County), an Iowa-based cheese manufacturer, expressed support for the proposals offered by IDFA and Agri-Mark that seek to increase make allowances. However, the brief asserted that the proposals do not go far enough to ensure that medium-sized plants, such as the one operated by Twin County, remain profitable. The brief argued that the proposed make allowances are heavily weighted toward large, low-cost plants and their adoption, especially the dry whey make allowance, would cause financial hardship for many cheese manufacturing plants that are similar in size to Twin County. Twin County insisted that even though product-price formulas are applied identically to large and small plants, USDA should conduct a regulatory impact analysis because in Twin County's opinion, product-price formulas have a disproportionate impact on small businesses compared with larger entities that may benefit from advantages of economies of scale.

A witness appearing on behalf of HP Hood LLC (HP Hood) testified in opposition to Proposals 1, 2 and 3. According to the witness, HP Hood is a manufacturer of Class I and Class II dairy products that are distributed nationally. The witness opposed Proposals 1, 2 and 3 because their adoption would change the Class III and Class IV milk pricing formulas that in turn are used to determine the Class I and Class II prices that HP Hood pays for its raw milk supply. The witness opposed adoption of any proposal that would result in the automatic or periodic updating of the Class III and Class IV pricing formulas arguing that such updates should be made through the formal rulemaking process.

A witness appearing on behalf of NAJ offered an amendment to Proposal 2. The witness said the amendment would expand the manufacturing cost survey to include gathering manufacturing cost data for whey protein concentrates (WPC's) and lactose. This inclusion was reiterated in NAJ's post-hearing brief.

A Michigan dairy farmer testified regarding the profitability of dairy farmers and in opposition to adopting any proposals that would increase make allowances. The witness was opposed to increasing make allowances until the price formulas are amended to recognize a farmer's cost of production. The witness stated that on-farm fuel costs were $35,000 in 2004 and had risen to $70,000 in 2006. The witness asserted that there are many Michigan dairy farmers considering leaving the dairy industry because of increased costs and low milk prices. The witness also expressed the opinion that NASS NFDM prices were misreported or under-reported during the prior 12 months.

A post-hearing brief submitted on behalf of O–AT–KA Milk Products Cooperative, Inc., (O–AT–KA) expressed support for Proposals 1 and 2, and opposition to Proposal 3. According to the brief, O–AT–KA is a Capper-Volstead cooperative located in New York and its plant manufactures 600 million pounds of milk annually into butter and NFDM. The brief stressed that changes to the make allowances and other factors of the product price formulas need to accurately represent the current manufacturing market. O–AT–KA expressed support for Proposal 1 and was of the opinion that the CPDMP 2006 survey should be considered a minimum when setting make allowances. According to the brief, O–AT–KA's plant manufacturing costs are higher than the CPDMP 2006 survey weighted average NFDM cost. O–AT–KA also wrote that they compete directly with California plants and requested that USDA keep the Class IV and California Class 4a prices aligned if it recommends any changes to the product price formulas. O–AT–KA noted support for Proposal 2, but not the portion that calls for automatically updating make allowances. The O–AT–KA brief opposed adoption of Proposal 3 because it would inhibit their ability

to provide balancing services to the market and a fair return to its member-owners.

A joint post-hearing brief filed on behalf of Dairylea and DFA (Dairylea et al.), opposed adoption of Proposals 1 and 2. The brief expressed the opinion that the current make allowances should be used with the addition of the energy adjustor advanced in Proposal 17 and cost add-ons described in Proposal 20. The Dairylea et al. brief supported the NAJ modification of Proposal 2 to expand the NASS product price survey to include information on whey protein concentrates.

Separate comments filed on behalf of Grande Cheese Company (Grande), Glanbia Foods, Inc. (Glanbia) and Kraft Foods (Kraft) expressed support for the proposed make allowances contained in the tentative partial final decision. Grande is a cheese manufacturer located in Wisconsin processing over 1.5 billion pounds of milk annually. Glanbia is a cheese manufacturer with plants located in Idaho and New Mexico. Kraft operates numerous manufacturing plants located throughout the country. Grande, Glanbia and Kraft all endorsed the comments and exceptions filed by IDFA.

Grande's comments also took exception to the exclusive use of CDFA data in determining the cheese make allowance and the sole use of CPDMP data to determine the dry whey make allowance. Glanbia and Kraft urged USDA to include CDFA dry whey cost data in the make allowance computation because CDFA has the only audited whey cost data available. Grande, Glaniba and Kraft also noted support for adopting a manufacturing cost survey (Proposal 2).

Comments filed by Leprino Foods in response to the tentative final partial decision expressed support for the proposed make allowances. Leprino also supported adoption of a one-time energy cost adjustment as proposed by Agri-Mark et al.

Comments filed in response to the tentative partial final decision submitted on behalf of the Wisconsin Cheese Makers Association (WCMA) offered support for the make allowances in the tentative partial final decision and urged USDA to adopt the annual manufacturing cost survey advanced in Proposal 2. WCMA is an organization representing 75 proprietary organizations and cooperatives that manufacture or process dairy products. WCMA argued that because small- and medium-sized plants typically do not have whey drying capacity, they are forced to pay more for the whey in their producer milk than what can be recouped in the market. WCMA stated that this is mostly because a plant's inability to dry whey for sale in the market forces them to sell a lower-valued whey product such as wet whey. According to WCMA, a higher whey make allowance keeps small- and medium-sized cheese plants from losing revenue in times of high dry whey prices. WCMA was of the opinion that USDA should include CDFA dry whey cost data in the make allowance computation as it would provide a higher make allowance than currently proposed.

An Indiana dairy farmer took exception with the increased make allowances contained in the tentative partial final decision. The dairy farmer stated that producer paychecks should not be reduced to cover the cost of manufacturing milk into finished products.

Comments filed in response to the tentative partial final decision submitted on behalf of the National Family Farm Coalition (NFFC) and the Ohio Farmers Union (OFU) opposed the increased make allowances. NFFC and OFU contend that the tentative partial final decision did not take into account farmers' costs of production. The two groups argued that make allowances should not be increased during a time when milk production costs also have increased.

Exceptions to the tentative partial final decision filed by St. Albans Cooperative Creamery, Inc., (St. Albans) requested USDA to consider dairy farmer production costs before permanently adjusting make allowances. St. Albans is a dairy farmer-member Capper-Volstead cooperative that operates a milk manufacturing plant. St. Albans was of the opinion that the 2008 Farm Bill requires a dairy farmer cost analysis before any final adjustments to make allowances.

2. Product Yields and Butterfat Recovery Percentage

A witness appearing on behalf of DPNM et al. testified in support of Proposals 6, 7 and 8. The witness testified that before January 1, 2000, the Federal milk order price discovery mechanism took into account dairy farmers' cost of production when determining minimum regulated prices. If farmers' cost of production increased, the witness said that manufacturers were able to pay farmers higher prices because on-farm production costs could be passed on to their customers. However, under the current pricing system, the witness argued, minimum prices to dairy farmers are based on the average prices of dairy products sold nationally during the month. As a result, the witness asserted, dairy farmers have experienced financial hardship because they are unable to pass on their higher costs to the marketplace.

The DPNM et al. witness was of the opinion that Proposals 6, 7 and 8 should be considered jointly as coordinated adjustments to the various yield factors to ensure that dairy farmers receive a fair minimum price. In its post-hearing brief, DPNM et al. added that Proposals 3 and 15 should also be considered in conjunction with Proposals 6, 7 and 8 because together they address all parts of the current product price formulas.

The DPNM et al. witness testified in support of Proposal 6 seeking to increase the butterfat yield factor from 1.20 to 1.211. The witness said that this change would correct for a mathematical error in calculating farm-to-plant shrinkage. The witness explained that in the 2002 final decision that established the current farm-to-plant shrinkage factor, shrinkage allocated to butterfat loss should have been calculated on a per cwt of milk basis, not on a per pound of butterfat basis. DPNM et al. noted on brief that no witnesses at the hearing disagreed with this assertion.

The DPNM et al. witness also offered a modification to Proposal 6 seeking to amend the butterfat credit in the protein price. The witness explained that when USDA adjusted the butterfat yield factor in the protein price formula to 1.572 in 2002 to account for farm-to-plant shrinkage, the butterfat credit portion of the protein formula was not adjusted to an equivalent of 89.4 percent. The witness estimated that increasing the butterfat yield factor from 1.20 to 1.211 and decreasing the butterfat credit portion of the protein formula from 90 to 89.4 percent would, on average, have increased blend prices by $0.07 per cwt.

The DPNM et al. witness testified in support of Proposal 7 seeking to eliminate the farm-to-plant shrinkage factor. The witness was of the opinion that accounting for farm-to-plant shrinkage allows producers and processors to mask inefficiencies. According to the DPNM et al. witness their farm-to-plant shrinkage is well below the 0.25 percent assumed in the pricing formulas. The witness attributed lower farm-to-plant shrinkage to large producers who ship tanker loads of milk. The witness insisted that shrinkage is not a result of milk solids being unrecoverable from the milk tanker and hoses but rather the result of imprecise measuring at the farm.

The DPNM et al. witness testified that the yield factors in the product pricing

formulas should be amended to reflect current technology. The witness proposed that the protein price formula be changed to reflect a 94 percent butterfat recovery in cheese manufacturing, that the casein percentage in milk be increased to 83.25 percent, and that the butterfat-to-protein ratio in cheese be changed to 1.214 to reflect average producer tests. According to the witness, the adoption of a 94 percent butterfat recovery rate also implies that the butterfat yield factor in the protein price should be increased from 1.587 to 1.653 as proposed in Proposal 8.

The DPNM et al. witness estimated that increasing the butterfat recovery rate from 90 to 94 percent would result in a $0.105 increase in producer blend prices. The witness said that the currently assumed 90 percent butterfat recovery rate is based on technology that is more than 20 years old while new technology enables manufacturers to achieve a much higher recovery rate. Using CDFA plant cost survey data for 2002 through 2005, the witness used a mass balance analysis to estimate the flow of milk components through a cheddar cheese plant and the allocation of milk components to products and by-products. Through this analysis the witness derived a 94 percent butterfat recovery rate for plants participating in the CDFA cost survey. The witness estimated the butterfat recovery rate for cheese plants that participated in the 2004 RBCS cost study to be 95.25 percent for all cheeses.

The DPNM et al. witness testified in support of Proposal 8. The witness argued that the percentage recovery factor for casein in milk should be increased from 82.2 to 83.25, to reflect average producer tests, which would result in a 2.3-cent per cwt increase in producer blend prices. However, in their post-hearing brief, DPNM et al. stipulated that a casein recovery factor of 83.10 percent was appropriate. DPNM et al. explained in their brief that changing the casein recovery factor would raise the protein yield factor from 1.383 to 1.405; and increasing the butterfat recovery rate to 94 percent would change protein price formulas by increasing the protein to butterfat ratio from 1.17 to 1.214 and increasing the butterfat yield from 1.587 to 1.653. These changes would update the protein price formula to reflect current industry recovery standards and return revenue to producers who, according to the DPNM brief et al. have received lower pay prices.

The DPNM et al. witness estimated that increasing the butterfat-to-protein ratio from 1.17 to 1.24 would result in a 3.7-cent increase in producer blend prices. The witness said that the current butterfat-to-protein ratio of 1.17 represents standardized milk tests at 3.5 percent butterfat and 2.9915 percent true protein. However, according to the witness the 2004 average producer milk test for milk contained in the 2004 RBCS study was 3.69 percent butterfat and 3.04 percent true protein which more accurately represents a butterfat-to-protein ratio of 1.214.

The DPNM et al. witness concluded that the current butterfat to protein ratio of standardized milk undervalues more than one half of the producer milk marketed on Federal orders. The witness also stated that since plants purchase milk at test, not at the standardized values, it is more appropriate to use weighted average milk tests in the pricing formulas. In brief, DPNM asserted that standardized milk tests are lower than average producer tests and result in yield factors in the protein price formula that are artificially low which in turn understates what the protein price paid to producers should be.

The DPNM et al. witness concluded that if the DPNM et al. proposals to change the butterfat recovery percentage, butterfat-to-protein ratio, and true protein in casein percentage are adopted, producer blend prices would increase by $0.20 per cwt.

The DPNM et al. witness also testified that the NFDM yield factor should be increased from .99 pounds of NFDM per pound of solids nonfat (SNF) to 1.02 pounds of NFDM per pound of SNF. The witness stressed that according to current FDA standards of identity, one pound of SNF can produce as much as 1.05 pounds of NFDM. The witness elaborated that NFDM is often sold with approximately 5 percent moisture, whereas SNF is assumed to contain 0 percent moisture. Therefore, concluded the witness, the current formula is incorrect in assuming that one pound of SNF actually produces less than one pound of NFDM. The witness referred to various studies conducted by CDFA and CPDMP that demonstrated a combined NFDM and buttermilk powder yield in excess of 1.025 pounds per pound of SNF. The witness was of the opinion that after taking into account the lower market value of buttermilk powder, a NFDM yield of 1.02 is appropriate. The witness estimated that this proposed change would increase producer blend prices by 4 cents.

The witness concluded that if all the DPNM et al. yield changes were adopted, blend prices would increase by $0.42 per cwt and on average, producers would receive $9,787 in additional income per year. The witness was of the opinion that any adjustment in yield factors should also be accompanied by an adjustment in make allowances because the two are inherently linked.

Exceptions to the tentative partial final decision filed on behalf of DPNM et al. opposed the denial of the butterfat recovery rate portion of Proposal 6, and Proposals 7 and 8. DPNM et al. reiterated their testimony presented at the hearing that the butterfat recovery in cheese is in excess of 90 percent. DPNM et al. also argued that the USDA did not properly evaluate the CDFA yield data for cheese and the relevance of the factors in determining butterfat retention in cheese making. They offered a calculation using the butterfat tests, solids nonfat tests, cheese yield and cheese moisture content for California plants which purported to show that those plants had a butterfat retention rate in the range of 94 percent. They also commented that similar results were obtainable from the RBCS data.

DPNM et al. noted in their comments to the tentative partial final decision that the farm-to-plant shrinkage allowances should be removed from the product-price formulas as advanced in Proposal 7. DPNM et al. explained that in the western part of the country, where the producers it represents operate, milk is delivered from the farm-to-plant in full tanker loads and therefore shrinkage is not a problem. Accordingly, they argued that DPNM et al. producers should not be penalized through lower component prices for being more efficient than producers who ship smaller loads and therefore experience farm-to-plant shrink.

Exceptions by DPNM et al. also requested the Department to reconsider adoption of Proposal 8. They argued that yields contained in the product-price formulas should be based on average producer tests, not on milk standardized to 2.9915 percent protein and 3.5 percent butterfat. They expressed the view that since cheese prices, butterfat prices and make allowances are based on weighted averages, yields should also be based on the weighted average component tests of producer milk. The exception also reiterated their position that the casein retention rate of 82.2 percent is incorrect and that the factor should be 83.25 percent.

A witness appearing on behalf of Leprino testified in opposition to Proposals 6, 7 and 8. The witness opposed the portion of Proposal 6 seeking to increase the butterfat recovery rate in cheese manufacturing from 90 to 94 percent. In the witness'

opinion, the proponents for increasing the butterfat recovery rate provided no evidence to support this increase aside from hypothetical examples. The witness also opposed the amendment to Proposal 6 to decrease the butterfat credit in the protein formula below the 90 percent butterfat recovery rate that is assumed in the cheese yield formula. The witness explained that this would cause cheese manufacturers to pay for more butterfat than is actually contained in the raw milk. The witness agreed that there is an error regarding how butterfat shrink is applied in the butterfat formula. However, the Leprino witness did not support increasing the butterfat yield factor to 1.211 because of milk component losses that occur in cheesemaking that are not recognized in the formula.

The Leprino witness testified in opposition to elimination of the farm-to-plant shrinkage factor advanced by Proposal 7. The witness said that the loss of milk when shipping from the farm to the plant is well documented and adjusting the Class III price to reflect this loss is appropriate. The witness said that Leprino experiences farm-to-plant milk losses of approximately 0.25 percent. The witness disagreed with the rationale offered by the proponent that increasing farm sizes and single producers shipping whole tanker loads of milk has remedied farm-to-plant shrinkage. The Leprino witness testified that deliveries to the Leprino plant in Waverly, New York, often have the milk of 15 to 18 producers per tanker. The witness argued that milk losses from farm-to-plant remain a reality that should continue to be acknowledged in the Class III price formula.

The Leprino witness testified in opposition to increasing the cheese protein yield factor from 1.383 to 1.405 (Proposal 8.) The witness said that the proponent's assumption of 83.25 percent casein in true protein content that would lead to a cheese protein yield factor of 1.405 was not based on actual laboratory casein tests. Leprino's post-hearing brief reiterated its opposition to Proposals 6, 7 and 8.

A witness appearing on behalf of IDFA testified in opposition to proposals seeking to increase yield factors (Proposals 6, 7 and 8). The witness was of the opinion that the yield factors should actually be decreased to reflect in-plant shrinkage and the sale of lower-valued products such as whey cream and buttermilk. In its post-hearing brief, IDFA espoused that proponents of increasing yield factors made erroneous assumptions. The brief stated that hearing evidence documents that farm-to-plant losses are a marketplace reality and should continue to be recognized in the product price formulas. The brief also argued that hearing evidence does not support proponent's claim that a 94 percent butterfat recovery rate is achievable by most cheese manufacturing plants. Lastly, the brief insisted that the 83.25 percent casein in true protein assumed by the proponents is not based on any actual milk tests.

Comments and exceptions filed by IDFA to the tentative partial decision expressed continued support for the denial of Proposal's 6, 7 and 8.

A food technologist witness appearing on behalf of IDFA testified regarding the cheese manufacturing process and specifically about cheese production at Alto Dairy Cooperative (Alto Dairy) during 1985—2003. The witness discussed the evolution of cheese processing technology and testified that the greatest loss of milkfat during the cheese making process occurs during the cutting of the coagulum. The witness estimated that in moving from the use of traditional open vats to newer horizontal enclosed vats, the loss of milkfat during the cutting of the coagulum was reduced from 9.6 percent to 6 percent. However, the witness said, this does not account for losses during other stages of the cheesemaking process. The witness was of the opinion that the industry average butterfat recovery rate in cheddar cheese is approximately 90 percent.

A witness appearing on behalf of Kraft testified in support of the positions and proposals advocated by IDFA. The Kraft witness opposed eliminating the farm-to-plant shrinkage factor in the Class III price formula (Proposals 7 and 8.) The witness said that Kraft manufacturing plants experience farm-to-plant milk shrinkage and that this factor should continue to be acknowledged in the price formulas so that the butterfat recovery percentages and yields are not arbitrarily inflated.

A witness appearing on behalf of Davisco Foods (Davisco) testified as being unable to use whey cream in standardized full-fat cheddar production. The witness explained Davisco sells whey cream to a butter manufacturer at a price lower than that reflected in the Class III pricing formula. According to the witness, Davisco owns and operates manufacturing plants in Idaho, Minnesota and South Dakota.

A witness appearing on behalf of HP Hood opposed adoption of increasing yield factors. According to the witness, the proposed yield factors are not reflective of industry data provided in record testimony. Furthermore, the witness said, the shrinkage factor should remain in the pricing formulas and claimed that HP Hood experiences an average total shrinkage (farm-to-plant and in-plant loss) of 1.5 percent.

A witness appearing on behalf of LOL testified in opposition to Proposal 6. The witness asserted that when determining the current farm-to-plant shrinkage factor USDA did not clearly state if the butterfat loss was based on product pounds or cwt of milk. The witness said that an increase in the butterfat yield would increase the raw milk costs for manufacturers who already contend with a make allowance that does not cover their cost of processing. The witness opposed increasing the butterfat recovery percentage to 94 percent and revealed that the LOL cheese plant in Kiel, Wisconsin, recently experienced an average annual cheese yield of 10.21 pounds per cwt. According to the witness, assuming a 90 percent butterfat recovery rate and applying the plant's average milk tests, the Van Slyke formula estimates a cheese yield of 10.16 pounds. The witness indicated that the theoretical Van Slyke result and observed plant yield validates the continued use of the 90 percent butterfat recovery rate in the Class III price formula.

The LOL witness also testified in opposition to Proposals 7 and 8 seeking to amend the yield factors by eliminating farm-to-plant and butterfat shrinkage factors. The witness said proponents' claim that minimal comingled milk in the Florida, Southwest, Arizona and Pacific Northwest orders fails to recognize that comingled milk in the Northeast and Upper Midwest is commonplace given that the milk of 10 or more producers is commonly comingled on a single load. According to the witness, this makes farm-to-plant shrinkage between farm and plant weights inevitable. The witness indicated that in 2006, the LOL butter and NFDM plant in Carlisle, Pennsylvania, experienced an average difference of 0.343 percent between farm and plant weights and a 0.511 percent butterfat shrinkage. The witness insisted that the LOL shrinkage percentages validate the continued incorporation of farm-to-plant and butterfat shrinkage factors in the pricing formulas.

A witness appearing on behalf of MMPA testified in opposition to Proposal 7 seeking to eliminate the farm-to-plant shrinkage factor. The witness elaborated that even though MMPA pays its farmers based on farm weights and tests, some milk solids are lost during transportation of milk from

the farm to the plant. According to the witness, MMPA plants experience approximately a 0.3 percent loss of milk from farm-to-plant. Without the farm-to-plant shrinkage factor in the product price formulas, the witness said that MMPA would have to pay farmers for milk that is lost in transport and cannot be manufactured into a saleable product.

The MMPA witness also opposed Proposals 6 and 8 that seek to amend the Class IV NFDM and butter yield factors. The witness provided evidence that MMPA experiences butter and NFDM plant yields that are slightly lower than those used by the Class IV formula. The MMPA witness claimed that their yields typically generate a milk value of $11.11 per cwt, while the assumed yields in the product price formulas generate a milk value of $11.06 per cwt. The witness asserted that this $0.05 per cwt advantage is eliminated because of the off-grade products it produces and sells at discounted prices. The witness concluded that the current Class IV yield factors are appropriate and that the current calculation is superior to the complicated alternatives in Proposals 6, 7 and 8.

A witness appearing on behalf of Foremost testified regarding cheese production at Foremost's manufacturing plants. The witness entered a declaration for the record describing the types of cheese produced by Foremost and the specific butterfat retention rate achieved at its cheese manufacturing plant in Marshfield, Wisconsin. Using a mass balance analysis, the witness stated that in 2006 the Marshfield plant had an average butterfat retention rate of 90.25 percent. The witness said that Foremost considered investing in more modern cheese vats that would yield a higher butterfat retention rate but chose not to do so because it would take at least 13 years to recoup any return on such a large investment.

The Agri-Mark et al. post-hearing brief expressed opposition to the adoption of Proposals 6, 7 and 8. The brief argued that the proponent's methodology in computing product yields was flawed because it ignored that milk solids and/or cream are sometimes added to farm milk during processing resulting in increased vat yields. Therefore, Agri-Mark et al. concluded that the product yields advanced in Proposals 6 through 8 are not representative of the volume of products that can be produced from a hundredweight of milk. Agri-Mark et al. also took exception to proponent's statements that dairy farmers are paying for the costs of new plant equipment designed to increase yields through increased make allowances and reduced producer income. Agri-Mark et al. argued that enhanced yields increase production thus lower manufacturing costs per pound of product from which make allowances are derived. Agri-Mark et al. also opposed the elimination of a farm-to-plant shrinkage factor used in the product price formulas.

The Agri-Mark et al. brief stated that increasing the butterfat recovery rate from 90 percent to 94 percent is not justified. Agri-Mark et al. insisted that the proponent's claim that cheese plants recycle their whey cream into the cheese vat and are then able to achieve a 94 percent butterfat recovery was contradicted by many witnesses at the hearing. Agri-Mark et al. also wrote that the record lacks sufficient evidence to justify increasing the NFDM yield factor from .99 to 1.02. The brief supported USDA's reasoning for relying on the current NFDM yield factor and said that the farm-to-plant shrinkage factor is still valid.

In comments and exceptions to the tentative partial final decision, Agri-Mark et al. expressed support for amending the butterfat yield factor, and to the denial of the portion of Proposal 6 seeking to increase the butterfat recovery rate and the entirety of Proposals 7 and 8.

The post-hearing brief filed on behalf of Dairylea et al. agreed with proponents of Proposal 6 that an arithmetic error in calculating the shrinkage factor in the butterfat yield had been made by USDA. Therefore, the brief advocated that the butterfat yield factor in the butterfat price formula be increased to 1.211. The brief also discussed the butterfat recovery percentage in the protein price formula and supported increasing the butterfat retention factor in cheese manufacturing but did not specify a factor. The brief explained that currently the formula assumes that 90 percent of the butterfat in the cheese vat ends up in the finished product. The brief emphasized the importance of recognizing that the butterfat retention factor is based on butterfat going into the vat, not butterfat coming from the farm. The brief asserted that a 90 percent recovery rate of butterfat going into the cheese vat is equivalent to 89.4 percent of the butterfat coming from farms going into the finished product after accounting for farm-to-plant shrinkage. The brief detailed that the cheese manufacturers who testified to achieving a butterfat recovery percentage of 90.25 percent on the basis of farm tests actually experienced a butterfat recovery of 90.9 percent of fat that entered the cheese vat. The brief concluded that this evidence, combined with additional testimony regarding available technology, makes higher butterfat recovery possible and should be reflected in the protein price formula.

The Dairylea et al. brief opposed the elimination of the farm-to-plant shrinkage factor as advanced in Proposal 7. The brief asserted that while some production areas are dominated by large farms, a large portion of the country is dominated by small farms where farm-to-plant shrinkage is prevalent. However, the brief noted that farm-to-plant shrinkage is reflected in the product-price formulas because yield data provided by manufacturers is commonly based on farm weights and tests.

The post-hearing brief submitted on behalf of O–AT–KA stated that the hearing record does not justify adoption of Proposals 6, 7 and 8, and that the proposed changes to yield factors would increase its raw milk costs and inhibit its ability to provide balancing services to the market. O–AT–KA was of the opinion that Proposal 6 should only be adopted if USDA simultaneously amends the product-price formulas to account for in-plant losses and off-grade products that are sold at a discount.

Comments to the tentative partial final decision filed separately by Grande, Glanbia, Kraft, Leprino and WCMA expressed continued support for the denial of Proposals 7 and 8.

3. Value of Butterfat in Whey

A witness appearing on behalf of IDFA testified in support of Proposal 9 seeking to adjust the protein price formula to reflect the lower value and volume of butterfat recoverable from whey cream and was of the opinion that Proposal 9 was superior to Proposal 10. The witness asserted that the current Class III price formula values the butterfat not captured in the cheese at the Grade AA butter price even though it is sold as whey butter which has a lower value in the marketplace. In its brief, IDFA supported the testimony of the Leprino witness regarding saleable volume and the value whey cream has in the marketplace. The brief also highlighted testimony that some processors do not return whey cream back into their cheese vats. The brief concluded that the butterfat adjustment contained in the protein price formula should be reduced by $0.016 to account for the lower value and saleable volume of whey cream.

Comments filed by IDFA in response to the tentative partial final decision took exception with the denial of Proposal 9. IDFA argued that record evidence demonstrates that whey cream has a lower value in the marketplace than butterfat used to produce Grade

AA butter. According to IDFA, opponents of Proposal 9 speculated as to how much whey cream is re-used in cheese manufacturing but did not provide any specific examples where the whey cream is valued at or above the value of butterfat in Grade AA butter. IDFA referenced hearing testimony from numerous cheese manufacturers who testified that they did not use whey cream in the cheese manufacturing process.

The witness appearing on behalf of Agri-Mark supported adoption of adjusting the Class III protein price component to account for the lower value of whey butter (Proposal 10). The witness estimated that 0.42 pounds of whey butter is made from a hundredweight of milk and is sold at a price below the Grade AA butter price. According to the witness, Agri-Mark sells its whey butter for $0.074 per pound less than its Grade AA butter. The witness was unaware of any public data or published reports on market prices for whey butter and was of the opinion that there are very few manufacturers making whey butter in the United States.

The post-hearing brief filed on behalf of Agri-Mark et al. contended that the product price formulas should recognize the lower value and saleable volume of whey cream and urged the adoption of Proposal 9. The brief summarized record evidence regarding plant whey cream prices and volumes and insisted that lower whey cream values are a market reality that should be reflected in the product-price formulas. Agri-Mark et al. reiterated this view in comments and exceptions filed in response to the tentative partial final decision. Agri-Mark et al. stated that despite a lack of widely available whey cream price data, USDA should still make an adjustment to the price formulas to recognize its lower market value.

A witness appearing on behalf of Leprino testified in support of Proposal 9. The Leprino witness reviewed the derivation of the current cheese yield per pound of fat in the Class III product-price formula using a Van Slyke formula with an assumed butterfat recovery rate of 90 percent and a moisture content of 38 percent. The witness asserted that the Class III formula implies that 0.035 pounds of butterfat per cwt of milk is recoverable as whey cream but is valued in the Class III pricing formula as if it was used to produce 0.042 pounds of Grade AA butter. However, the witness asserted that all whey cream is used to produce Grade B butter which has a lower value than Grade AA butter. Based on testimony from Agri-Mark, LOL and NDA, the witness estimated that under the Class III price formula, cheese manufacturers in the Northeast and Pacific Northwest are being charged 12.5 and 20.4 cents, respectively, per pound of butterfat in the whey cream more than what these products can be sold for in the marketplace. The witness was unaware of any publicly available data on national whey cream production volumes and prices.

The Leprino witness testified that the Class III formula also overestimates the volume of butterfat recoverable as whey cream. With an assumed 90 percent butterfat recovery rate, the witness said that the formulas infer the remaining 10 percent of butterfat is captured as whey cream. However, the witness explained that only 7.8 percent of the butterfat is actually recoverable because some butterfat is incorporated into dry whey or the skim portion of the salt whey that must be disposed.

The Leprino witness testified that Proposal 9 would amend the Class III formula to better account for overvaluing the theoretical volumes and market values of whey cream. The witness explained that the butterfat credit in the protein portion of the Class III formula should be increased from 90 to 92.20 percent to acknowledge and correct for the 7.8 percent of butterfat that is recoverable as whey cream. In addition, the witness maintained that the butterfat portion of the Class III formula should be reduced by $0.016 to account for the lower price manufacturers receive for Grade B butter. The witness estimated that these changes would have lowered the Class III price by $0.169 per cwt over the last five years. The witness revealed that Leprino uses all of its whey cream in its cheese production and therefore is able to recoup the cheese value for all its milk components.

A post-hearing brief filed on behalf of Leprino stressed that the butterfat portion of the Class III formula should actually be reduced by $0.021 because hearing testimony from other witnesses revealed that 2007 whey prices in the Pacific Northwest were significantly lower than those in 2005 and 2006. The brief highlighted testimony that the 2005–2006 Pacific Northwest average whey cream sale price was 94.4 percent of the average Grade AA butter price while the 2005–2007 average whey price fell to 89.4 percent of the Grade AA butter price.

Comments to the tentative partial final decision filed by Leprino took exception to the denial of Proposal 9. Leprino reiterated arguments made during the hearing that the market value and volume of whey cream recoverable in the cheesemaking process is overvalued in the product-price formulas, and that the decision ignored record evidence demonstrating these market realities. Leprino wrote that opponents of Proposal 9 did not offer any evidence of other higher-valued uses for whey cream, but they did acknowledge that whey cream for use in Grade B butter has a lower market value. Leprino also argued that even if there are higher-valued end uses for whey cream, that the ultimate use of whey cream is irrelevant. According to Leprino, if whey cream is sold at a discount to regular cream, then that should be reflected in the price formulas.

A witness appearing on behalf of Kraft supported adoption of Proposal 9. The witness indicated that on average, Kraft receives $0.10 per pound less for whey butter than for Grade AA butter.

Comments to the tentative partial final decision filed by Kraft took exception to the denial of Proposal 9. Kraft argued that Proposal 9 should be adopted because the record demonstrates that whey cream has a lower market value than cream used to produce Grade AA butter.

A witness appearing on behalf of Saputo testified that the Class III pricing formula wrongly presumes that all cheese manufacturers have dry whey processing capabilities and can obtain a high value for dry whey in the marketplace. In reality, the witness said, manufacturers sell whey as whey protein concentrates, whey protein isolates or in liquid form that have widely disparate market values. According to the witness, assumptions regarding the production of dry whey may financially harm cheese manufacturers and could result in the accelerated consolidation of milk manufacturing. For these reasons, the witness supported the adoption of Proposal 9.

A witness appearing on behalf of Great Lakes Cheese (GLC) testified in support of adoption of Proposal 9. According to the witness, GLC is a cheese manufacturer whose plant in Adams, New York, annually processes 410 million pounds of milk into American style cheeses and by-products. The witness said that because milk components are lost in many stages of the cheesemaking process, the Federal order system should not have class prices that require manufacturers to pay for milk components that they are unable to use and sell. The witness illustrated by example the in-plant milk losses incurred from sanitizing equipment and the removal of sludge from the whey separator. In the

example, the witness estimated that in 2006, GLC lost $23,770 worth of whey solids in the desludging process.

The GLC witness said that GLC's Adams facility produces one million pounds of whey cream annually and usually sells it for the Grade AA butter market price. In 2006, the witness stated, GLC received $1.2425 per pound of whey cream fat and the average CME AA butter price was $1.2405. However, the witness explained, because the average Class III butterfat price was $1.3185 per pound (a $0.076 price difference), it had to pay a higher price for the butterfat in raw milk than it could recover in the market.

A witness appearing on behalf of NDA testified that Federal orders should establish fair minimum prices for producer milk while ensuring that the product-price formulas reflect the true value of dairy products in the market. The witness stated that NDA receives significantly less for its whey cream sales than it does for sweet cream sales and that Proposal 9 or Proposal 10 should be adopted to reflect this reality in the product-price formulas. The witness estimated that, on average, from 2005 through 2007, on a butterfat basis, NDA sold its whey cream for 36 percent less than it sold its sweet cream and $0.0244 per pound less than the Class III butterfat price. Therefore, the witness said, NDA supports IDFA's proposal to adjust the protein price to reflect the lower value of whey cream.

The NDA witness also explained that its average selling price for manufactured products is less than its reported prices to NASS because some of its production does not meet NASS specifications. The witness testified that products not meeting NASS specifications are either products made to meet specific customer orders or off-grade production such as cheese fines. The witness said that in fiscal year 2007, 3.98 percent of NDA's cheese production did not meet NASS specifications either by design or error. The volume was sold for a weighted average price of $0.0218 per pound less than its NASS reported cheddar—lowering NDA's total average cheese price for the year by $0.009 per pound, the witness said. The witness described similar scenarios for NDA's whey, NFDM and buttermilk production.

The NDA witness revealed that in fiscal year 2007, NDA's Sunnyside, Washington, plant, which uses modern horizontal cheese vats, experienced a cheese yield of 10.22 pounds of cheese per cwt of milk with an average moisture content of 38 percent and a butterfat recovery rate of 92 percent. The witness noted that NDA's yield reflects the use of whey cream added to the cheese vats.

A witness for Twin County testified in support of adopting Proposal 9. The witness asserted that the Class III price formula and current make allowances for cheese and dry whey overvalue milk components, particularly other solids, leading to reduced plant profitability. As a result, explained the witness, manufacturers are required to account to the marketwide pool for some components at the Class III price of milk even though they receive less than the Class III price for them in the marketplace.

The witness explained that Twin County produces cheddar cheese that meets particular customer specifications which do not allow for returning whey cream into its cheese-making process. Consequently, the witness said that Twin County invested in a whey processing facility to process its skim whey into whey protein concentrates (WPC), ultra filtered milk and permeate. According to the witness, Twin County sells all of its whey cream in the marketplace for approximately the Grade AA butter price times a multiplier of 1.12. The witness said that Twin County does fortify its cheese vats with additional milk solids when it is economically feasible and its average cheese yield (including fortification) is seasonal and ranges from nine to ten pounds of cheese per 100 pounds of milk. The witness said that while Twin County is required to account to the marketwide pool for all milk components at the Class III price, it sells the whey produced at a reduced price in the market resulting in a net loss to the company for those components. Additionally, while the current make allowances (effective March 2007) did improve the profitability of Twin County, the witness insisted that the whey make allowance is still inadequate in covering the whey manufacturing costs of the plant.

The Twin County witness conceded that the premiums it pays for milk could be adjusted downward to offset revenue losses. However, the witness indicated, renegotiating premiums with suppliers may have the unintended consequence of impeding or damaging long-standing relationships with suppliers and disrupt their ability to procure milk as needed.

The witness appearing on behalf of HP Hood also supported adoption of Proposal 9 or 10.

The post-hearing brief submitted on behalf of Dairylea et al. opposed the adoption of Proposals 9 or 10. The brief did not dispute that whey cream has a lower value in the marketplace, but noted that there are also higher valued uses for butterfat that are not recognized in the butterfat price. The brief concluded that it would be inappropriate to amend the butterfat value to recognize lower-valued whey cream without also recognizing higher-valued butterfat uses.

The post-hearing brief submitted on behalf of DPNM et al. opposed adoption of Proposals 9 or 10. The brief stressed that there is no publicly announced information regarding prices and volumes for whey cream or whey butter. The brief argued that record evidence demonstrates that a significant portion of whey cream is returned to the cheese vat and not sold as whey cream in the market. Exceptions to the tentative partial final decision filed by DPMN et al. expressed their continuing opposition to Proposal 9.

The post-hearing brief submitted on behalf of NAJ also expressed opposition to the adoption of Proposals 9 or 10. The brief said that if the value of whey butter is as low as the proponents claim, then a separate whey butterfat price should be established in lieu of lowering the protein price.

Separate comments to the tentative partial final decision submitted on behalf of Grande and Glanbia each took exception to the denial of Proposal 9. Grande and Glanbia both argued that record evidence indicates that whey cream has a lower market value than cream processed into Grade AA butter. Glanbia further insisted that while opponents to Proposal 9 claimed that other higher-value uses for whey cream exist, they provided no examples. Grande and Glanbia comments concluded that Proposal 9 should be adopted so cheese manufacturers will not be required to pay more for whey cream than can be recouped in the market.

Comments filed by WCMA also took exception with the denial of Proposal 9 in the tentative partial final decision. WCMA argued that whey cream is over-valued in the current product-price formulas because it is made into lower valued Grade B butter. WCMA was of the opinion that NASS should collect data on end uses and values of whey cream.

4. Barrel-Block Cheese Price

The witness appearing on behalf of IDFA testified in support of eliminating the current 3-cent barrel-block price adjustment (Proposal 12). The witness maintained that there is no cost difference between block and barrel production, therefore the 3-cent adjustment should be eliminated. Furthermore, the witness said, the CPDMP data used to determine the

current make allowances takes into account the manufacturing cost difference between barrels and blocks. Maintaining the 3-cent adjustment would, the witness said, result in double counting of any purported cost difference. In its post-hearing brief, IDFA reiterated the need to eliminate the 3-cent barrel-block price adjustment.

Comments filed by IDFA in response to the tentative partial final decision opposed the denial of Proposal 12. IDFA argued that because cost data contained in the record demonstrates no difference in packaging costs between block and barrel cheese production, elimination of the 3-cent barrel-block spread is warranted.

A witness appearing on behalf of Davisco testified in support of Proposal 12. The witness offered evidence on Davisco's manufacturing costs for 40-pound block and 500-pound barrel cheese production at its LeSueur, Minnesota, plant. The witness explained that the LeSueur plant has separate block and barrel production lines that enable Davisco to easily isolate and compare packaging and capital costs. After discussing the differences in packaging and equipment needed to produce block cheese and barrel cheese, the witness testified that Davisco spends $0.0012 per pound more to produce block cheese. According to the witness, its de minimis cost differences in producing block and barrel cheese warrant eliminating the 3-cent adjustment.

The witnesses appearing on behalf of Kraft, NDA and Saputo expressed support for adoption of Proposal 12. The Kraft witness testified that the 3-cent adjustment historically represented the additional cost of producing blocks instead of barrels. However, the Kraft witness asserted, the gross return between blocks and barrels (adjusted to 38 percent moisture) is approximately $0.0075 per pound. Therefore, concluded the Kraft witness, it is no longer necessary to add 3-cents to the barrel cheese price because that cost difference is being recouped in the marketplace.

Separate comments filed by Grande and Kraft in response to the tentative partial final decision opposed the denial of Proposal 12. Grande and Kraft argued that record evidence demonstrates that there is no processing cost difference between block and barrel cheese. Kraft elaborated that the cost data contained in this hearing record is the first actual cost data contained in any hearing record that addressed the 3-cent barrel adjustment. Therefore, Grande and Kraft urged USDA to adopt Proposal 12 in the final decision.

While no testimony was received from proponents DFA and NDA regarding Proposal 13, a witness appearing on behalf of Kraft testified in opposition to eliminating the barrel cheese price from the Class III price formula (Proposal 13). The witness asserted that since 2000, the NASS cheese price survey represented approximately 57 percent barrels and 43 percent blocks. Therefore, the witness was of the opinion that it would be inappropriate to eliminate the barrel price from the Class III price formula because it would not reflect the actual prices of such a large part of the national cheese market.

The witness appearing on behalf of Leprino supported eliminating the 3-cent block-barrel adjustment. The witness asserted that the adjustment was originally added to the barrel cheese price because it was considered the standard cost difference between producing block and barrel cheese. The witness testified that the 3-cent adjustment was no longer necessary because the CPDMP cheese manufacturing cost survey used to derive the current make allowances already accounts for the cost difference. The witness explained that keeping the 3-cent adjustment would be double counting cost differences that may exist. According to the witness, the 3-cent adjustment was never based on actual cost data; rather it was a generally accepted valuation of the average production cost difference between producing 40 pound blocks and 500 pound barrel cheese at a 39 percent moisture standard. However, the witness noted that after January 2001 the barrel cheese price was adjusted to a 38 percent moisture standard. The witness asserted that this moisture standard change, on average, increased the barrel cheese price 2.2 cents per pound during the last 5 years. The witness estimated that eliminating the 3-cent barrel-block adjustment would reduce the Class III price by $0.1624 per cwt.

The Leprino witness also opposed adoption of Proposal 13 because it would reduce the amount of data used to compute the classified milk prices. The witness said that the barrel cheese price should continue as a factor in computing the Class III price because of the additional cheese volume for which it accounts.

Comments to the tentative partial final decision submitted by Leprino opposed the denial of Proposal 12. Leprino disagreed with the reasoning advanced in the tentative partial final decision that differences in selling prices have no causal relationship to differences in manufacturing costs. Leprino argued that the 3-cent cost add-on was originally incorporated into the product-price formulas because historically the selling price difference between blocks and barrels was 3-cents. This difference in selling prices, Leprino asserted, has always been attributed to manufacturing cost differences. Regardless, Leprino added that the Davisco plant cost data contained in the record proves that the difference in packaging costs between blocks and barrels is negligible; therefore Proposal 12 should be adopted. Leprino's comments were endorsed by Glanbia.

The post-hearing brief submitted on behalf of Agri-Mark et al. maintained that the 3-cent barrel adjustment should be eliminated and supported the views of the IDFA witness and its post-hearing brief urging the adoption of Proposal 12. Agri-Mark et al. reiterated this view in its comments and exceptions on the tentative partial final decision. Agri-Mark et al. argued that proponents of the elimination of the 3-cent add-on had provided enough record evidence to meet their administrative burden. Agri-Mark et al. summarized the regulatory history of the 3-cent barrel adjustment. They argued that record evidence by the Davisco witness demonstrated that the packaging cost difference between block and barrel cheese is negligible, and maintained that opponents of its elimination offered no rebuttal evidence.

The post-hearing brief submitted on behalf of Dairylea et al. opposed eliminating the 3-cent per pound barrel-block cheese adjustment as advanced in Proposal 12. The brief expressed the opinion that cost data from one cheese plant offered by Davisco Foods is not adequate to support adopting the proposed change. According to the brief, cost data presented by Davisco Foods only compared packaging and capital costs for producing barrel and block cheese. The brief argued that despite Davisco's belief that total manufacturing costs before packaging were the same, there may be differences in other processing costs because block and barrels are produced at different moisture contents. The brief asserted that if Davisco Foods cost data is adjusted to reflect average moisture content for blocks (37.75 percent) and barrels (34 percent), the cost of capital and packaging for blocks would be 10 percent higher than for barrels.

The Dairylea et al. brief also addressed the proponents' assertion that incorporating CPDMP data into the determination of new make allowances provides the necessary recognition of

the cost difference between block and barrel production. The brief argued that CDFA data only includes cost data from block production and its continued use would mean that new make allowances would be too heavily weighted towards block production. The brief also asserted that evidence showing the market price relationship between blocks and barrels does not provide a basis to conclude that similar cost changes have occurred in the manufacturing costs of block and barrel cheese.

In its brief, DPNM et al. opposed the reduction or elimination of the 3-cent barrel price adjustment (Proposal 12) unless Proposal 15 was adopted. The brief explained that Proposal 15 (using the CME to determine product prices) is intended to use only the CME block cheese price, not an average of the 500-pound barrel and 40-pound block prices. If Proposal 15 is adopted as intended, DPNM et al. wrote, the 3-cent barrel adjustment would no longer be necessary.

Comments filed by DPNM et al. in response to the tentative partial final decision supported the continued use of the 3-cent barrel price adjustment if USDA continues to use both block and barrel survey prices in the Class III price formulas.

5. Product Price Series

A witness appearing on behalf of Agri-Mark testified in support of Proposal 14. The witness said that the proposed price series would use a combination of the NASS and CME cheese prices in the Class III product-price formula. The witness said that Proposal 14 seeks to incorporate current CME data to reduce the monthly differences between prices that most manufacturers sell their cheese and the cheese price from which the manufacturers cost of raw milk is determined. The witness said that cheese manufacturers use the CME cheese price to set their base cheese price which is then reflected in the NASS cheese price announced two weeks later. The witness explained by example that the two week lag between CME and NASS price releases was a problem in 2004 when cheese prices were rapidly changing from week-to-week causing the two price series to vary by more than 10 cents per pound during seven months of the year. According to an analysis conducted by the witness from January 2000 until February 2007, 98 percent of the variation in the NASS block cheese price and 87 percent of the variation of the NASS barrel cheese price could be explained by the CME price.

The Agri-Mark witness provided an example to illustrate how Proposal 14 could be administered. The witness explained that the cheese price in the Class III formula for April 2007 would be calculated as follows: (1) Compute the average CME cheese price for the four weeks in April; (2) add the average NASS cheese price for the last two weeks of March and the first two weeks of April; and (3) subtract the average CME cheese price for the four weeks of March. The Agri-Mark witness explained that the cheese price used to determine the advanced Class I price should be as follows: (1) Compute the average CME cheese price for the second and third weeks of March; (2) add the average NASS cheese price for the first and second weeks of March; and (3) subtract the average CME cheese price for the last two weeks of February. The witness was of the opinion that these new formulas would enable USDA to use current CME prices while in the long-run the NASS price series would continue as the primary determinant of cheese prices. The witness was of the opinion that the resulting ''hybrid price'' would reduce large monthly price variations like those experienced in 2004. The witness said that Agri-Mark does not support the sole use of CME prices in the price formulas because of low trading volume and the possibility of price manipulation.

The Agri-Mark witness indicated that adopting this hybrid price would not significantly change the average USDA cheese prices or FMMO producer blend prices. The witness estimated that the average Class III prices would have been approximately $0.005 per pound less and the Northeast order producer blend prices would have averaged $0.003 per cwt less using this hybrid price during 2003–2006. The witness did not see a need to compute a hybrid price for butter because the lag between the CME and NASS price reporting is not a problem.

In their post-hearing brief, Agri-Mark et al. reiterated their support for adoption of Proposal 14 and opposition to adopting Proposals 15 and 18, both of which are discussed subsequently.

In their comments and exception to the tentative partial final decision, Agri-Mark et al. expressed support for USDA's decision to deny Proposals 14, 15 and 18.

A witness appearing on behalf of DPNM et al. testified in support of using CME product prices in the FMMO price formulas as advanced in Proposal 15. The witness was of the opinion that the CME is a superior price discovery mechanism. The witness asserted that the time lag associated with the NASS price survey has, at times, created huge differences between the advanced Class I and Class II prices and the monthly prices that are incorporated into the Class III and Class IV formulas. The witness opined that the time lag associated with using the NASS price survey sends incorrect price signals to producers and that it creates a disincentive for manufacturers to seek higher product prices in the market as it results in increased raw milk costs.

The DPNM et al. witness testified that NASS product prices track closely with CME prices for cheese and butter. However, the witness said, the NASS NFDM price does not reflect the current cash market. The witness stated that the NFDM market is unique because there are only a few sellers and they tend to use the previous week's NASS NFDM price to sell their products. The witness stated that there has been a growing price disparity between the NASS NFDM price and the NFDM price reported by Dairy Market News. According to the witness, during the first quarter of 2007, the monthly NASS NFDM prices averaged $0.12 per pound less than what was reported as the average Western Mostly NFDM price by Dairy Market News. The witness calculated that this resulted in Class II and Class IV prices that were $1.03 per cwt lower. The witness asserted that the price discrepancy could be a reporting error, noting that NASS does not have the authority to audit its surveyed price data.

The DPNM et al. witness testified that CME product prices could become the preferred price discovery mechanism because they originate in a public market that, since 1997, has expanded trading times and the number of dairy products traded. The witness stressed that CME product prices are more reflective of the current market for cheese, butter and dry whey because many manufacturers refer to the current CME product price when making their sales. The witness added that the involvement of the Commodity Futures Trading Commission (CFTC) provides for regulatory oversight. However, the witness testified that NFDM is not actively traded on the CME because packaging specifications require that NFDM traded on the CME be in government-specified bags. The witness was of the opinion that if the packaging requirement was changed, then the CME would become a viable market for NFDM.

The brief submitted by DPNM et al. expressed support for adoption of Proposal 15 and reiterated the position that NASS product price surveys should be replaced by CME product prices in

each of the price formulas except for the other solids formula. According to the brief, since the other solids formula uses the NASS dry whey price and the CME does not have a cash traded dry whey price, continued use of the NASS dry whey price is appropriate. The brief indicated that the use of CME prices would alleviate timing and circularity issues associated with relying on NASS survey prices. The brief noted that this position is supported in a June 2007 General Accountability Office (GAO) study.

The DPNM et al. brief expressed support for using a competitive pay price series to establish classified Federal order milk prices. However, the brief expressed the opinion that Proposal 18 needs to be more fully developed. It further requested that USDA investigate the use of a competitive pay price and convene a hearing to consider it as an alternative to NASS survey price information.

DPNM et al. exceptions to the tentative partial final decision stated their opposition to the denial of Proposal 15. They reiterated arguments made in their hearing testimony that the NASS survey is vulnerable to manipulation. Consequently, DPNM et al. advocated use of the CME prices in the product-price formulas to provide for transparent market signals.

A witness appearing on behalf of the Maine Dairy Industry Association (MDIA) testified in support of Proposal 18. According to the witness, MDIA is an association that represents all of Maine's 350 dairy farmers. The witness said that Proposal 18 seeks to establish an average competitive pay price for milk by incorporating a factor into the other solids portion of the Class III price formula to account for any monthly spread between the component prices for milk and a competitive pay price for equivalent Grade A milk. The witness was of the opinion that a competitive pay price is a superior method to product-price formulas in determining the value of milk used to set regulated minimum prices. The witness contended that butter, NFDM, cheese and dry whey each have a separate market that responds to unique supply and demand factors. The witness explained that in a competitive pay price system, buyers pay for raw milk according to the supply and demand conditions of the particular market in which they operate.

The MDIA witness stated that USDA has previously considered competitive pay price mechanisms for pricing Class III milk. The witness explained that a 1994–1996 simulated analysis conducted by USDA revealed several difficulties with competitive pay prices, such as: (1) The inability to eliminate the influence of regulated minimum prices; (2) inadequate vigorous competition among buyers of milk; and (3) the problems associated with using a competitive pricing scheme based on the competitive situation for milk in Minnesota and Wisconsin. The witness explained that these limitations formed the basis for Proposal 18.

The MDIA witness explained how Proposal 18's competitive pay price would be administered. The witness said that geographic areas where an adequate level of competition for milk exists should be determined by computing a Herfindahl index for each county. The witness said this index is a measurement of market competitiveness wherein a low Herfindahl index indicates more competition for milk. For example, competition for milk in a county with a value of 0.3450 is greater than in a county with a value of 0.3500. The witness proposed that competitive price zones be determined by aggregating clusters of ten or more contiguous counties with values below 0.33. The witness said that an ideal situation would be if at least a third of the manufacturing milk in Federal order marketing areas were competitive price zones. The witness explained that handlers purchasing milk within these zones would be exempt from paying minimum classified prices, but would still be required to pay current differentials for Class I and Class II milk. According to the witness, these differentials would be pooled and producers within the competitive price zones would receive a 12-month rolling average producer price differential (PPD). Handlers would still pay regulated classified prices for milk produced outside of these zones, the witness said.

According to the MDIA witness, market administrators would collect actual payment data from handlers for milk purchased within the competitive price zones for the preceding month and estimated payments for the current month. The market administrators would then compute a weighted average price and deduct from that price the 12-month rolling average PPD for the month. This residual would be the value of manufacturing milk in the competitive price zone. A national average competitive manufacturing milk price would then be computed by aggregating the average price and volume data from all reporting competitive price zones. This result would become the new minimum Class III price for milk purchases outside of the competitive price zones.

The MDIA witness said that the computation of protein and fat prices would be unchanged under its competitive price proposal. However, the other solids price would be the residual value of the Class III price once the values of butterfat and protein were deducted. The witness explained that indirect compensation to farmers, such as hauling charges, would not be included in the computation of a weighted average price. However, the witness also noted that Class III milk prices could potentially be decreased if manufacturers choose to exploit a ''loophole'' and shift more monies into hauling subsidies.

The MDIA witness asserted that, over the long run, producers located inside competitive price zones would receive the same revenue for their milk as producers located outside of competitive price zones. The witness did not know if Proposal 18's pricing method would generate higher or lower prices to all producers than the prices generated by the current end-product pricing system.

The MDIA witness was of the opinion that the largest group of counties in competitive price zones would be in the Upper Midwest (UMW) marketing area because of the large number of cheese plants competing for a milk supply. The witness predicted that this would most likely lead to a weighted average competitive pay price that is heavily influenced by prices paid by UMW plants that historically have been higher than Federal order minimum prices. The witness conceded that a competitive pay price heavily weighted to conditions in the UMW would not reflect national supply and demand conditions.

A Maine dairy farmer appearing on behalf of the MDIA testified in support of Proposal 18. The witness testified that Maine is not an area regulated by the Federal milk marketing order program, but that producer prices in Maine are heavily influenced by those established under the Northeast order. The witness stated that, in the face of Federal minimum prices that are too low and driven by unpredictable price swings for dairy products, Maine dairy farmers have had to turn to alternative sources of income including state subsidies and increased equity financing to keep their farms operating. After adjusting USDA cost of production information for Vermont to account for lower labor and feed costs, the MDIA witness estimated the cost of production for a Maine dairy farmer in 2004, 2005 and 2006, to be $19 per cwt, $20 per cwt

and $24 per cwt, respectively. The witness compared this price to the Northeast Federal order mailbox prices of $16.29 per cwt, $15.39 per cwt and $13.22 per cwt in 2004, 2005 and 2006, respectively. Using the Vermont cost data and the Northeast Federal order price data, the witness estimated that for a medium-sized Maine dairy farm with 150 cows, average net income fell by $70,000 in 2004, $140,000 in 2005, and $320,000 in 2006. The witness asserted that this increasing difference between revenue and costs illustrates why the Federal order pricing system needs to be amended to more fully reflect dairy farmer cost-of-production.

The MDIA witness also testified regarding two programs operated by the State of Maine. One program boosts revenue to Maine dairy farmers by distributing an over-order price payment determined by the Maine Milk Commission, and a second program provides for a subsidy payment from the State's general fund. However, the witness said that during recent months these payments have not been enough to make up for the difference between declining milk prices and increasing production costs. The witness was of the opinion that, in the long-run, these State programs cannot be relied upon to provide a stable marketplace for dairy farmers.

A post-hearing brief filed on behalf of MDIA reiterated the position that end-product pricing does not result in high enough prices for the dairy farmers of the northeastern region of the United States. MDIA stated that Proposal 18 is ''a good starting point'' from which to develop a competitive price scheme that would replace the current scheme which derives prices from the values of manufactured dairy products. The brief acknowledged that MDIA's proposal is complex and lacks much of the detail needed for its adoption. However, MDIA reiterated its position that the adoption of a competitive pay price system would improve the valuation of producer milk and the subsequent determination of minimum classified prices.

The MDIA brief argued that price discovery based on competitive conditions for milk is superior to milk prices derived from the market prices of manufactured dairy products. The brief insisted that prices derived using sound economic principles and accurate market data are crucial to accurate price determination. The brief stressed that ending a competitive pay price series for milk has harmed dairy farmers, especially in the northeastern, midwestern and southeastern regions of the country. The brief attributed observed price volatility in milk prices to the use of end-product price formulas. The brief asserted that the product-price formulas and the logic underlying component pricing do not meet the articulated policy of the AMAA. The brief argued that the AMAA's paramount objectives are the stabilization and enhancement of producer income.

Exceptions to the tentative partial final decision filed by MDIA opposed the denial of MDIA's motion to reopen the hearing. The witness appearing on behalf of Dairylea supported using the CME cheese and butter prices as substitutes for the NASS surveyed prices as advanced in Proposal 15. The witness said that the industry already uses the CME to set base selling prices. The witness asserted that using NASS surveys to set minimum prices has resulted in disorderly market conditions because the time lag of NASS product price reporting results in short-term manufacturing losses. According to the witness, using the CME prices for butter and cheese to set minimum classified milk prices would eliminate the time lag issue and price circularity issues.

A post-hearing brief submitted on behalf of Dairylea et al. opposed adoption of Proposal 18 based on the conclusion that the record evidence is insufficient to support its adoption. Their post-hearing brief specifically expressed support for the portion of Proposal 15 proposing the use of CME prices for cheese and butter in the product price formulas. This was not supported by DFA. While Dairylea's brief expressed the opinion that using CME prices would address the issue of price circularity inherent in the NASS price survey, they did not support the use of CME prices for dry whey and NFDM.

In a separate post-hearing brief, DFA specifically expressed support for adoption of the hybrid price series advanced in Proposal 14. DFA emphasized that the hybrid price series would transmit more timely market signals to processors and producers by aligning the purchase price of milk with the market prices of milk products.

The witness appearing on behalf of IDFA testified in opposition to adoption of Proposal 14. The witness was of the opinion that using the proposed hybrid price would result in unnecessarily complex price formulas that would provide no tangible benefit to the industry. The witness acknowledged the problems associated with the time-lag of the NASS price series, but stated that there are alternative ways to address the lag adding complexity to the price formulas. Similar arguments were offered in IDFA's post-hearing brief.

The IDFA witness also testified in opposition to adoption of Proposal 15. The witness stated that the NASS product price survey provides the largest possible sample of wholesale prices and should continue to be relied upon in the product price formulas. The witness said that USDA's reasoning for relying on the NASS price survey in the Federal order reform decision is still relevant. The witness was of the opinion that many of the complaints associated with the NASS price series could be remedied if price reporting to NASS were electronic, mandatory and audited. IDFA insisted in its post-hearing brief that using the CME to determine product prices could result in product prices unrepresentative of actual market sale prices and could encourage product trading on the CME solely to manipulate the minimum classified milk prices established under Federal orders.

The IDFA witness also testified in opposition to adopting a competitive pay price series as advanced in Proposal 18. The witness indicated that currently no reliable unregulated milk supply of adequate size exists to become the basis for a competitive pay price series.

The witness appearing on behalf of Kraft opposed adoption of Proposal 15 and supported the continued use of the NASS price survey to determine classified prices. The witness explained that the NASS price survey is national in scope and represents a significantly larger proportion of national cheese production than does the CME. The witness was of the opinion that if CME prices are used to determine classified prices, the growing volume of cheese production and sales in the western states would not be adequately represented. Therefore, the witness concluded, NASS survey prices best reflect the settled sales prices at the plants. The witness acknowledged the time lag between CME prices and the NASS survey prices and insisted that a better solution to the time lag problem would be to require timelier reporting of prices to NASS rather than abandon the NASS price survey.

The witness appearing on behalf of Saputo opposed the adoption of Proposals 14 or 15 and indicated support for the continued use of the NASS price survey. The witness was of the opinion that timelier reporting of prices to NASS would counter asserted problems associated with the lag between the CME and NASS survey prices. The Saputo witness opposed using the CME to set minimum prices because, in the witness' opinion, the CME is too thin a market to provide accurate market signals.

The witness appearing on behalf of Leprino testified in opposition to Proposal 15 because of the low volume of cheese that is traded on the CME as compared to the volume of cheese production that is represented in the NASS survey. The witness also testified that Leprino is not concerned with the time lag between the CME prices and the NASS price survey. The witness was of the opinion that the time lag is predictable and manageable for manufacturers.

The witness appearing on behalf of LOL testified in opposition to Proposal 15. The witness was of the opinion that the more appropriate solution to the problem of increased manufacturing costs is a more timely method of updating make allowances and not the use of the CME to derive classified prices. The witness argued that the NASS price survey is more representative of the national cheese market while the CME continues to remain a thinly traded market.

The witness appearing on behalf of HP Hood opposed adoption of Proposal 18 because of the lack of analysis available to determine its utility.

A post-hearing brief filed on behalf of O–AT–KA stated that Proposal 18 may warrant further consideration but it should not be adopted in this proceeding.

Comments to the tentative final partial decision filed separately by IDFA, Grande, Glanbia, Kraft, Leprino and WCMA expressed support for the denial of Proposals 14, 15 and 18.

6. Other Solids Price

A witness appearing on behalf of NAJ testified in support of adopting Proposal 16. The witness was of the opinion that the value of dry whey should be derived primarily from its protein content, rather than its other solids content as it is currently computed. The witness acknowledged that from August 2006 to February 2007 the NASS dry whey price more than doubled from 29.65 cents per pound to 60.05 cents per pound and the lactose price reported in Dairy Market News increased from 33.89 cents per pound to 59.34 cents per pound. The witness was of the opinion that the recent increase in lactose prices is reflective of a shortage in lactose processing capacity and not a lack of available lactose. The witness believed that the higher dry whey and lactose prices prior to the fall of 2006 justify valuing dry whey on a protein rather than on an other solids basis. According to the NAJ witness, if Proposal 16 had been in place from April 2003 to September 2006, the Class III price would have been one-cent per cwt higher and only marginally higher since September 2006.

The NAJ witness testified that from 2003 to 2006 dry whey production only increased 1.5 percent, while the increased production of whey protein concentrates (WPCs) ranged from 6.6 percent to 45.5 percent depending on the percent protein in the WPC. The witness concluded that purchasers of whey solids prefer WPC products that are high in protein. It is this preference that led the witness to conclude that dry whey should be priced on a protein basis.

Using Dairy Market News' monthly prices since January 2000, the witness discussed the costs of buying a pound of protein (protein parity) and a pound of lactose (lactose parity) in dry whey or WPC–34 (34 percent protein). The witness concluded that, in all months, the average price per pound of protein in dry whey or WPC–34 exceeded the average price per pound of lactose. The witness also asserted that the cost per pound of lactose in WPC–34 is higher than if lactose were purchased separately. According to the witness, this price relationship reveals that buyers of dry whey and WPCs are purchasing these products for their protein content rather than for their lactose content. The witness also emphasized that the value of protein in dry whey and WPC–34 more closely reflect each use than does lactose value contained in the two products.

The NAJ witness also offered a modification to Proposal 16 such that the NASS price surveys would be expanded to include collection and reporting of market prices for various WPC's and lactose. The witness said this would build a dataset for use in future rulemakings to consider the appropriate valuation of whey solids.

A post-hearing brief filed on behalf of NAJ reiterated positions given in testimony. According to the brief, the current other solids price formula does not reasonably connect the market value of whey solids which NAJ maintains is based on its protein content and how producers are paid for whey.

NAJ stated its opposition to the denial of Proposal 16 in its exceptions to the tentative partial final decision. NAJ argued that counter to what USDA found as a flaw in Proposal 16, one of its strengths is its revenue neutrality. NAJ was of the opinion that adoption of Proposal 16 would give producers a financial incentive to increase their milk protein content. NAJ reiterated arguments that Proposal 16 would allow manufacturers to account to the pool for protein, the component in whey that is most valued, while also simplifying the product-price formulas. NAJ was also of the opinion that USDA's decision to only make changes in the product-price formulas to the make allowances and the butterfat yield factor indicates its unwillingness to amend other factors in the formulas.

The witness appearing on behalf of IDFA opposed adoption of Proposal 16 because it was too complex and would inappropriately value whey based on its protein content when it is comprised mainly of other solids. The witness said that USDA's preliminary economic analysis demonstrates that adoption of Proposal 16 could increase the cost of high protein milk while lowering the cost of low protein milk. However, milk's other solids content (primarily whey) does not change in relationship to the protein content, the witness said. The witness also stated it would be inappropriate to price dry whey on its protein content since protein does not affect whey yields.

The witness appearing on behalf of Leprino testified in opposition to Proposal 16 because its adoption would result in distorted milk component values. The witness insisted that since dry whey yields are primarily driven by the lactose content of milk and the other solids composition, it would be inappropriate to price whey on its protein content.

The post-hearing brief filed on behalf of Agri-Mark et al. opposed adoption of Proposal 16 arguing that the price of other solids would then be determined on its protein component which has no impact on yield. The brief claimed that since there is no standardized protein content for whey, adoption of Proposal 16 could result in significant over-valuing of the protein in whey. However, the brief supported NAJ's call for USDA to collect manufacturing cost and price data for WPCs and lactose on the basis that it would provide data on how to appropriately value whey solids for use in future proceedings.

The post-hearing brief filed on behalf of Dairylea et al. opposed adoption of Proposal 16 because it would not add value or efficiency to the product price formulas.

The post-hearing brief filed on behalf of DPNM et al. opposed the adoption of Proposal 16. However, the brief did express support for NAJ's call for USDA collection of prices, manufacturing costs and volumes for whey protein concentrates and whey protein isolates.

Comments filed separately by Agri-Mark et al.; DPNM et al.; IDFA; Grande; Glanbia; Kraft and Leprino in response to the tentative partial final decision expressed support for the denial of Proposal 16.

A witness from Pennsylvania State University offered testimony on the use of an econometric model framework to analyze changes to the Federal milk marketing orders from all the proposals under consideration and provided the results at the hearing. The testimony was not given on behalf of the Pennsylvania State University. The witness testified neither in support of, nor in opposition to, any proposals. The witness explained that the model is a short-run, supply-side model that does not take into account changes in milk demand. The witness said that the model was used to analyze scenarios as outlined in the USDA preliminary economic analysis that was based on the USDA Baseline Projections to 2015. The witness concluded that the USDA preliminary economic analysis did not accurately reflect changes in the milk supply because it did not adequately account for the increase in feed prices and the resulting effect on producer decisions.

A witness testifying on behalf of the Ohio Farmers Union (OFU), National Farmers Union (NFU) and the National Family Farm Coalition (NFFC) called for the hearing to be terminated because dairy farmers continuously face low milk prices and high input costs, and that these concerns were not being addressed in this proceeding. The witness was of the opinion that the FMMO system was no longer accomplishing its mission of returning market power to dairy farmers.

7. Energy Cost Adjuster

A witness from NMPF testified that energy costs are the most volatile manufacturing input cost in dairy manufacturing. The witness asserted that increases in energy costs have countered many of the measures manufacturers have taken to increase productivity and efficiency.

The NMPF witness testified that the current make allowance levels reliance on a fixed energy cost derived from information that existed at a single point in time is no longer appropriate. The witness said USDA should instead adopt a monthly energy price adjuster to capture the change in energy prices that may occur from month to month. The witness explained that the base energy cost should be derived from surveyed energy costs in the manufacturing cost surveys used to determine the make allowances. If two or more surveys were used to determine make allowances, then the energy costs of each survey should be weighted accordingly, the witness said. According to the witness, an energy price adjustor would then be added (or subtracted) to the base energy cost value.

The NMPF witness explained that the energy price adjustor should be computed using the Bureau of Labor Statistics Producer Price Indexes for Industrial Electricity and Industrial Natural Gas (PPI). The witness said that the time period selected for the energy price adjustor should correspond with the same time period of the manufacturing cost survey data. The witness suggested the use of the monthly PPI series for several energy products and proposed 2005 as the base period from which percentage changes would be calculated. The witness stressed that if an energy price adjuster is not adopted, then the make allowances that are determined as a result of the current proceeding may become obsolete prior to implementation.

The NMPF witness said that the adoption of a monthly energy price adjustor would help maintain equity between producers and manufacturers given that processors would not be unduly harmed when energy prices rise while producers would not be harmed when energy prices fall. The witness was of the opinion that it was not necessary to establish monthly indexes for other cost factors contained in the make allowances.

The NMPF witness asserted that if an annual manufacturing survey as offered in Proposal 2 is adopted, then an energy cost factor should be used in making monthly adjustments to make allowances. The witness was of the opinion that even if make allowances were updated on an annual basis, manufacturing cost data as old as 24 months would be incorporated. According to the witness, energy prices vary so much over short time periods that make allowances are essentially using a fixed energy cost factor which results in make allowances that are neither timely nor accurate.

A post-hearing brief filed on behalf of NMPF reiterated their testimony in support of the adoption of Proposal 17. NMPF's brief offered various methods USDA could use to determine an appropriate base energy cost factor and corresponding monthly energy price adjustor.

The NMPF brief also addressed other hearing participants' objections that an energy price adjustor would inhibit a plant's ability to use the futures markets to hedge risk. The brief said that while energy futures can be used to reduce energy price volatility, a plant is more likely to lock in a high energy price if that plant predicts energy costs will rise above levels covered by current make allowances. The brief also argued that the use of energy futures may not be applicable for balancing plants facing unpredictable energy costs due to large seasonal fluctuations in product output.

A witness appearing on behalf of MMPA testified in support of Proposal 17. The witness said that the large fluctuations in gas and energy prices in recent years demonstrate the need for an energy price adjustor in the determination of make allowances. The witness also stated that adoption of the adjustor would ensure that manufacturers could recover increased energy costs while also preventing financial windfalls should energy prices decrease. Agri-Mark, Dairylea and O–AT–KA also offered support for Proposal 17 in their post-hearing briefs.

The witness appearing on behalf of IDFA testified in opposition to the adoption of Proposal 17 and was of the opinion that adoption of the proposal would complicate manufacturers' ability to manage risk. IDFA reiterated these arguments in its post-hearing brief. Kraft, Lactalis, HP Hood and Leprino supported IDFA's position opposing the adoption of Proposal 17.

With the exception of DPNM et al., Proposal 17 was supported by all producer organizations that market the milk of dairy farmers who participated in this proceeding, including those who manufacture NFDM and dry whey. The record reflects that manufacturers of NFDM and dry whey, in particular, intensively use either natural gas or electricity in their drying processes. Accordingly, proponents favored the ability of an energy cost adjustor to reflect actual natural gas or electricity prices in minimum prices paid for producer milk. Supporters also testified that this feature would account for monthly energy price changes without permanently decreasing the value of producer milk until subsequent rulemaking changes to make allowance levels can be made.

Opposition to Proposal 17 was universal among IDFA, along with its member companies Saputo, Kraft, H.P. Hood and Leprino, who testified at the hearing. The central themes of their opposition were that a monthly energy adjuster would undermine the value of existing risk management tools, and increase the complexity of product price formulas. DPNM et al. also opposed adoption of Proposal 17 because, they assert, it would add complexity to the pricing system.

8. Cost-of-Production Add-on

A witness appearing on behalf of Dairylea testified that manufacturing plants would negotiate a price for the

applicable product with wholesale customers that included a factor reflecting manufacturing costs not reflected in the pricing formula make allowances. The witness said that these surcharges, or ''add-ons,'' would not be included in the NASS price survey and therefore would not affect Class III and Class IV prices. According to the witness, the negotiated add-ons would be capped at a maximum amount to be determined through a separate formal rulemaking.

The Dairylea witness explained that when a dairy manufacturer attempts to pass on its higher manufacturing costs by charging higher prices to its customers, the price increase is captured in the NASS price survey which, in turn, increases a manufacturer's raw milk costs through higher Class III and Class IV prices. The witness described this as a ''price circularity'' problem. The witness was of the opinion that Proposal 20 provided a method whereby dairy processors could pass on higher manufacturing costs not reflected in the product-price formulas to customers without those higher prices being reflected in the NASS price survey. According to the witness, classified prices would not be affected by a change in manufacturing costs.

The Dairylea witness acknowledged that manufacturers have experienced higher processing costs than those that are represented by the current make allowances. However, according to the witness, higher make allowances cause dairy farmers to receive lower prices for their milk even though they also face higher production costs. The witness said that because dairy farmers are unable to pass on their higher costs of production, as a matter of fairness and equity, processors should seek needed manufacturing cost recovery through the price they charge their customers, rather than through the price they pay dairy farmers for raw milk.

The Dairylea witness emphasized that while the manufacturing cost add-ons would not be included in the NASS price survey, any amount a manufacturer charged in excess of the cost add-ons would be required to be reported to NASS. The witness testified that the maximum manufacturing cost add-on should only be changed through formal rulemaking and that the value of a cost add-on should never be negative. The witness was of the opinion that the National Fluid Milk Processors Promotion Program (MilkPEP) check-off assessment administered by AMS and the in-state over-order premium program administered by the Pennsylvania Milk Marketing Board are examples of successful programs providing for surcharges.

The Dairylea witness viewed adoption of an energy price adjustor to modify make allowances as detailed in Proposal 17 to be a complement to Proposal 20. The witness explained that any change in the energy price adjustor should be subtracted from the value of the manufacturing cost add-on. For example, the witness explained that for a given month, if the manufacturing cost add-on for cheese was determined to be $0.0029 per pound and the energy price adjustor was $0.0023 per pound, then the maximum cheese manufacturing cost add-on for that month would be $0.0006 per pound. In months when the energy price adjustment was greater than the maximum cost add-on, then the cost add-on for that month would be zero, the witness said.

A joint post-hearing brief filed on behalf of Dairylea and Dairy Farmers of America (Dairylea et al.) reiterated that adoption of the cost add-on would address the price circularity problem inherent to the NASS price survey. The brief argued that the Federal order system needs to evolve such that manufacturing cost increases can be fully passed on to consumers without lowering the value of producer milk used to make Class III and Class IV products.

The Dairylea et al. brief emphasized that opposition to the adoption of Proposal 20 was based on the invalid assumptions that: (1) Manufacturing plants would not be able to negotiate cost add-ons, and (2) manufacturing plants regulated by Federal orders would become disadvantaged. The brief noted that a NFDM processor has been successful in negotiating an energy cost surcharge with its customers, despite competition from non-pool NFDM plants located in the United States and abroad. The brief also countered opposition arguments suggesting that a buyer would simply purchase finished products on a spot basis from the Chicago Mercantile Exchange (CME) to avoid paying a manufacturing cost add-on. The brief asserted that manufacturing plants, regardless of pool status, would not give up the opportunity to maximize profit by charging a cost add-on.

The witness appearing on behalf of HP Hood testified as being receptive to the manufacturing cost add-on feature of Proposal 20 without offering any further details or justification.

The witness appearing on behalf of IDFA testified in opposition to the adoption of Proposal 20. The witness disagreed with the assertion that all manufacturers would be able to negotiate cost add-ons with their customers. The witness insisted that manufacturers unsuccessful in negotiating the cost add-on would only be able to recoup manufacturing costs equal to the product-price formula's make allowances. The witness argued that the examples of successfully administered surcharges—the Milk PEP check-off assessment and the Pennsylvania Milk Marketing Board over-order premiums—are misleading because they involve regulated charges that processors are required to pay. The witness was of the opinion that Federally regulated manufacturers would be harmed by the adoption of manufacturing cost add-ons because customers would simply seek a lower-cost product from other manufacturers whose milk is not priced by an order or would make spot purchases of product from the CME.

In characterizing that all cheeses have a price relationship in the market, the IDFA witness strongly disagreed that a commodity cheddar cheese manufacturer could include a cost add-on in its sales price. According to the witness, cost add-ons change the price relationship of commodity cheddar to other cheese varieties in the marketplace and as a result, cheesemakers buying pooled milk would be at a competitive disadvantage to those buying non-pooled milk. IDFA reiterated their opposition to the adoption of Proposal 20 in their post-hearing brief.

The witness appearing on behalf of Lactalis found merit with the intent of Proposal 20 but thought its method too complex and impractical, and therefore opposed its adoption. According to the witness, Lactalis operates six cheese plants in the United States. The witness was of the opinion that Federally regulated manufacturers would not be able to consistently and successfully negotiate a higher sales price with their customers to compensate for higher manufacturing costs.

In their post-hearing brief, Agri-Mark et al. opposed adoption of Proposal 20 on the grounds that it assumes plants can successfully negotiate manufacturing cost add-ons to recoup increased manufacturing costs. The brief expressed the opinion that a manufacturing cost add-on scheme would only be successful if all plants, including unregulated plants, simultaneously increased prices and clearly labeled the cost add-on on all invoices so that the add-on would not be included in the NASS price survey. The brief asserted that unregulated manufacturing plants have no incentive to report a manufacturing cost add-on

because NASS prices do not impact their raw milk costs in the same way as plants regulated by Federal orders. The brief also stressed that if plants were unsuccessful in negotiating a manufacturing cost add-on, they would likely be unable to obtain cost relief elsewhere.

In their post-hearing brief, DPNM et al. opposed the adoption of a manufacturing cost add-on in an attempt to eliminate the circularity problem inherent to the NASS survey (now administered by AMS). DPNM et al. was of the opinion that USDA resources should instead be concentrated on developing a competitive pay price to replace the product-price formulas.

A post-hearing brief filed on behalf of O-AT-KA stated that while Proposal 20 may warrant further consideration, it should not be adopted in this proceeding.

Discussion and Findings

1. Amending the Product Price Formulas

This proceeding offered a wide array of proposals aimed at changing FMMO end-product pricing formulas used to establish classified prices in all orders. The original 19 proposals noticed range from those that seek to abandon the current product-price formulas used to compute minimum Class III and Class IV prices to those that seek a variety of changes to the product-price formulas including manufacturing cost factors (make allowances), yield factors, technical factors and the authority to separate a portion of manufactured product sales prices from what otherwise is used to establish subsequent raw milk prices. The diversity of proposals considered indicates a lack of consensus within the dairy industry concerning how the Federal order program should set minimum milk prices in general and more specifically, how the many features of the product-price formulas should be altered.

Witnesses representing Agri-Mark, NMPF, Leprino, Twin County and IDFA provided evidence that energy, transportation, labor and packaging costs for manufacturing processors have increased since the adoption of the March 2007 make allowances. As pointed out by IDFA, make allowances account for manufacturing costs in the Class III and Class IV price formulas but do not change as those costs change, therefore, increasing make allowances is the only reasonable way that those increased costs can be recovered.

The ability of a manufacturer to offset cost increases is limited by the level of make allowances in the Class III and Class IV price formulas. Manufacturing processors are charged the FMMO minimum price for producer milk used to produce Class III and Class IV products. However, plant manufacturing cost increases may not be recovered because Class III and Class IV product-price formulas use make allowances that are fixed regardless of market conditions and change only by regulatory action. Simply put, when manufacturing cost increases result in higher costs than those provided for in the formula make allowance factors, the value of milk used to make those products may be over-valued.

Product-price formulas are relied upon to establish the minimum class prices of raw producer milk used to make Class III and Class IV products, which in turn establish Class I and Class II prices. The product-price formulas use market prices collected by AMS for cheddar cheese, Grade AA butter and dry whey to set a minimum price for Class III milk, and NFDM and Grade AA butter to set a minimum price for Class IV milk. No competitive pay price series currently exists that can be relied upon to establish a price for raw milk nationally. While some proponents look to the CME, the futures prices of the CME use the FMMO minimum class prices as the starting points for Class III and Class IV milk futures contracts.

In the absence of a competitive pay price series, product-price formulas based on cheese, dry whey, NFDM and butter serve as the only practical basis that the value of raw producer milk used in their production can be derived. A raw milk value is, in part, derived from sales price data collected by AMS from manufacturers who produce and market these commodity products. The information is aggregated weekly and reported in the AMS Dairy Product Sales Repot. The Class III and Class IV product-price formulas use, among other factors, the wholesale market prices of the manufactured products from which make allowance factors are subtracted. The remaining value, when converted to a milk equivalent basis, is the value of raw milk. Accordingly, the accuracy of deriving the minimum value of raw milk is dependent on the accuracy of the commodity sale prices reported and, in large part, the accuracy of the manufacturing cost factors, or make allowance factors, that are used in the pricing formulas.

The Agri-Mark proposal, Proposal 1, seeks to change make allowances used in the Class III and Class IV product formulas by relying on manufacturing cost data contained in the record of this proceeding and combining such data for plants outside of California with the most current manufacturing cost data published by the CDFA.[3] The two sets of manufacturing costs for cheese, NFDM, dry whey and butter would be combined on a weighted average basis in a manner consistent with the development of the current make allowances used in determining Class III and Class IV prices. Other proponents seek to use the most recently available publications of the CDFA.[4] This method was used in earlier rulemakings to develop the make allowances used in the product-price formulas.[5] [6]

Opponents of increasing make allowances argue a number of points—that they are already set at too high a level, that dairy farmer production costs also have increased significantly due to higher energy and feed costs, that processors should look beyond asking dairy farmers to receive less for their milk by charging more for manufactured products, and that make allowance increases should be made only when all dairy farmer production costs are captured in their milk pay price. These are not valid arguments for opposing how make allowances should be determined or what levels make allowances need to be in the Class III and Class IV product-price formulas. The record evidence demonstrates that make allowance levels are not reflective of the costs manufacturers incur in processing raw milk into the finished products of cheese, butter, NFDM and dry whey.

Additionally, the Class III and Class IV product-price formulas establish derived classified prices for producer

[3] Official Notices are taken of amendments to make allowances and all related documentation by the State of California in the Determinations, Findings, Conclusions and Order of the Secretary of Food and Agriculture, November 20, 2007, by the Office of the California Secretary of Agriculture. See: *http://www.cdfa.ca.gov/dairy/dairy_hearings_matrix.html*, and *http://www.cdfa.a.gov/dairy_hearings.html*. and Summary of Weighted Average Manufacturing Costs, Butter, Nonfat Dry Milk, Cheddar Cheese, and Dry Whey Powder, Released September 18, 2007; See *http://www.cdfa.ca.gov/dairy/pdf/manufcostexhibit2006.pdf.*

[4] Ibid

[5] Official notice is taken of 67 FR 67906 November 7, 2002, and 68 FR 7063, February 12, 2003, final decision and final rule respectively, and 66 FR 54064, 65 FR 76832.

[6] Official notice is taken of 71 FR 67467, November 22, 2006, 71 FR, 78333, December 29, 2006, as well as hearing testimony, exhibits, and post hearing briefs for the hearing and hearing continuations originally noticed in 71 FR 545, January 5, 2006, and related materials concerning make allowances and dairy product manufacturing costs, and published for the convenience of the public on the USDA, AMS Dairy Programs Web site at *www.ams.usda.gov/dairy.*

milk that are used nationally in all Federal milk orders. When dairy farmer production costs exceed the value that products are sold in the marketplace, no source of revenue from the marketplace is available to cover those costs.

In the aggregate, the costs of producing milk are reflected in the supply and demand conditions for the dairy products. When the supply of milk is insufficient to meet the demand for Class III and Class IV products, the prices for these products increase as do regulated minimum milk prices paid to dairy farmers because the milk is more valuable and the greater value is captured in the pricing formulas. Dairy farmers face no regulatory minimums in their costs and face no regulated minimum payment obligation in the way that regulated handlers must pay dairy farmers for milk.

It is reasonable to conclude that the make allowances used in the Class III and Class IV product-price formulas should be updated to reflect changes in the costs manufacturers incur in producing cheese, butter, dry whey and NFDM. It is necessary to reflect changes in manufacturing costs so that with the prevailing market prices for manufactured products, minimum Federal order classified prices can be set. In the record of this proceeding, the evidence demonstrates that the manufacturing costs of producing cheese, dry whey, NFDM and butter have increased since the implementation of the make allowances that were adopted on an interim basis, effective March 1, 2007.[7]

The record reveals an absence of industry consensus concerning the method that make allowances should be changed which in turn determines the level of the make allowances used in the Class III and Class IV product-price formulas. The differing proposed make allowance levels offered during this proceeding represent the changes in opinions concerning which manufacturing costs, which manufacturing cost survey(s) and which other factors should be considered. For example, some proponents seeking higher make allowances argued that only CPDMP survey data and/or RBCS survey data volumes should be relied upon as they are most reflective of costs borne by plants that pay Federal order prices.

Proposal 3, proposed by DPNM, was offered in opposition to increasing make allowances annually through a USDA administered manufacturing cost survey, as contained in Proposal 2 offered by Agri-Mark. DPNM argued that because the CPDMP 2005 survey represents manufacturing costs of plants not located in California, it should be relied upon exclusively in determining new make allowances. This argument is rejected. Proponents of increasing make allowances have clearly demonstrated that costs of producing Class III and Class IV products have increased. Continuing with the method previously relied upon—relying on manufacturing cost data from CPDMP's cost survey and CDFA in combination—has provided effective and useable make allowances in the pricing formulas.

At issue in this proceeding, in part, is whether make allowance levels should be increased and what method should be relied upon to determine those levels. On its face, the DPNM proposal to rely only on the CPDMP 2005 survey data in determining make allowances may seem reasonable as the survey excludes California plants. However, the argument does not consider other important factors that affect the marketing conditions for milk and dairy products represented by California's dairy sector and its impact on the supply and demand for milk and dairy products nationally. Cheese, butter, dry whey and NFDM compete in a national marketplace and as such, the prices established under the Class III and Class IV product-price formulas need to be reflective of marketing conditions that directly affect the determination of the minimum value of raw milk. Accordingly, Proposal 3 is not adopted.

Others participants supported the use of CDFA data. However, CDFA data represents a cost survey of only California processing plants. Federal order Class III and Class IV prices must be derived, as much as possible, from national estimates of manufacturing cost information. AMS survey prices, used to establish minimum Federal order prices, include California processing plants. Accordingly, it is reasonable to conclude that appropriately combining CDFA cost data with cost survey data of manufacturing plants not located in California will produce a measure of national manufacturing costs. This combination removes as much bias as possible in manufacturing costs measurements that may otherwise result from the exclusive use of one set of cost survey data over another.

While many hearing participants support the general method of determining make allowances proposed to be adopted in this decision, the record nevertheless reveals a lack of industry consensus in determining the specific factors to be used in the Class III and Class IV product-price formulas. This is illustrated by the information presented in Table 1 below. The seven sets of suggested make allowances represent proposals from four different groups at various points during this proceeding. The Agri-Mark, LOL and DPNM proposals were advanced by producer groups with different milk marketing and processing interests. Regulated processors, including some producer groups who are also regulated in their capacity as processors, are represented in this regard by the proposals advanced by IDFA and Leprino.

TABLE 1—PROPOSED MAKE ALLOWANCES

Proponents	Cheese $/lb	Butter $/lb	NFDM $/lb	Dry whey $/lb
Agri-Mark et. al. (Brief Pg 20–24)	0.2154	0.1725	0.1782	0.2080
IDFA (Brief pg 11)	0.2154	0.1725	0.1782	0.2080
IDFA (Brief pg 12)	0.2198	0.1846	0.1662	0.1976
Leprino (Brief pg 2)	0.2154	0.1725	0.1782	0.2080
DPNM Proposal	0.1638	0.1108	0.1410	0.1500
DPNM Brief (pg 1)	0.1638	0.1150	0.1410	0.1590
DPNM Brief (pg 20)	0.1638	0.1108	0.1410	0.1498

[7] Ibid. Official notice is taken of 72 FR 36341, July 3, 2007.

The range of proposed make allowances presented in Table 1 varies more than 30 percent between the highest and lowest proposed make allowance levels for cheese and dry whey and about 25 percent for NFDM. Similarly, the range from highest to lowest proposed make allowances for butter varies by more than 60 percent.

This final decision continues to find that it is appropriate to rely on the CPDMP 2006 survey of manufacturing costs in establishing the methodology of how make allowances should be determined. Its use is consistent with the methodology relied upon in determining the previous make allowance levels (effective March 1, 2007) in the Class III and Class IV product-price formulas that utilized the CPDMP 2005 survey. The CPDMP 2006 survey results provide a new estimation of manufacturing costs for plants not located in California. The CPDMP 2006 survey results, when used in conjunction with the most current survey results from CDFA, improve the estimation of manufacturing costs on a national basis and is consistent with the methodology relied upon in determining the previously set make allowances.

The CPDMP 2006 survey is essentially a new cost survey. The manufacturing cost data presented in the survey is similar to CPDMP's earlier cost survey in that they both rely on cost information provided from manufacturing plants not located in California. The surveys also are similar in that they collect manufacturing cost data for cheese, butter, NFDM and dry whey. However, there are differences with the most important one being the use of different samples of plants.

In the CPDMP 2005 survey, 16 cheese plants provided cost data that were incorporated to represent the weighted average costs to manufacture cheese. The 2006 survey represents data from 11 cheese plants, 8 of which were among the 16 plants that participated in the 2005 survey. For butter, 4 plants provided cost data in both the 2006 survey and the 2005 survey, but the surveys represent different collections of sampled plants with different production volumes. In addition, the butter manufacturing cost data in the 2006 survey differs from the earlier survey because it employed a different method for allocating costs between butter and NFDM production in plants that jointly manufacture these products. For NFDM, the plants sampled and reported in the 2006 survey included 7 of the 8 plants sampled as part of the 2005 survey.

The purpose of this proceeding, in part, is to determine if make allowances should be updated. Central to this question is determining the proper methodology for determining new make allowances given the available public data. Proponents of Proposal 1 argued that both CDFA and CPDMP data were used to determine the 2006 make allowances and that they should continue to be used because their combination better reflects conditions in the national marketplace. This decision continues to find that incorporating CDFA data into the make allowance computations is justified to best reflect the national market where dairy commodity products are sold. AMS prices used in the product-price formulas incorporate sales from across the country, including California. Despite comments filed by DPNM et al. this decision finds that it is appropriate to rely on cost data from California (CDFA survey) and the rest of the country (CPDMP survey). It is also appropriate, contrary to comments from DPNM et al. to assess the economic impact of the changes on the national market. Consequently, the record supports use of the 2006 CDFA data to determine make allowances.

DPNM et al. also commented that the Department failed to consider producer feed and fuel costs as mandated by the Food, Conservation and Energy Act of 2008 (2008 Farm Bill, (Pub. L. 110–246)). At the hearing, official notice was taken of USDA data pertaining to various producer costs. This information is part of the hearing record and as such, was considered by the Department in determining whether make allowances should be amended.

Comments regarding the tentative final decision from Agri-Mark et al. request that make allowances be updated to reflect energy costs through June 2008. Their comments cite the Bureau of Labor Statistics Producer Price Indexes for Industrial Natural Gas and Industrial Electric Power that demonstrate an increase in these energy prices through June 2008. Agri-Mark et al. assert that energy prices would remain high through 2009. Updating energy costs would result in make allowances that may give an inappropriate weight to one cost factor in an array of cost factors that are considered in determining make allowances. This would lock in an artificially high make allowance based solely on the costs of electricity and natural gas. Accordingly, the request by Agri-Mark's et al. is denied. The determination of the adopted make allowances for cheese, butter, NFDM and dry whey are discussed below. The make allowances proposed to be permanently adopted represent national manufacturing cost averages for cheese, butter, NFDM and dry whey. As found and determined in previous rulemakings on this issue, an estimation of manufacturing costs for national application requires that national production volumes of these commodities be considered in determining the level of make allowances to be relied upon and used in the Class III and Class IV product-price formulas. This is critical because Class III and Class IV prices are the same in all Federal milk marketing orders.

Butter Make Allowance

The butter manufacturing cost data presented in the CPDMP 2006 survey reports weighted average costs based on a sample of four plants. These data are combined with the average cost data from the most recent CDFA survey and averaged over the 2006 national production volume as published by NASS. The combination of the weighted average costs from the CPDMP and CDFA surveys over the national production volume plus a marketing cost adjustment of $0.0015 yields a make allowance $0.1715 per pound for butter.

NFDM Make Allowance

The NFDM manufacturing cost data presented in the CPDMP 2006 survey reports weighted average costs based on a sample of 7 non-California plants. These data are combined with the weighted average costs reported by CDFA and averaged over the 2006 national NFDM production volume as reported by NASS. The combination of the weighted average costs from the CPDMP and CDFA surveys by the national production volume plus a marketing cost adjustment of $0.0015 yields a make allowance $0.1678 per pound of NFDM.

Cheese Make Allowance

The cheese manufacturing cost data presented in the CPDMP 2006 survey reports an average cost of producing a pound of cheese of $0.1584 per pound. This is significantly below the cost of producing a pound of cheese reported by the CPDMP 2005 survey. The cost difference was explained by the inclusion of fewer small plants in the 2006 survey. In addition, cheese manufacturing costs of a larger plant were included in the 2006 survey that did not participate in the 2005 survey. This led to 2006 survey results that are heavily weighted towards larger volume plants.

The record reveals that eight cheese plants participated in both the 2005 and 2006 surveys and that their costs increased an average of $0.017 per pound of cheese between the two survey years. The Cornell researcher who administered both surveys conceded that this was the strongest conclusion which can be drawn from the cheese manufacturing data of the two surveys. Supporters of relying on the $0.017 factor to compute a new make allowance purport that this number can simply be added to the 2005 CPDMP plant average population cost of $0.2028. This decision finds that combining those two figures to compute a new cheese make allowance is procedurally incorrect. While a cost increase of $0.017 is significant and may be factually correct, it cannot be a factor in determining a new make allowance unless the original 2005 average manufacturing cost of the eight plants is included in the record. Therefore, use of the $0.017 cost increase in determining a new cheese make allowance is denied.

While the $0.017 cannot be used to determine a new cheese make allowance, the cost comparison between the same samples of plants does reveal that average manufacturing costs have increased. However, comparing the weighted average cheese costs of the two CPDMP surveys indicates that processing costs have actually declined $0.0054 per pound. This decision finds that the inconsistencies between the two CPDMP surveys call into question whether either survey is representative of cheese manufacturing costs. Accordingly, for the purpose of determining a make allowance for cheese, the CPDMP 2006 survey results for cheese are rejected.

This decision finds that the CDFA 2006 survey of average cheese manufacturing costs is the best available information representing the manufacturing cost of producing a pound of cheddar cheese. Accordingly, the make allowance proposed to be permanently adopted for cheddar cheese is $0.2003 per pound including a $0.0015 per pound marketing cost adjustment.

Dry Whey Make Allowance

Estimating the cost of manufacturing dry whey presents a problem similar to that for cheese. Despite exceptions to the tentative partial final decision from Kraft, Glanbia and WCMA that CDFA whey data should be factored into determining a dry whey make allowance, this decision continues to reject relying on CDFA data in determining the dry whey make allowance. The CDFA 2006 manufacturing cost survey reveals that CDFA was not satisfied with the precision in estimating the average cost per pound for whey products. Accordingly, it is unreasonable to rely on information that may not be reflective of market conditions. Adopting an artificially high make allowance for dry whey would result in the unwarranted decrease of producer revenue. Accordingly, CDFA dry why manufacturing cost data is not relied upon in determining the dry whey make allowance in the product-price formulas.

This decision continues to rely on the CPDMP 2006 survey of the average manufacturing cost to produce a pound of dry whey. Relying solely on the CPDMP 2006 survey is identical to the approach used in determining the make allowance for dry whey used in the Class III price formula effective March 1, 2007. The 2006 survey value of $0.1976 plus a marketing cost adjustment of $0.0015 yields a dry whey make allowance of $0.1991 per pound.

An issue was raised by Twin County in its brief concerning an alleged differential impact on small and large businesses if make allowances or Class III and IV price formulas are amended. However, the purpose of the Class III and IV price formulas and make allowances is to set individual minimum class prices for the Federal milk order program on a national basis.

Butterfat Yield Factor

A proposal, published in the hearing notice as Proposal 6, was included in a package of proposals advanced by DPNM seeking to amend the product-price formulas to more accurately capture the use of modern manufacturing technology and its impact on milk value. A portion of Proposal 6 seeks to amend the butterfat yield factor in the butterfat price formula from 1.20 to 1.211 to account for what DPNM and other participants in this proceeding characterized as a misapplication of farm-to-plant shrinkage when the Class III and Class IV product-price formulas were adopted in November 7, 2002 (67 FR 67906), and became effective on April 1, 2003 (68 FR 7063).[8]

Specifically, DPNM explained that the butterfat recovery factor of 1.20 used in the butterfat pricing formula was the result of the incorrect application of the butterfat shrinkage factor of 0.015 percent on a per pound of butterfat basis rather than on a per cwt basis. As explained by DPNM, the shrinkage factor was, however, properly applied to the butterfat adjustment portion of the protein price formula. Correction of this mathematical error removes this inconsistency between the butterfat pricing formula and the protein price formula.

This decision agrees with DPNM and others who support correction of this error. In the 2002 final decision adopting the butterfat yield of 1.20, USDA correctly explained that when accounting for the farm-to-plant loss of milk, there is a 0.25 percent butterfat loss per pound of butterfat, plus an additional loss of 0.015 pounds per cwt of milk. However, when mathematically accounting for the loss in the price formulas, the additional 0.015 pound of loss was applied on a per pound of butterfat basis. This decision corrects that error and proposes to permanently adopt a butterfat yield of 1.211.

Opponents of amending this factor do not dispute that the 1.20 butterfat yield factor used in the pricing formulas was in error. Rather, opposition rests on the premise that manufacturing processors are already paying too much for raw milk and they attribute this to the in-plant shrinkage of butterfat that cannot be processed into a finished product. Furthermore, adopting the 1.211 factor would result, all other factors unchanged, in a higher minimum price for raw milk. This decision rejects such arguments. The arguments are based on an unwanted outcome and not on the basis of the proper application of this factor. The other features of Proposal 6 are not proposed to be adopted and those features are discussed later in this decision.

Other proposals considered in this proceeding address the three major elements of the product-price formulas—end-product prices used in the formulas, manufactured product yield factors and other intra-formula cost factors. A proposal (Proposal 18) advanced to establish an alternative approach to determining prices of raw milk by attempting to develop a competitive pay price also is considered.

Product Yields and Butterfat Recovery Percentage

A package of proposals, advanced by DPNM, seek to amend the product-price formulas to capture the use of more modern manufacturing technology and its impact on milk value (Proposals 6, 7, and 8). As already discussed, a part of Proposal 6 seeking to amend the butterfat yield factor in the butterfat price formula from 1.20 to 1.211 is proposed to be permanently adopted.

[8] Official notice is taken of 67 FR 67906, published November 7, 2002, and 68 FR 7063, effective April 1, 2003.

However, Proposal 6 also seeks to increase the butterfat recovery percentage in the protein price formula from 90 percent to 94 percent. The argument for increasing this factor is that new cheese manufacturing technology has increased the amount of butterfat that manufacturers can potentially recover when making cheese. A 94 percent recovery rate also will increase the blend price paid to producers by $0.07 per cwt.

Opponents to increasing the butterfat recovery rate, including LOL, NDA, Sorrento, Leprino, MMPA, and H. P. Hood presented evidence countering the DPNM claim that a butterfat recovery in excess of 90 percent is achievable industry-wide. Many manufacturer witnesses testified that their butterfat recovery percentage in cheese is, on average, 90 percent.

While the record contains evidence of what butterfat recovery rate in cheese production is possible through the use of more modern manufacturing methods and technology, the preponderance of evidence reflects that many cheese manufacturers generally achieve butterfat recovery near 90 percent. DPNM et al. failed to make a compelling argument for an increase in the butterfat recovery rate in their exceptions to the tentative partial final decision. While they did offer several references to articles published by dairy scientists providing examples of cheese yields with higher butterfat retention rates, they did not provide examples of manufacturing facilities currently experiencing those higher rates. Furthermore, the use of advertisements claiming that a specific cheese vat will result in higher butterfat retention rates does not merit the conclusion that those rates are, on average, achieved. It is important that the product-price formulas reflect current plant conditions, not plant conditions that may be possible but not reflective of general industry wide conditions. Accordingly, this final decision continues to reject adoption of this feature of Proposal 6.

Proponents also commented that plants whose butterfat recovery rate is greater than 90 percent are not paying for all of the protein used to make cheese. This final decision rejects that assertion. All of the protein contained in producer milk, regardless of if its end use in cheese or in the whey stream, is priced at the protein price. The protein price is not reduced to reflect a lower value for the protein in the whey stream.

A second proposal of the DPNM package of proposals, Proposal 7, seeks to eliminate the farm-to-plant shrink adjustment factors in the Class III and Class IV product-price formulas. The argument by proponents is that modern measurement and milk-handling techniques, and the trend of transporting full loads of milk from single producers negate the need to retain the shrinkage adjustment factors. Opponents argue that in many marketing areas, milk shipments are commonly assembled from multiple farms and some farm-to-plant shrinkage is inevitable.

Record evidence supports concluding that farm-to-plant shrinkage remains a reality for manufacturers. Numerous witnesses testified regarding actual average farm-to-plant shrinkage experienced at their plants: LOL (0.343 percent); MMPA (0.3 percent); Leprino (0.25 percent); and HP Hood (1.5 percent including in-plant losses). While DPNM argued at the hearing and in its exceptions that its members' farm-to-plant shrinkage is well below the 0.25 percent contained in the Class III and Class IV product-price formulas, no evidence was offered for examination as an alternative other than its elimination. Furthermore, while proponents assert that shipping full tanker loads of milk is common in the southwest where they operate, record evidence does not demonstrate this reality in the rest of the country.

This final decision continues to find that the Class III and Class IV product-price formulas should recognize the loss of milk that occurs when milk is moved from the farm to a receiving plant. Record evidence demonstrates that farm-to-plant shrinkage occurs, for example, from imprecise stick readings and sampling at the farm or from product remaining on tanker walls after emptying the load at the plant. In most cases, producers are paid based on farm weights and tests, in which case the handler pays for product that is not ultimately received. It is therefore reasonable when determining component prices charged to handlers to make an adjustment for the lost product. The 0.25 percent shrinkage factor contained in the formulas is a reasonable factor that represents the loss of producer milk when shipped from farm-to-plant. Accordingly, Proposal 7 is not proposed to be adopted.

A third proposal of the DPNM package of proposals, Proposal 8, seeks to increase the nonfat solids (NFS) yield factor in the Class IV product price formula and the yield factors for protein and butterfat in the protein price formula components of the Class III product-price formula. Proponents computed the proposed conversion factors to be used in the protein price formula by assuming: a) that the percentage of casein in true protein is actually 83.25 percent (resulting in a cheese yield per pound of protein of 1.405); b) the butterfat recovery rate in cheese is 94 percent (resulting in a cheese yield per pound of butterfat of 1.653); and c) that average producer tests should be used in the price formulas (resulting in a fat to protein ratio of 1.214). The conversion factor for computing the nonfat solids should be 1.02 based on actual nonfat dry milk yield per pound of nonfat solids. Opponents counter that the methodology used to derive the proposed yield factors are flawed and that no actual studies were offered to support their conclusion that product yields are higher than those currently provided in the formulas. This final decision continues to find no record evidence to support amending the yield factors as proposed in Proposal 8.

Despite comments to the tentative partial final decision by DPNM et al., record evidence does not support making changes to the yield factors in the protein price formula. Proponents continue to argue that based on producer tests, the actual percentage of casein in true protein is 83.25 percent. The formulas currently assume that the percentage of casein in true protein is 82.2 percent. This factor, adopted in 2002 (67 FR 67928),[9] was based on evidence provided at that proceeding by a university researcher whose studies demonstrated a casein in true protein range of 82.2 percent to 82.4 percent. The record of this proceeding does not contain data from any studies that would indicate that the casein in true protein percentage has increased. Accordingly, this decision does not propose increasing the percentage of casein in true protein to 83.25.

In their exceptions DPNM et al. reiterated its arguments that a butterfat recovery rate of 94 percent should be adopted. Its adoption would result in an increase in the cheese yield per pound of butterfat to 1.653. This final decision has already discussed why a 94 percent butterfat recovery rate is not proposed to be adopted. Consequently, the butterfat yield factor in the protein formulas is not amended.

Proposal 8 also seeks to increase the fat-to-protein ratio in the protein formula to 1.214. Proponents claim that the increased ratio reflects the use of average producer milk tests of 3.04 percent true protein and 3.69 percent butterfat. The current ratio of 1.17 was computed using standardized milk tests

[9] Official notice is taken of 67 FR 67928, published November 7, 2002.

of 2.9915 percent true protein and 3.5 percent butterfat. Record evidence does not support using average producer tests in determining yield factors. Proponents claim that other yield factors were determined using average producer tests. This statement is incorrect. Other yield factors in the product price formulas take into account the amount of the component in the product; there is no consideration of average producer tests. For example, the yield factor in the butterfat price formula is 1.211. This value was derived from the percentage of butterfat in butter, and was later adjusted for farm-to-plant shrinkage. Weighted average producer tests have no bearing on this yield number. This final decision continues to find that increasing the fat-to-protein ratio to account for weighted average producer tests is not justified.

The last portion of Proposal 8 seeks to increase the nonfat solids yield factor from .99 to 1.02. DPNM et al. claims that it is impossible for 1 pound of solids nonfat to yield less than one pound of nonfat dry milk. In their exceptions, DPNM et al. claims that the California milk pricing formulas actually use a yield factor of 1.02. According to a December 2007 California Milk Pricing Formulas publication release by CDFA, California price formulas utilize a nonfat solids yield factor of 1.[10] The .99 yield factor currently contained in the nonfat solids price formula was adopted on April 1, 2003 (68 FR 7063).[11] This factor was reduced from 1.02 to account for farm-to-plant shrinkage. USDA continues to find it appropriate to acknowledge farm-to-plant shrinkage in the product price formulas. Therefore, the nonfat solids yield factor is unchanged.

Value of Butterfat in Whey

Two proposals advanced by IDFA and Agri-Mark, Proposals 9 and 10 respectively, seek to change the protein price formula feature of the Class III product-price formula by reducing the protein price to reflect the lower market value of whey cream. Proposal 9 also seeks to further lower the protein price to reflect the reduced recoverable volume of whey cream in the cheese making process. (During the proceeding Agri-Mark withdrew its support of Proposal 10 in support of IDFA's Proposal 9.) The argument for seeking these changes is that that the volume of milkfat contained in whey cream is currently valued at the Grade AA butter price but can only be sold as whey butter (Grade B butter) or for other uses with values below the Grade AA butter price. Record evidence does indicate that Grade B is often marketed to commercial food service establishments such as bakeries and is marketed at a discount to the Grade AA butter price. Some hearing participants (NAJ) suspect that the volumes of whey cream produced and the extent of a secondary market for whey butter are relatively small. Record evidence contains very limited data regarding plant sales of whey cream or Grade B butter. More importantly, there is no known publically available data for U.S. market prices and volumes of whey cream or Grade B butter produced or sold.

Opponents (Dairylea et al.) to IDFA's proposal acknowledge that while whey cream does have a lower value than that reflected in the Grade AA butter price, other higher-value uses for whey cream exist that also are not recognized. Opponents argue that it would be inappropriate to amend the butterfat value to reflect a selected measure of whey cream value while not considering whey cream value in other (possibly higher-value) uses.

After considering the comments and exceptions to the tentative partial final decision for reducing the protein price to reflect the lower market value of whey cream, this decision continues to reject this proposal. Whey cream may have a lower market value, but without publicly available market data that provides whey cream volumes and prices, no reasonable and objective means is available to determine if or how whey cream is distorting the protein price formula feature contained in the Class III product-price formula. Supporters of Proposal 9 did not offer market information that could be relied upon as a basis for changing the protein price. While there is record evidence from some manufacturers as to their individual saleable volumes and values of whey cream, that limited data does not provide for a reasonably complete assessment of the national market for whey cream and its various competing uses. The lack of verifiable data concerning whey cream and/or its applicability to any additional costs or value loss experienced by cheese manufacturers across the industry is unknown. Accordingly, Proposals 9 and 10 are not proposed to be adopted.

Barrel-Block Cheese Price Spread

Proposal 12 offered by IDFA and supported by Leprino, DFA, NDA, Agri-Mark, and others, seeks to eliminate the 3-cent addition to the barrel price in the protein price formula. The argument for elimination from the protein price formula is that the average price difference between block and barrel cheese was 3-cents when first incorporated into the formula but now there is virtually no difference in the packaging costs of blocks and barrels. Proponents also argue that even if there were a cost difference, that difference would have been captured in the CPDMP 2006 survey of manufacturing costs. Other proponents add to the argument that after the NASS barrel cheese price was adjusted from 39 percent to 38 percent moisture content in January 2001, the price difference between barrels and blocks has averaged $0.008 per pound.

The record contains only one cheese manufacturer's (Davisco) specific packaging cost data for a single plant located in Minnesota that produces cheese in both blocks and barrels. That plant's average packaging cost for block cheese was $0.0012 per pound more than for barrels. Another cheese manufacturer (Twin County) producing cheese exclusively in barrels in Iowa was unable to indicate whether it was advantageous to their business to support or oppose any change in the 3-cent adjustment advanced in Proposal 12.

This final decision does not support adoption of Proposal 12. The argument that any packaging cost differences that exist between barrel and block cheese is captured in the CPDMP 2006 survey is inadequately supported. The record reveals that all packaging costs reported in the CPDMP 2006 survey were for 40-pound block cheese production. If a surveyed plant produced barrel cheese, an average packaging cost for 40-pound blocks was assigned to the plant.

Additionally, proponents assert that since the price difference between blocks and barrels is almost zero, it can be concluded that that any packaging cost difference must also be nearly zero. This decision does not find a causal relationship between selling prices and manufacturing costs. Even though the price spread between blocks and barrels has narrowed over time and recently averaged near zero, the cost difference between block and barrel packaging cannot be assumed to also be zero. Blocks and barrels have different supply and demand functions. Comparing average prices over a period of time does not therefore automatically reflect cost differences. Since barrel cheese prices exceed block cheese prices at certain times, due to different supply and demand curves, average prices will not in and of themselves indicate cost

[10] Official notice is taken of ''California Milk Pricing Formulas'', December 2007, Dairy Marketing Services Branch, California Department of Agriculture: *http://www.cdfa.ca.gov/dairy/pdf/steps_for_calc_minprices.pdf.*

[11] Official notice is taken of 68 FR 7063, February 12, 2003.

differences. While the record contains packaging cost information for a single plant that suggests similar packaging costs of barrel and block cheese, such evidence is insufficient to conclude that this is representative across Federal order manufacturing plants or should be the basis for adopting the proposal. Accordingly, Proposal 12 is denied.

The proposal by DFA and NDA, Proposal 13, seeks to eliminate the cheese barrel price from the protein price formula feature of the Class III product-price formula but no testimony was given in support of this proposal. In addition to NDA proponent support during the hearing and DFA opposition to the adoption of the proposal in their post-hearing brief, significant opposition from others was given. Opponents argue that because barrel cheese represents roughly half of the NASS price survey cheese volume (now captured in the AMS survey), removing the barrel price from the protein price formula would greatly reduce the total AMS survey volume thereby making the price survey less representative of the cheddar cheese market.

This final decision continues to find that retaining the cheese barrel price in the protein price formula is necessary to ensure that the protein price is representative of the national cheese market. The Class III product-price formula needs to be reasonably representative of the market for cheese that determines the value of milk. Record evidence reveals that barrel production in the AMS survey is often in excess of 50 percent of the total cheese volume surveyed. Eliminating the barrel price from the protein price formula would significantly and needlessly reduce the volume of cheese used in the Class III product price formula which could lead to protein prices that are not as representative of the national cheese market. Accordingly, Proposal 13 is not proposed to be adopted.

Product Price Series

Proposal 14, advanced by Agri-Mark, seeks to change the price data used in the Class III and protein price formula by combining the NASS price survey data for cheddar cheese (now the AMS price survey data for cheddar cheese) with the weekly average CME cheese prices as a method that results in a superior benchmark price for cheese. The argument rests on the assertion that the 2-week timing difference, or lag, between the CME price and the AMS price survey for cheese fails to capture changes in market prices in the current value of cheese and the near-actual Class III value. The proponent also argues that adoption of this new price series would reduce price volatility and provide more up-to-date market information than that provided by the AMS price survey. In other words, more current market information would be transmitted through minimum Class III prices and provide more accurate pricing signals to processors and producers.

Opponents to adoption of Agri-Mark's Proposal 14, including IDFA and its members, collectively argue that combining the CME price with the AMS price would reduce the usefulness of currently available risk management tools. These tools include the use of futures contracts and the use of forward contracts. Opponents also note that (1) the CME is a spot market representing only about 4.1 percent of all cheddar cheese traded and is not representative of cheese being more commonly produced and marketed on a longer-term contract basis, (2) it adds a degree of complexity to a pricing-formula which is already too complex without any discernible benefit and (3) its adoption would tend to bias price reporting to the market conditions of the Chicago area. All comments to the tentative partial final decision regarding Proposal 14 supported USDA's denial of the proposal.

It is reasonable to expect that adding a degree of complexity may tend to reduce transparency and lessen the understanding of the Class III and Class IV product-price formulas. Other than assertions by the proponent, the record lacks evidence that combining CME prices with AMS survey prices would improve price discovery or market information or would offer superior transmission of economic signals through the minimum Class III price.

In addition, rulemaking action on mandatory product price reporting overtakes the need to consider adoption of a new price series that combines CME prices with AMS survey prices. Improved mandatory price reporting that provides for the auditing of prices reported to AMS makes the accuracy, but not the timing, of price data less of an issue than envisioned throughout this proceeding. Accordingly, Proposal 14 is not proposed to be adopted.

A proposal advanced by DPNM, Proposal 15, seeking to replace the AMS price series for cheese with the CME price has similarities to that of Proposal 14. It seeks to eliminate the 2-week lag between CME prices and AMS price reporting. DPNM has argued throughout this rulemaking proceeding that the use of CME prices in the price formula for cheese would provide producers, marketers and manufacturers of cheddar cheese with more timely and transparent prices as the CME represents actual current cheese prices.

In opposition to the adoption of Proposal 15, the opponents, including IDFA, NDA, Agri-Mark and DFA, as in their opposition to the adoption of Proposal 14, argue that (1) The CME is too thin a market to be relied upon for use in the Class III product-price formula, (2) the CME represents only about 4.1 percent of all cheddar cheese traded, (3) its exclusive use would tend to bias and limit the price reporting for cheese to the market conditions of the Chicago market, and (4) being a spot market for cheese, the CME ignores other sales agreements and marketing arrangements that account for more than 95 percent of the cheese marketed and largely captured in the AMS price survey.

This final decision continues to find that cheese prices used in product-price formulas should reflect broad markets and not rely exclusively on a smaller subset of cheese prices and spot marketing conditions as represented by the CME. The record also makes clear that more industry confidence is placed in AMS price surveys than in spot market prices for cheese. Accordingly, Proposal 15 is not adopted.

Other Solids Price

Proposal 16, advanced by NAJ, seeks to eliminate the other solids price and expand the protein price formulas to include the value of dry whey because, according to NAJ, the value of whey lies in its protein content. The proponent asserts that the other solids price formula does not connect the market value of whey solids to how producers are paid for whey. Therefore, the proponent advocates that the value of dry whey in the price formulas be determined on the basis of its protein content which will make the other solids price formula no longer necessary.

IDFA and other opponents argue that it would be inappropriate to value dry whey on a component (protein) that has no measurable effect on the product yield. Except for comments filed by the proponent, comments filed by both producer and manufacturer groups in response to the tentative partial final decision expressed opposition to the adoption of Proposal 16.

This decision continues to find that Proposal 16 would add no additional value arising from protein to the marketwide pool. It would simply shift the money attributed to other nonfat solids into the protein price formula and add a level of complexity to the product

price formulas that would yield no measurable benefit.

Record evidence regarding Proposal 16 does not support eliminating the other nonfat solids prices and shifting the value of dry whey into the protein price formula. Other solids in milk are composed primarily of lactose, whey protein, ash and other non-protein solids. Numerous component markets, such as lactose and dry whey, were evaluated during Federal order reform to determine an appropriate market to base the other solids price. It was determined that because no reliable lactose market existed, the dry whey market was the next best alternative. At this time, there is still no reliable market for lactose on which the other solids price could be based. Therefore, this final decision finds that dry whey, despite the opinion of NAJ, remains the most relevant market on which to base the other solids price. Accordingly, Proposal 16 is not adopted.

Competitive Price Series

Proposal 18, advanced by the Maine Dairy Industry Association (MDIA), seeks to determine Class III and Class IV prices with a competitive pay price series rather than the current product-price formulas. The proposal seeks a return to a competitive pay price used by the FMMO program prior to 2000. The proponent argues that adoption of the proposed competitive pay price series would eliminate the need for establishing make allowances that, when increased, reduce prices received by dairy farmers.

A competitive pay price series previously existed for nearly 40 years and provided the foundation for all classified prices set in the system of milk marketing orders. A competitive pay price series would negate the need to directly consider manufacturing costs and other factors such as product yields and their relationship in deriving the value of raw milk.

However, there are many details that need resolution before the FMMO program could return to using a competitive pay price series. For example, the proposed method is based on geographic areas (zones) wherein strong competition for raw milk prevails. A competitive pay price would be derived by averaging prices from all the competitive price zones. As conceded by the proponent, these areas would most likely be surrounded by Federal milk marketing areas where minimum classified prices prevail. Milk prices within the competitive price zones would therefore be influenced by milk priced under adjoining Federal orders. Other considerations, including an accounting of various forms of in-kind payments to producers, also need to be addressed. Ignoring consideration of such payments would allow plants to increase (decrease) their hauling charges as a way of reducing (increasing) the actual pay price to dairy farmers.

Therefore, this final decision finds that Proposal 18 cannot be implemented as proposed and is herein denied

B. Termination of a Portion of the Proceeding

Proposal 2, offered by Agri-Mark, proposed to amend the Class III and Class IV product formulas to annually update the manufacturing allowances using an annual manufacturing cost survey of cheese, whey powder, butter and non-fat dry milk plants. The proposal would give authority for selecting the sample and conducting the survey to the market administrators. The manufacturing cost data would then be used to update manufacturing allowances to prescribed levels. On brief, Agri-Mark withdrew the automatic-updating portion of the proposal.

The record of hearing reflects a mixture of support and opposition to this proposal. This wide variance in industry response clearly demonstrates a lack of unity and policy direction. Opposition to Proposal 2 tended to stem primarily from the implementation of an automatic adjuster to manufacturing allowances, which was subsequently withdrawn by Agri-Mark. However, amongst supporters there was a clear lack of consensus as to how and by whom the survey should be implemented, what regions should comprise the survey sample, and specifics as to how the survey data were to be used. The only clear assertion made by the record was that some participants supported establishing a manufacturing cost survey.

Proposal 17, advanced by NMPF, would have amended the Class III and Class IV product price formulas to incorporate a monthly energy cost adjustment based on monthly changes in the producer price indices for industrial natural gas and electricity as published by the Bureau of Labor Statistics. Proponents argued that the implementation of an energy price adjuster would update make allowances in response to fluctuating energy prices. As mentioned earlier, this proposal was broadly supported by producer organizations, many of which manufacture NFDM and dry whey. These two products, in particular, require the use of energy-consuming driers in their production processes.

Opponents to Proposal 17 were overwhelmingly manufacturers of dairy products. They argued that the inclusion of an energy cost adjuster in the make allowance would complicate the milk pricing system and reduce the effectiveness of certain risk management tools.

Proposal 20, advanced by Dairylea, would amend the Class III and Class IV product price formulas by establishing cost-of-production add-ons that manufacturers could include in the selling price of their products, but which would not be included as part of the NASS (now AMS) dairy product price survey. Proponents noted that increases in wholesale prices on dairy products are captured by product price surveys and subsequently drive up the costs of raw milk, through higher Class III and Class IV prices. The proposed mechanism, they argued, would break the existing price circularity, allowing processors to increase wholesale prices without affecting input costs.

Opponents, many of whom are dairy processors, argued that it would be difficult to negotiate cost add-ons with wholesalers. Those handlers unable to successfully negotiate a higher cost add-on would be limited to the cost allowance included in the manufacturing allowance. Similarly, handlers operating outside of the Federal order system could potentially gain market share over regulated competitors. Additionally, opponents noted, the implementation of a cost add-on would further complicate the existing price discovery mechanism used by the Federal order system.

In the time following the implementation of the interim final rule (73 FR 44617), the Department received a request, which has been made part of the Official Record, from the Greater Northeast Milk Marketing Agency (GNEMMA) to finalize those proposals from this proceeding implemented on an interim basis and terminate the remainder (Proposals 2, 17 and 20). GNEMMA is a marketing agency in common comprised of: Agri-Mark, Inc.; Dairy Farmers of America, Inc.; Dariylea Cooperative, Inc.; Dairy Marketing Services, LLC; Land O'Lakes, Inc.; Maryland and Virginia Milk Producers Cooperative Association, Inc.; St. Albans Cooperative Creamery, Inc.; and Upstate Niagara Cooperative, Inc. GNEMMA members market in excess of 64 percent of all milk in the Northeast milk marketing area. The petitioners argue that certain market conditions have changed in the time since the hearing and certain data reflected in the record of hearing in regards to Proposals 2, 17 and 20 are no longer valid.

Other proposals proposed to be permanently adopted by this decision have already been implemented on an interim basis. This decision continues to support their adoption, and in essence the status quo.

While evidence regarding Proposals 2, 17 and 20 was collected during the hearing, the Department has never issued a decision on their merits. The hearing was initially held in 2007. The hearing record reflects marketing conditions at that time. Marketing conditions since the 2007 hearing have changed. Accordingly, given these circumstances, it is reasonable to terminate the proceeding in regards to Proposals 2, 17 and 20 in their entirety.

In view of the foregoing, it is hereby determined that the proceeding with respect to Proposals 2, 17 and 20 should be and are hereby terminated.

Rulings on Motions

A motion for official notice of a publication [12] and a final decision [13] by the CDFA was submitted by Agri-Mark et al. joined by Twin County Dairy, Inc., (Twin County) and supported by IDFA. This decision takes official notice of these publications.

In their comments to the tentative partial final decision, Agri-Mark et al. and Twin County also filed a motion for official notice of specific energy price statistics and projections of the U.S. Department of Labor and the U.S. Department of Energy. This motion was supported by IDFA. The motion advocated use of this data for a one-time energy cost adjustment to the manufacturing allowances adopted in the final decision. Previous publications of these statistics were officially noticed during the hearing. This final decision takes official notice of these publications through March 2009.

A motion and supplemental information in support of the motion seeking a continuance of the hearing for the limited purpose of offering additional data and analysis in advancing Proposal 18 were submitted by MDIA. A counter motion opposed to MDIA's motion was made by IDFA. Offering new data and analysis by continuing or re-opening the hearing for the limited purpose of reconsidering Proposal 18 would put all other hearing participants advancing or opposing proposals during the proceeding at a disadvantage. This proceeding lasted for 3 weeks over a 6 month period from February 2007 through July 2007. It also was preceded by an information session in December 2006. The tentative final decision found that sufficient time was made available to all known parties to develop and present noticed proposals and the motion was denied.

Exceptions to the tentative partial final decision filed by MDIA requested that USDA reconsider their original motion for a continuance of the hearing. MDIA argued that because a decision has yet to be issued on three other noticed proposals, the hearing—in regard to those proposals—remains open. Therefore, concluded MDIA, USDA has the latitude to grant MDIA's motion for a continuance on Proposal 18. MDIA also stated that in denying its first motion, USDA did not give proper weight to the support for the basic concept of Proposal 18 (a competitive pay price series) expressed in numerous post-hearing briefs that were submitted by various hearing participants.

MDIA also took exception with the tentative partial final decision's characterization that the MDIA's witness conceded problems with the proposed competitive pay price series. MDIA wrote that Proposal 18 was designed to be a beginning framework for a functioning competitive pay price series that would be superior to end-product pricing formulas. MDIA argued that it intended to use the hearing process as a method for determining concerns with the proposal and then recommend to the Department a procedure for further development of the proposal.

MDIA's motion for a continuance continues to be denied. Though a continuation might allow for further development of Proposal 18 with USDA and industry participants, there is a necessity to proceed with finalizing the rulemaking on the Class III and Class IV price formulas. While MDIA's motion is denied, this does not prevent future consideration of a competitive pay price system.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the Northeast and other marketing orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreements and the orders, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing areas, and the minimum prices specified in the tentative marketing agreements and the orders, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreements and the orders, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, marketing agreements upon which a hearing has been held.

Rulings on Exceptions

In arriving at the findings and conclusions, and the regulatory provisions of this decision, each of the exceptions received was carefully and fully considered in conjunction with the record evidence. To the extent that the findings and conclusions and the regulatory provisions of this decision are at variance with any of the exceptions, such exceptions are hereby overruled for the reasons previously stated in this decision.

Marketing Agreement and Order

Annexed hereto and made a part hereof is one document: A Marketing Agreement regulating the handling of milk. The order amending the order regulating the handling of milk in the Northeast and other marketing areas was approved by producers and published in the **Federal Register** on July 31, 2008 (73 FR 44617), as an Interim Final Rule.

[12] California Department of Food and Agriculture: Summary of Weighted Average Manufacturing Costs, Butter, Nonfat Dry Milk, Cheddar Cheese, and Dry Whey Powder, Released September 18, 2007.

[13] California Department of Food and Agriculture: Final Results for Class 4a and 4b Pricing Formula Hearing of October 10, 2007, released November 20, 2007.

Both of these documents have been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered that this entire final decision and the Marketing Agreement annexed hereto be published in the **Federal Register**.

Referendum Order To Determine Producer Approval; Determination of Representative Period; and Designation of Referendum Agent

It is hereby directed that referenda be conducted and completed on or before the 30th day from the date this decision is published in the **Federal Register**, in accordance with the procedure for the conduct of referenda (7 CFR 900.300–311), to determine whether the issuance of the orders as amended and as hereby proposed to be amended, regulating the handling of milk in the Upper Midwest, Mideast, and Northeast marketing areas is approved or favored by producers, as defined under the terms of the orders (as amended and as hereby proposed to be amended), who during such representative period were engaged in the production of milk for sale within the aforesaid marketing areas.

The representative period for the conduct of such referenda is hereby determined to be May 2012.

The agents of the Secretary to conduct such referenda are hereby designated to be the respective market administrators of the aforesaid orders.

Determination of Producer Approval and Representative Period for All Other Orders

May 2012 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the orders, as amended and hereby proposed to be amended, regulating the handling of milk in the Appalachian, Florida, Southeast, Central, Pacific Northwest, Arizona, and Southwest areas is approved or favored by producers, as defined under the terms of each of these orders as amended and as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the aforesaid marketing areas.

List of Subjects in 7 CFR Part 1000

Milk marketing orders.

Order Amending the Orders Regulating the Handling of Milk in the Northeast and Other Marketing Areas

This order shall not become effective until the requirements of 7 CFR section 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) *Findings.* A public hearing was held upon certain proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the Northeast and other marketing areas. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure (7 CFR part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said orders as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing area. The minimum prices specified in the order as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said orders as hereby amended regulate the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, the handling of milk in the Northeast and other marketing areas shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby amended, as follows:

The provisions of the order amending the order contained in the interim amendment of the order issued by the Administrator, Agricultural Marketing Service, on July 25, 2008, and published in the **Federal Register** on July 31, 2008 (73 FR 44617), are adopted without change and shall be and are the terms and provisions of this order.

[**Note:** The following will not appear in the Code of Federal Regulations.]

Marketing Agreement Regulating the Handling of Milk in Certain Marketing Areas

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof, as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of § _____ to _____ all inclusive, of the order regulating the handling of milk in the _____ marketing area (7 CFR part _____); and

II. The following provisions:

§ _____ Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he/she handled during the month of _____, _____ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Deputy Administrator, or Acting Deputy Administrator, Dairy Programs, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Department in accordance with Section 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, The contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

Signature

By (Name) _____

(Title) _____

(Address) _____

(Seal)

Attest _____

Dated: February 1, 2013.

David R. Shipman,

Administrator, Agricultural Marketing Service.

[FR Doc. 2013–02623 Filed 2–6–13; 8:45 am]

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Part V

Environmental Protection Agency

40 CFR Part 80

Regulation of Fuels and Fuel Additives: 2013 Renewable Fuel Standards; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA–HQ–OAR–2012–0546; FRL–9678–8]

RIN 2060–AR43

Regulation of Fuels and Fuel Additives: 2013 Renewable Fuel Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Under section 211(o) of the Clean Air Act, the Environmental Protection Agency is required to set the renewable fuel standards each November for the following year. In general the standards are designed to ensure that the applicable volumes of renewable fuel specified in the statute are used. However, the statute specifies that EPA is to project the volume of cellulosic biofuel production for the upcoming year and must base the cellulosic biofuel standard on that projected volume if it is less than the applicable volume set forth in the Act. EPA is today proposing a projected cellulosic biofuel volume for 2013 that is below the applicable volume specified in the Act. EPA is proposing that the applicable volumes of advanced biofuel and total renewable fuel would remain at the statutory levels for 2013. Finally, today's action also proposes annual percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and renewable fuels that would apply to all gasoline and diesel produced or imported in year 2013.

DATES: Comments must be received on or before March 25, 2013. A request for a public hearing must be received by February 14, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2012–0546, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.*
- *Mail:* Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.
- *Hand Delivery:* EPA Docket Center, EPA West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2012–0546. 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. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, go to Section I.B of the **SUPPLEMENTARY INFORMATION** section of this document.

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, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Julia MacAllister, Office of Transportation and Air Quality, Assessment and Standards Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; Telephone number: 734–214–4131; Fax number: 734–214–4816; Email address: *macallister.julia@epa.gov*, or the public information line for the Office of Transportation and Air Quality; telephone number (734) 214–4333; Email address *OTAQ@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected by this proposed rule are those involved with the production, distribution, and sale of transportation fuels, including gasoline and diesel fuel or renewable fuels such as ethanol and biodiesel. Potentially regulated categories include:

Category	NAICS [1] codes	SIC [2] codes	Examples of potentially regulated entities
Industry	324110	2911	Petroleum Refineries.
Industry	325193	2869	Ethyl alcohol manufacturing.
Industry	325199	2869	Other basic organic chemical manufacturing.
Industry	424690	5169	Chemical and allied products merchant wholesalers.
Industry	424710	5171	Petroleum bulk stations and terminals.
Industry	424720	5172	Petroleum and petroleum products merchant wholesalers.
Industry	454319	5989	Other fuel dealers.

[1] North American Industry Classification System (NAICS).
[2] Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this proposed action. This table lists the types of entities that EPA is now aware could potentially be regulated by this proposed action. Other types of entities not listed in the table could also be regulated. To determine whether your activities would be regulated by this proposed action, you should carefully examine the applicability criteria in 40 CFR part 80. If you have any questions regarding the applicability of this proposed action to a particular entity, consult the person listed in the preceding section.

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

1. Submitting CBI

Do not submit confidential business information (CBI) to EPA through *www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for Preparing Your Comments

When submitting comments, remember to:

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

Outline of This Preamble

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F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
VII. Statutory Authority

I. Executive Summary

The Renewable Fuel Standard (RFS) program began in 2006 pursuant to the requirements in Clean Air Act (CAA) section 211(o) which were added through the Energy Policy Act of 2005 (EPAct). The statutory requirements for the RFS program were subsequently modified through the Energy Independence and Security Act of 2007 (EISA), resulting in the promulgation of major revisions to the regulatory requirements on March 26, 2010.[1]

The volumes of renewable fuel to be used under the RFS program each year (absent an adjustment or waiver by EPA) are specified in CAA 211(o)(2). The volumes for 2013 are shown in Table I–1.

TABLE I–1—REQUIRED APPLICABLE VOLUMES IN THE CLEAN AIR ACT FOR 2013

[Bill gal]

Cellulosic biofuel	[a] 1.0
Biomass-based diesel	[b] ≥1.0
Advanced biofuel	[a] 2.75
Renewable fuel	[a] 16.55

[a] Ethanol-equivalent volume.
[b] Actual volume. The ethanol-equivalent volume would be 1.5 if biodiesel is used to meet this requirement.

Under the RFS program, EPA is required to determine and publish annual percentage standards for each compliance year by November 30 of the previous year. The percentage standards are used by obligated parties to calculate their individual compliance obligations. The percentage standards are applied to the volume of gasoline and/or diesel fuel that each obligated party produces or imports during the specified calendar year to determine the volumes of renewable fuel that they must cause to be used as transportation fuel, heating oil, or jet fuel. The percentage standards are calculated so as to ensure use in transportation fuel of the ''applicable volumes'' of four types of biofuel (cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel) that are either set forth in the Clean Air Act or established by EPA in accordance with the Act's requirements.

[1] 75 FR 14670.

The cellulosic biofuel industry is transitioning from research and development (R&D) and pilot-scale to commercial scale facilities, leading to increases in production capacity. Construction has begun on several facilities with multiple facilities having progressed to the start-up phase. Based on detailed information from production companies and a consideration of various potential uncertainties, we are projecting that 14 million ethanol-equivalent gallons of cellulosic biofuel will be available in 2013.

We have evaluated the types of advanced biofuels that can be produced or imported in 2013. Our preliminary determination is that there should be sufficient volumes to meet the statutory applicable volume of 2.75 billion gallons. As a result, we are proposing to use that volume to calculate the advanced biofuel standard for 2013. Combined with the availability of conventional biofuels such as corn ethanol, we have preliminarily determined that there should be sufficient total renewable fuels available in 2013 to meet the statutory applicable volume of 16.55 billion gallons. Therefore, we are not proposing to reduce the advanced biofuel and total renewable fuel applicable volumes below the levels specified in the statute. However, as described in Section III.C, there is some uncertainty in the projected availability of advanced biofuel in 2013. Therefore, we are requesting comment on the possibility of reducing the required volume of advanced biofuel and total renewable fuel in 2013 to reflect this uncertainty.

A. Purpose of This Proposed Action

EPA is today proposing volume requirements for cellulosic biofuel, advanced biofuel, and total renewable fuel for 2013. Table I.A–1 lists the statutory provisions and associated criteria relevant to determining the applicable volumes in today's proposal. We are also proposing percentage standards for all four categories of renewable fuel for 2013.

TABLE I.A–1—STATUTORY PROVISIONS FOR DETERMINATION OF PROPOSED APPLICABLE VOLUMES

Applicable volumes	Clean Air Act reference	Criteria provided in statute for determination of applicable volume
Cellulosic biofuel in 2013	211(o)(7)(D)(i)	Required volume must be lesser of volume specified in CAA 211(o)(2)(B)(i)(III) or EPA's projected volume.
Advanced biofuel in 2013	211(o)(7)(D)(i)	If applicable volume of cellulosic biofuel is reduced to the projected volume, EPA may reduce advanced biofuel by the same or lesser volume. No other criteria specified.
Total renewable fuel in 2013	211(o)(7)(D)(i)	If applicable volume of cellulosic biofuel is reduced to the projected volume, EPA may reduce total renewable fuel by the same or lesser volume. No other criteria specified.

EPA must annually determine the projected volume of cellulosic biofuel production for the following year. If the projected volume of cellulosic biofuel production is less than the applicable volume specified in section 211(o)(2)(B)(i)(III) of the statute, EPA must lower the applicable volume used to set the annual cellulosic biofuel percentage standard to the projected volume of production. In today's proposal, we present our analysis of cellulosic biofuel production and proposed projected volume for 2013. The analyses that led to the proposed 2013 applicable volume requirement were based on our evaluation of EIA's projection for 2013 as well as individual producers' production plans and progress to date. For the final rule, we will also consider comments received in response to this notice of proposed rulemaking and other information that becomes available.

When we lower the applicable volume of cellulosic biofuel below the volume specified in CAA 211(o)(2)(B)(i)(III), we also have the authority to reduce the applicable volumes of advanced biofuel and total renewable fuel by the same or a lesser amount. Today's proposal includes our consideration of the 2013 volume requirements for these biofuels.

Based on the applicable volumes for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel presented in today's proposal, we have calculated proposed percentage standards (shown in Section I.B.3 below) that would apply to all producers and importers of gasoline and diesel in 2013. The proposed percentage standards are based on a projection of volumes of gasoline and diesel consumption in 2013 from the Energy Information Administration (EIA).

B. Summary of Major Provisions in This Notice

1. Cellulosic Biofuel Volume for 2013

The cellulosic biofuel industry in the United States continues to make significant advances in its progress towards large scale commercial production. Ongoing research and development work has resulted in increasing product yields, while at the same time lowering enzyme and catalyst costs. New supply chains have been developed, and several companies have reached contract agreements to provide the necessary feedstock for large scale cellulosic biofuel production facilities. Companies are continuing to invest significant sums of money to further refine cellulosic biofuel production technology and to construct the first commercial-scale facilities. From 2007 through the second quarter of 2011 over $2.4 billion was invested in advanced biofuel production companies by venture capitalists alone.[2] For more information on the current status of the cellulosic biofuel industry in the United States and the advances being made, see Section II.B.

2013 is also expected to be a year of transition for the cellulosic biofuel industry, as many companies are shifting their focus from technology development to commercialization. This transition began in 2012 with commercial production facilities from INEOS Bio and KiOR completing construction and scheduled to begin producing fuel in the first quarter of 2013. Abengoa, one of the largest producers of ethanol in the United States, is planning to begin producing cellulosic ethanol at commercial scale by the end of 2013. Several others companies, including DuPont and Poet, expect to be constructing their first commercial scale facilities in 2013, with the intention of beginning production in 2014. If these facilities are able to operate as anticipated, the uncertainty associated with commercial-scale

[2] Solecki M, Rickey D, Epstein B. Advanced Biofuel Market Report 2011: Meeting the California LCFS. Environmental Entrepreneurs. August 22, 2011. *http://www.e2.org/ext/doc/E2%20Advanced%20Biofuel%20Mkt%20Report%202011.pdf.*

cellulosic biofuel production will decrease, and the expansion of the industry could be rapid.

As part of our effort to estimate the volume of cellulosic biofuel that can be made available in the U.S. in 2013, we researched all potential production sources by company and facility. This included sources that were still in the planning stages, those that were under construction, and those that are already producing some volume of cellulosic ethanol, cellulosic diesel, or some other type of cellulosic biofuel. Facilities primarily focused on research and development were not the focus of our assessment as production from these facilities represents very small volumes of cellulosic biofuel, and these facilities typically have not generated RINs for the fuel they have already produced. From this universe of potential cellulosic biofuel sources we identified the subset that could be producing commercial volumes of qualifying cellulosic biofuel for use as transportation fuel in 2013. To arrive at a proposed projected volume for each facility, we took into consideration EIA's company specific projections and factors such as the current and expected state of funding, the status of the technology utilized, progress towards construction and production goals, and other significant factors that could potentially impact fuel production or the ability of the produced fuel to generate cellulosic Renewable Identification Numbers (RINs) in 2013. Further discussion of these factors can be found in Section II.B.

In our assessment we focused on domestic sources of cellulosic biofuel. At the time of this proposal no internationally-based cellulosic biofuel production facilities have registered under the RFS program and therefore no volume from international producers has been included in our projections for 2013. Of the domestic sources, we estimated that up to four facilities may produce commercial-scale volumes of cellulosic biofuel available for transportation use in the U.S. in 2013. Two of these four facilities have made sufficient progress to project that commercial scale production from these two facilities will occur, and we have therefore included production from them in our projected available volume for 2013. All four facilities are listed in Table I.B.1–1 along with our estimate of the projected 2013 volume for each.

TABLE I.B.1–1—PROJECTED AVAILABLE CELLULOSIC BIOFUEL PLANT VOLUMES FOR 2013

Company	Location	Fuel type	Capacity (million gallons per year)	First production (projected)	Projected available volume [a]
Abengoa	Hugoton, KS	Ethanol	24	4Q 2013	0
Fiberight	Blairstown, IA	Ethanol	6	4Q 2013	0
INEOS Bio	Vero Beach, FL	Ethanol	8	1Q 2013	6
KiOR	Columbus, MS	Gasoline and Diesel	11	1Q 2013	8
Total			49		14

[a] Volumes listed in million ethanol-equivalent gallons.

The EIA projections, variation in expected start-up times, along with the facility production capacities, company production plans, and a variety of other factors have all been taken into account in predicting the actual volume of cellulosic biofuel that will be produced in 2013. For more detailed information on our projections of cellulosic biofuel in 2013 and the companies we expect to produce this volume see Section II.

2. Advanced Biofuel and Total Renewable Fuel in 2013

The statute indicates that we may reduce the applicable volume of advanced biofuel and total renewable fuel specified in the statute for 2013 if we determine that the projected volume of cellulosic biofuel production for 2013 falls short of the statutory volume of 1.0 billion gallons. As shown in Table I.B.1–1, we have proposed a finding that this is the case. Therefore, we have also evaluated whether to propose lowering the applicable volumes for advanced biofuel and total renewable fuel. The statute provides no explicit criteria or direction for making this determination. We have focused our evaluation on the availability of renewable fuels that would qualify as advanced biofuel. The CAA specifies an applicable volume of 2.75 billion gallons of advanced biofuel for 2013. To determine whether to lower this volume, we considered the sources that are expected to satisfy any advanced biofuel mandate including: Cellulosic biofuel, biomass-based diesel, other domestically-produced advanced biofuels, and imported sugarcane ethanol.

As described in Section II, we project that 14 mill gallons of cellulosic biofuel will be available in 2013. This volume would fulfill 0.014 bill gal of the 2.75 bill gal advanced biofuel requirement.

We have finalized a volume of 1.28 bill gal for 2013 biomass-based diesel in a separate action, and we expect that the vast majority of this requirement will be fulfilled with biodiesel. Since biodiesel has an Equivalence Value of 1.5, 1.28 billion physical gallons of biodiesel would provide 1.92 billion ethanol-equivalent gallons that could be counted towards the advanced biofuel standard of 2.75 billion gallons.

As described in more detail in Section III, we have projected that domestic advanced biofuels are expected to grow steadily through 2013, and would include renewable diesel that does not qualify to be biomass-based diesel, heating oil, biogas used as CNG, and ethanol. We are projecting that about 150 mill gal of domestic advanced biofuels is likely to be available in 2013, which would fulfill 0.15 bill gal of the 2.75 bill gal advanced biofuel requirement.

After taking into account cellulosic biofuel, biomass-based diesel, and domestic advanced biofuels, 666 mill gal of imported sugarcane ethanol would be needed to fulfill the advanced biofuel requirement of 2.75 bill gal. As described in Section III, there is reason to believe that this volume can be exported from Brazil to the U.S. in 2013 given Brazilian production and consumption projections. However, we note that there is some uncertainty in the volumes of Brazilian sugarcane ethanol that could be imported into the U.S. in 2013. This uncertainty arises from the possibility of poor sugarcane crop yields in the next harvest as occurred during the previous harvest, and the interplay between these yields and Brazilian demand for ethanol, world sugar prices, and international demand for biofuels. While most

projections indicate that Brazilian sugarcane crop yields will be significantly better in the coming harvest in comparison to the previous harvest, and that as a result sufficient sugarcane ethanol could be produced and exported to the U.S. to help meet the need for 2.75 bill gal advanced biofuel, we nevertheless request comment on whether the advanced biofuel requirement should be reduced to account for this uncertainty.

We also note that in both 2011 and 2012 there was significant two-way trade in ethanol between the United States and Brazil. According to current EIA data, in 2011 the U.S. imported 101 million gallons of sugarcane ethanol from Brazil and exported 396 million gallons of corn-based ethanol to Brazil. Total fuel ethanol exports in 2011 were 1.2 billion gallons, and total exports through October 2012 were 646 million gallons.

Finally, we believe there will be sufficient volumes of conventional renewable fuel including corn-ethanol, combined with advanced biofuel, to satisfy the 16.55 billion gallon applicable volume of total renewable fuel specified in the Act. For instance, corn-ethanol production capacity in 2012 was 14.9 bill gal, compared to the 13.8 bill gal needed to meet the RFS requirements in 2013.[3] We are not proposing to reduce the advanced biofuel volume requirement of 2.75 bill gal, nor the total renewable fuel volume requirement of 16.55 bill gal. However, we are taking comment on lowering the advanced biofuel and total renewable volumes due to various uncertainties. For example, we currently project that 666 mill gal of sugarcane ethanol would need to be imported in order to meet the advanced biofuel volume. However, the recent reinstatement of the biodiesel tax credit introduced uncertainty around those projections, since it affects the amount of biodiesel that may be produced above the required 1.28 bill gal. In addition, the potential for increased domestic demand in Brazil if the 25% biofuel blending requirement is reinstated also introduces uncertainty around the projections. We seek input on these and other such factors that are relevant to how the advanced biofuel volume requirement would be met.

3. Proposed Standards for 2013

The renewable fuel standards are expressed as a volume percentage and are used by each refiner, blender or importer to determine their renewable fuel volume obligations. The applicable percentages are set so that if each regulated party meets the percentages, and if EIA projections of gasoline and diesel use for the coming year are accurate, then the amount of renewable fuel, cellulosic biofuel, biomass-based diesel, and advanced biofuel actually used will meet the volumes required on a nationwide basis.

To calculate the percentage standards for 2013, we have used the proposed projected volume of 14 million ethanol-equivalent gallons of cellulosic biofuel and the volume of biomass-based diesel of 1.28 bill gal that we have finalized in a separate action. The applicable volumes used in this proposal for advanced biofuel and total renewable fuel for 2013 are those specified in the statute. These volumes are shown in Table I.B.3–1.

TABLE I.B.3–1—PROPOSED VOLUMES USED TO DETERMINE THE PROPOSED 2013 PERCENTAGE STANDARDS [a]

Cellulosic biofuel	14 mill gal.
Biomass-based diesel	1.28 bill gal.
Advanced biofuel	2.75 bill gal.
Renewable fuel	16.55 bill gal.

[a] All volumes are ethanol-equivalent, except for biomass-based diesel which is actual.

Four separate standards are required under the RFS program, corresponding to the four separate volume requirements shown in Table I.B.3–1. The specific formulas we use to calculate the renewable fuel percentage standards are contained in the regulations at § 80.1405 and repeated in Section IV.B.1. The percentage standards represent the ratio of renewable fuel volume to projected non-renewable gasoline and diesel volume. The projected volume of transportation gasoline and diesel used to calculate the standards in today's proposed rule was derived from EIA projections.[4] At this time EPA has not approved any small refinery or small refiner exemptions for 2013, and thus no adjustment has been made to the proposed standards to account for such exemptions. The proposed standards for 2013 are shown in Table I.B.3–2. Detailed calculations can be found in Section IV, including the projected 2013 gasoline and diesel volumes used.

TABLE I.B.3–2—PROPOSED PERCENTAGE STANDARDS FOR 2013

Cellulosic biofuel	0.008%
Biomass-based diesel	1.12%
Advanced biofuel	1.60%
Renewable fuel	9.63%

4. Biomass-Based Diesel for 2014

While Clean Air Act section 211(o)(2)(B) specifies the volumes of biomass-based diesel through year 2012, it directs the EPA to establish the applicable volume of biomass-based diesel for years after 2012 no later than 14 months before the first year for which the applicable volume will apply. EPA proposed an applicable volume of biomass-based diesel for 2013 on July 1, 2011, and issued a final rule establishing that applicable volume on September 27, 2012.[5]

Under 211(o)(2)(B)(ii) EPA, in coordination with the Secretary of Energy and the Secretary of Agriculture, is to establish the applicable volume for biomass based diesel in 2014 based on a review of implementation of the program in prior years and analysis of a number of factors, including biodiesel production capacity, consumption, and infrastructure capabilities, as well as impacts on emissions, costs, energy security, and other factors. While the industry produced around 1.15 bill physical gallons in 2012, we are still evaluating the potential market impacts of this production level. In order to provide sufficient time for this evaluation, as well as the other analyses we are required to conduct, we are not proposing an applicable volume of biomass-based diesel for 2014 in today's NPRM. Instead, we will issue a separate proposal at a later date.

5. Administrative Actions

By November 30 of each year we are required to make several administrative announcements which facilitate program implementation in the following calendar year. These announcements include the cellulosic biofuel waiver credit price and the status of the aggregate compliance approach to land-use restrictions under the definition of renewable biomass for both the U.S. and Canada. Since we did not make these announcements for 2013 by November 30 of 2012, we are here presenting our assessments of these administrative actions. We will provide the final announcements for these administrative actions when we finalize the standards being proposed in today's action.

[3] "2012 Ethanol Industry Outlook," Renewable Fuels Association, *http://ethanolrfa.3cdn.net/d4ad995ffb7ae8fbfe_1vm62ypzd.pdf.*

[4] Letter, Adam Sieminski, Administrator, U.S. Energy Information Administration, to Lisa P. Jackson, Administrator, U.S. EPA, October 18, 2012.

[5] 77 FR 59458.

In the event that we reduce the required volume of cellulosic biofuel for 2013 below the applicable volume specified in the statute, EPA is required to offer biofuel waiver credits to obligated parties that can be purchased in lieu of acquiring cellulosic biofuel RINs. These waiver credits are not allowed to be traded or banked for future use, are only allowed to be used to meet the 2013 cellulosic biofuel standard, and cannot be applied to deficits carried over from 2012. Moreover, unlike cellulosic biofuel RINs, waiver credits may not be used to meet either the advanced biofuel standard or the total renewable fuel standard. For the 2013 compliance period, we estimate that cellulosic biofuel waiver credits could be made available to obligated parties for end-of-year compliance should they need them at a price of $0.42 per credit.

As part of the RFS2 regulations, EPA established an aggregate compliance approach for renewable fuel producers who use planted crops and crop residue from U.S. agricultural land. This compliance approach relieved such producers (and importers of such fuel) of the individual recordkeeping and reporting requirements otherwise required of producers and importers to verify that feedstocks used in the production of RIN-qualifying renewable fuel meet the definition of renewable biomass. EPA determined that 402 million acres of U.S. agricultural land was available in 2007 (the year of EISA enactment) for production of crops and crop residue that would meet the definition of renewable biomass, and determined that as long as this total number of acres is not exceeded, it is unlikely that new land has been devoted to crop production based on historical trends and economic considerations. We indicated that we would conduct an annual evaluation of total U.S. acreage that is cropland, pastureland, or conservation reserve program land, and that if the value exceed 402 million acres, producers using domestically grown crops or crop residue to produce renewable fuel would be subject to individual recordkeeping and reporting to verify that their feedstocks meet the definition of renewable biomass. Based on data provided by the USDA, we have estimated that U.S. agricultural land reached 384 million acres in 2012, and thus did not exceed the 2007 baseline acreage.

On September 29, 2011, EPA approved the use of an aggregate compliance approach to renewable biomass verification for planted crops and crop residue grown in Canada. The Government of Canada utilized several types of land use data to demonstrate that the land included in their 124 million acre baseline is cropland, pastureland or land equivalent to U.S. Conservation Reserve Program land that was cleared or cultivated prior to December 19, 2007, and was actively managed or fallow and nonforested on that date (and is therefore RFS2 qualifying land). The total agricultural land in Canada in 2012 is estimated at 121 million acres. The total acreage estimate of 121 million acres does not exceed the trigger point for further investigation.

C. Impacts of Proposed Actions

Analyses for the March 26, 2010 RFS2 final rule indicated the GHG benefits from cellulosic biofuels compared to the petroleum-based fuels they displace could likely range well above the 60 percent threshold. Therefore, EPA expects that the increase in cellulosic biofuel use that EPA has projected for 2013 over prior year production levels would have directionally beneficial GHG emissions impacts.

For advanced biofuel and total renewable fuel, we are not proposing to reduce the applicable volumes below the volumes required in the statute. All of the impacts of the biofuel volumes specified in the statute were addressed in the RFS2 final rule published on March 26, 2010. Today's rulemaking simply proposes the standards for 2013 advanced biofuel and total renewable fuel whose impacts were previously analyzed. Nevertheless, we recognize that the combination of imports of sugarcane ethanol from Brazil into the U.S. and exports of corn-ethanol from the U.S. to Brazil that may occur as a result of the advanced biofuel volume requirement engenders additional transport related emissions.

II. Projection of Cellulosic Volume for 2013

In order to project the production volume of cellulosic biofuel in 2013 for use in setting the percentage standard, we considered the EIA projections and collected information on individual facilities that have the potential to produce qualifying volumes for consumption as transportation fuel, heating oil, or jet fuel in the U.S. in 2013. This section describes the volumes that we project will be produced or imported in 2013 as well as some of the uncertainties associated with those volumes.

In the past several years the cellulosic biofuel industry has made many significant advances. The production cost of cellulosic biofuels continues to fall as a result of ongoing technology development and operating experience gained from many research and development and demonstration-scale facilities across the country. These important advances include higher biofuel yields per ton of feedstock as well as lower enzyme and catalyst costs. As a result of these yield increases, the projected capital costs and energy costs to produce a gallon of cellulosic biofuel have decreased. New feedstock supply chains, which will be necessary to provide the raw materials for anticipated commercial facilities, have been established, and in several cases companies have signed contracts to obtain significant quantities of feedstocks for their first commercial facilities. These developments, along with the increased availability of project financing, have resulted in the construction of new commercial-scale cellulosic biofuel production facilities. Two commercial-scale facilities are both structurally complete and currently in the start-up phase of operations. Several additional facilities are planning construction in 2013 and start-up in 2014. If these first facilities are successful and operate as designed it will significantly decrease the perceived risk associated with similar future facilities and could potentially lead to the rapid deployment of cellulosic biofuel production facilities around the United States.

Despite significant advances in cellulosic biofuel production technology in recent years, RIN-generating cellulosic biofuel production in 2010 and 2011 was zero despite our projections that the industry was positioned to produce about 6 million gallons in each of those years.[6] In 2010 the majority of the cellulosic biofuel shortfall was met through the use of RINs generated under the RFS1 regulations, and since there were excess RFS1 cellulosic RINs many carried over into the following year. The remaining cellulosic biofuel requirements in 2011 were met through the purchase of cellulosic biofuel waiver credits.[7] A

[6] In the first half of 2010 when the RFS1 program was still effective, some cellulosic biomass ethanol was produced and the RINs generated were valid for demonstrating compliance with the 2010 and 2011 RFS2 cellulosic biofuel standards. However, the RFS1 cellulosic biomass ethanol that was produced was not made from cellulosic feedstocks, but rather was categorized as cellulosic because it was produced in plants using waste materials to displace 90% or more of fossil fuel use under the then-effective definition of cellulosic biomass ethanol in CAA Section 211(o)(1)(A). See also 40 CFR 80.1101(a)(2).

[7] 4,248,338 cellulosic waiver credits were purchased for 2011 compliance according to the EMTS Web site (information retrieved from the Web site on December 11, 2012) at a cost of $1.13 per

Continued

discussion of the reasons for this disparity between our projections and subsequent production is provided in Section II.B below.

In 2012 the first cellulosic RINs were generated under the RFS2 regulations. However, cellulosic biofuel production once again fell far short of our projections in 2012.[8]

A. Statutory Requirements

The volumes of renewable fuel to be used under the RFS program each year (absent an adjustment or waiver by EPA) are specified in CAA 211(o)(2). For 2013, the statute specifies a cellulosic biofuel applicable volume requirement of 1.0 bill gal. The statute requires that if EPA determines, based on EIA's estimate, that the projected volume of cellulosic biofuel production for the following year is less than the applicable volume shown in Table II.A–1, then EPA is to reduce the applicable volume of cellulosic biofuel to the projected volume available during that calendar year.

In addition, if EPA reduces the required volume of cellulosic biofuel below the level specified in the statute, the Act also indicates that we may reduce the applicable volumes of advanced biofuels and total renewable fuel by the same or a lesser volume. Our consideration of the 2013 volume requirements for advanced biofuels and total renewable fuel is presented in Section III.

B. Status of the Cellulosic Biofuel Industry

As in previous years, cellulosic biofuel production in the United States in 2011 was limited to small-scale research and development, pilot, and demonstration-scale facilities. Companies such as Abengoa, BP, Coskata, DuPont Danisco, KL Energy, KiOR, Poet, and others successfully operated small-scale facilities in 2011. Several of these facilities, including all that were part of our 2012 volume projections, are discussed in more detail in Section II.C below. While there were numerous small-scale facilities producing cellulosic biofuel in 2011, the total volume of fuel produced was very small. Because of the R&D nature of these small facilities they are neither designed to produce fuel for commercial sale nor required to report the small volumes of fuel they produced. No RINs were generated for volumes that were produced in 2011, despite all of the companies included in the 2011 projections expressing interest and/or intent in doing so. Although EPA has not attempted to accurately assess production volumes, based on generally available information we believe that total production in the United States in 2011 was likely less than one million gallons of cellulosic biofuel across the industry.

Each of the companies included in our 2011 projections for cellulosic biofuel production had different reasons for not generating cellulosic RINs in 2011. DuPont had concerns about their ability to retain the R&D status of their Vonore, TN facility if they generated RINs and sold the cellulosic ethanol they produced from this facility. Fiberight was unable to secure the funding required to complete the modifications to their facility to allow for cellulosic ethanol production. KL Energy finalized an agreement with Petrobras in the second half of 2010 and changed the direction of their facility to focus on using bagasse as a primary feedstock. Finally, after completing initial production of cellulosic ethanol Range Fuels shut down operations in January 2011 and eventually declared bankruptcy.

While cellulosic biofuel production in the United States remains limited, the industry continues to make significant progress towards producing cellulosic biofuel at prices competitive with petroleum fuels. From 2007 through the second quarter of 2011 venture capitalists invested over $2.4 billion in advanced biofuel companies in North America.[9] Recent advancements in enzyme and catalyst technologies are allowing cellulosic biofuel producers to achieve greater yields of biofuel per ton of feedstock. These advancements have led to lower operational costs as they have driven down the cost for feedstock, energy, and other important inputs on a per gallon basis. For example, the estimated cost of producing cellulosic ethanol using an enzymatic hydrolysis process in 2007 was $4–$8 per gallon.[10] By 2012 the estimated cost of cellulosic ethanol production using the same process had fallen to $2–$3.50 per gallon.[11] The U.S. Department of Energy similarly reports that advancements in cellulosic ethanol technology have resulted in a decrease in modeled costs from approximately $4 per gallon (minimum ethanol selling price) in 2007 to approximately $2.50 per gallon in 2011.[12] The same technological advances have also lowered the capital costs of cellulosic biofuel production facilities per gallon of annual fuel production, as more gallons of biofuel can be produced at a facility without additional equipment or increased feedstock requirements.

As cellulosic biofuel producers gain experience and continue to progress towards commercial-scale biofuel production, it is reasonable to expect that the production costs and capital costs will continue to decline. This is a pattern shown by many new technologies, including renewable and emerging energy technologies. One example which has several similarities to the cellulosic biofuel industry is the experience with the dry mill corn ethanol industry. From 1983, the year in which the first commercial volumes of dry mill ethanol were produced, to 2005 the processing cost of corn ethanol decreased by 45%, while the capital costs of a dry mill ethanol facility decreased by 88%.[13] Many of the drivers for this cost reduction, such as higher ethanol yields, reduced enzyme costs, and better fermentation technologies [14] are also expected to be factors in the lower cellulosic biofuel costs expected in the future. While the cost reduction percentages observed in the dry mill corn ethanol industry are not directly applicable to the cellulosic biofuel industry, the trend of decreasing production and capital costs over time is expected to hold true.

Another area where significant progress has been made is that of feedstock supply for commercial-scale cellulosic biofuel production facilities. This issue has often been raised as a factor that could hinder the development of the cellulosic biofuel industry as many of the proposed facilities rely on feedstocks, such as

credit. The ethanol-equivalent volume of cellulosic biofuel projected for 2011 and used to calculate the percentage standard for that year was 6.0 million gallons.

[8] On December 31, 2012 EPA also received a request for a waiver of the 2012 cellulosic biofuel volume requirement from the American Fuel and Petrochemical Manufacturers.

[9] Solecki M, Rickey D, Epstein B. Advanced Biofuel Market Report 2011: Meeting the California LCFS. Environmental Entrepreneurs. August 22, 2011. Available Online <*http://www.e2.org/ext/doc/E2%20Advanced%20Biofuel%20Mkt%20Report%202011.pdf*>.

[10] Nielsen, Peder Holk. ''The Path to Commercialization of Cellulosic Ethanol—A Brighter Future.'' PowerPoint Presentation. Conference Call. February 22, 2012. Available Online <*http://www.novozymes.com/en/investor/events-presentations/Documents/Cellic3_conf_call_220212.pdf*>.

[11] IBID.

[12] Department of Energy. Biomass Multi-Year Program Plan. April 2012. DOE/EE–0702. Available Online <*http://www1.eere.energy.gov/biomass/pdfs/mypp_april_2012.pdf*>.

[13] Hettinga WG, Junginger HM, Dekker SC, Hoogwijk M, McAloon AJ, Hicks KB. Understanding the reductions in US corn ethanol production costs: An experience curve approach. Energy Policy 37 (2009): 190–203. Available Online <*http://ddr.nal.usda.gov/bitstream/10113/22550/1/IND44146988.pdf*>.

[14] IBID.

agricultural residues or energy crops, for which supply chains have not previously existed. Over the past several years both Abengoa and Poet have been reaching out to farmers in the regions surrounding their first commercial-scale facilities to ensure the availability of the necessary feedstock. Because corn cobs and stover are only seasonally available, using them as a feedstock for a cellulosic biofuel production facility would require significant feedstock storage facilities. In the last two years Abengoa and Poet completed construction of large-scale feedstock storage facilities to ensure adequate supply to their cellulosic biofuel production facilities throughout the year. Both companies successfully completed fall biomass harvests in 2011 and have contracted with local farmers to provide feedstock for their cellulosic ethanol facilities. This supply chain will not only provide feedstock for their first commercial-scale facilities, but also a model that can be re-created at future production facilities.

Several cellulosic biofuel producers are planning to use slash, forest thinnings, and forest product residue or the cellulosic portions of yard waste as feedstock. This material has many qualities that make it desirable as a cellulosic biofuel feedstock. It is generally inexpensive and is readily available in some regions of the United States. It is also available year round rather than seasonally, significantly reducing the need for large-scale feedstock storage facilities. Securing a sufficient quantity of this feedstock for a commercial-scale facility, however, can be challenging. In the summer of 2011 KiOR announced it had signed a feedstock agreement with Catchlight Energy to provide all the necessary slash, forest thinning, and forest product residue for their first commercial-scale facility. While KiOR plans to transition to planted trees for future facilities, KiOR now has secured sufficient feedstock such that they can produce cellulosic biofuel and cellulosic RINs using an existing pathway at their first commercial-scale facility. INEOS Bio also has a long term agreement with Indian River County to provide vegetative waste which will serve as the feedstock for their first facility.

Another appealing feedstock for cellulosic biofuel production is separated municipal solid waste (MSW). MSW is already being collected and transported to a centralized facility, is consistently available throughout the year, and can be obtained for a very low, or even negative cost. MSW often contains contaminants, however, that may make it challenging to process for some cellulosic biofuel technologies. EPA also requires that waste separation plans be submitted and approved prior to any company generating RINs using separated MSW as a feedstock. In June 2012 EPA approved the first waste separation plan under the RFS program for Fiberight's facility in Blairstown, Iowa.

Significant progress has also been made by some companies towards funding the construction of their first commercial-scale facilities. In the early years of the cellulosic biofuel industry several small start-up companies announced plans to build large commercial-scale facilities that were scheduled to begin production in the past few years. The construction of many of these facilities was dependent on the companies raising additional funding, either from venture capitalists, government grants, or loans backed by government guarantees. So far few of the companies that made these early announcements have been able to successfully raise the necessary funds and begin construction. Securing this funding proved difficult, and when it did not materialize the projects were delayed or cancelled.

The funding profiles of the companies included in our proposed volume for 2013, as well as for many of the companies targeting production in 2014, are markedly different. Many of these projects have already received, and in several cases have closed on loan guarantees and grants offered by DOE or USDA. Other companies have filed for and successfully executed IPOs. Several cellulosic ethanol projects are being self-financed by large companies such as Abengoa and Poet with significant experience in the biofuel, petrochemical, and specialty chemical markets. This solid financial backing has allowed these companies to proceed with construction. Both of the facilities included in our proposed volume for 2013 have already completed the construction of their first commercial production facilities. There is therefore far less uncertainty as to likely production from these two facilities than has been present for most of EPA's earlier projections. The next section provides additional details on the funding and construction status of the projects included in our projected cellulosic biofuel production volumes for 2013.

If these first commercial-scale cellulosic biofuel production facilities are successful, the potential exists for a rapid expansion of the industry in subsequent years. Having successful commercial-scale facilities would not only provide useful information to help maximize the efficiency of future facilities, but would also significantly decrease the technology and scale-up risks associated with cellulosic biofuel production facilities and could lead to increased access to project funding. Fiberight and ZeaChem both plan to build larger-scale facilities (~25 mill gal per year) as soon as they are able to raise the necessary funds. INEOS Bio plans to expand production by building additional units near sources of inexpensive feedstock ranging in size from 8 to 50 million gallons of ethanol per year. They are currently exploring expansion possibilities in the United States and internationally. KiOR has plans for a second commercial-scale facility to be built in Natchez, MS, that will be approximately three times larger (~30 mill gal per year) than their Columbus, MS, plant and plans to break ground at their second facility after their first is fully operational. Abengoa currently anticipates construction of additional cellulosic ethanol facilities at multiple locations, likely including co-locating with some of their existing starch facilities in the US. Poet has a similar expansion strategy to build cellulosic ethanol plants at their grain ethanol facilities, license their technology for use at other grain ethanol facilities, and build cellulosic ethanol facilities that use feedstocks such as rice straw, rice hulls, woody biomass, or energy crops as a feedstock. Poet's goal is to be involved in the production of 3.5 billion gallons of cellulosic ethanol per year by 2022. Several other companies, such as DuPont and Enerkem are also targeting 2014 for the start-up of cellulosic biofuel production facilities and would likely look to build additional facilities relatively quickly if successful. While many of these expansion plans are still in the early stages and are subject to change, they do point to the potential for cellulosic biofuel production to increase rapidly in future years.

C. Cellulosic Biofuel Volume Assessment for 2013

In 2011 no cellulosic biofuel RINs were generated, though some small volumes were produced. Announcements of new projects and project funding, changes in project plans, project delays, and cancellations occurred. Biofuel producers faced not only the challenge of the scale-up of innovative, first-of-a-kind technology, but also the challenge of securing funding in a difficult economy. While the cellulosic biofuel producer tax credit has been extended through 2013, the short-term nature of this incentive and legal challenges to the RFS volumes

have caused some technology developers and investors to question the long term RIN value of cellulosic biofuels. The resulting uncertainty may have had an impact on cellulosic biofuel production in 2011 and 2012.

Despite these challenges, there are several factors indicating that significant volumes of cellulosic biofuel are projected to be produced in 2013. Commercial-scale cellulosic biofuel projects from INEOS Bio and KiOR are structurally complete and expected to begin fuel production in the first quarter of 2013 and achieve production rates at or near their nameplate capacities by the end of 2013. Another commercial-scale facility backed by Abengoa, a large company with significant experience in biofuel production, is also scheduled to begin producing cellulosic biofuel in 2013. These facilities are indicative of a shift across the cellulosic biofuel industry from small-scale R&D and demonstration facilities operated by small start-up companies to large commercial-scale facilities backed by large companies, many of which have substantial experience in related industries.

In order to project cellulosic biofuel production for 2013, we have tracked the progress of more than 100 biofuel production facilities. From this list of facilities we used publically available information, as well as information provided by DOE and USDA, to make a preliminary determination of which facilities are the most likely candidates to produce cellulosic biofuel and generate cellulosic biofuel RINs in 2013. Each of these companies was investigated further in order to determine the current status of their facilities and their likely cellulosic biofuel production and RIN generation volumes for the coming years. Information such as the funding status of these facilities, current status of the production technologies, announced construction and production rampup periods, and annual fuel production targets were all considered when we met with senior level representatives of each company to discuss cellulosic biofuel target production levels for 2013. Our projection of the cellulosic biofuel production in 2013 is based on the estimate we received from EIA as well as the individual production projections that emerged from these discussions. A brief description can be found below for each of the companies we believe will produce cellulosic biofuel and make it commercially available in 2013. We will continue to gather more information to help inform our decision regarding the final cellulosic biofuel volume to be required for 2013.

In the sections that follow, we first discuss the cellulosic production facilities that were part of our volume projections for the 2012 compliance year and the progress that they have made. Then we present our consideration of additional facilities that we believe will also produce cellulosic biofuel in 2013.

1. Cellulosic Biofuel Facilities Considered in the 2012 Projections

In the January 9, 2012, final rule that established the required 2012 cellulosic biofuel volume, we identified six production facilities that we projected would produce cellulosic biofuel and make that fuel commercially available in 2012. Five of these production facilities are currently structurally complete and one is planning to retrofit an existing corn ethanol plant with construction beginning in the first half of 2013. Six active facilities have completed the registration process for the RFS program, and are currently able to generate cellulosic RINs. The current status of each of these facilities, including target production levels for each facility in 2013, is discussed below.

API

American Process Inc. (API) is developing a project in Alpena, Michigan capable of producing up to 900,000 gallons of cellulosic ethanol per year from woody biomass. This facility will use a technology developed by API called GreenPower+™. This technology extracts the hemicellulose portion of woody biomass using hot water and hydrolyzes it into sugars. These sugars are then converted to ethanol or other alcohols, while the remaining portion of the woody biomass, containing mostly cellulose and lignin, is processed into wood paneling at a co-located facility. At future, larger-scale facilities API anticipates burning the residual biomass in a boiler to produce renewable steam and electricity as well as cellulosic biofuel.

In January 2010 API received a grant from DOE for up to $18 million for the construction of their demonstration facility. Construction of the Alpena, Michigan facility began in March 2011 and API began commissioning operations at their facility in the summer of 2012. Production start-up is expected to begin in 2013.

Fiberight

Fiberight uses an enzymatic hydrolysis process to convert the biogenic portion of separated MSW and other waste feedstocks into ethanol. They have successfully completed five years of development work on their technology at their small pilot plant in Lawrenceville, Virginia. In 2009 Fiberight purchased an idled corn ethanol plant in Blairstown, Iowa with the intention of making modifications to this facility to allow for the production of 6 million gallons of cellulosic ethanol per year from separated MSW and industrial waste streams. These modifications were scheduled to be completed in 2011, but difficulties in securing funding have resulted in construction at this facility being delayed. In January 2012 Fiberight was offered a $25 million loan guarantee from USDA. Closing on this loan would provide substantially all of the remaining funds required for Fiberight to complete the required modifications at their Blairstown facility. Construction is expected to begin in early spring 2013 and the company expects that it will take approximately 6 months to complete. Additionally, Fiberight's waste separation plan for this facility was approved in June 2012 allowing Fiberight to generate RINs for the cellulosic ethanol they produce using separated MSW as a feedstock. Fiberight is also currently developing a second commercial-scale project based on their MSW ''hub and spoke'' concept. They anticipate that this facility will begin fuel production in 2014 and will produce approximately 25 million gallons of cellulosic ethanol per year when fully built out.

INEOS Bio

INEOS Bio has developed a process for producing cellulosic ethanol by first gasifying cellulosic feedstocks into a syngas and then using naturally occurring bacteria to ferment the syngas into ethanol. In January 2011 USDA announced a $75 million loan guarantee for the construction of INEOS Bio's first commercial facility to be built in Vero Beach, Florida. This loan was closed in August 2011. This was in addition to the grant of up to $50 million INEOS Bio received from DOE in December 2009. At full capacity, this facility will be capable of producing 8 million gallons of cellulosic biofuel as well as 6 megawatts (gross) of renewable electricity from a variety of feedstocks including yard, agricultural, and wood waste. The facility also plans to use a limited quantity of separated MSW as a feedstock after initial start-up.

On February 9, 2011, INEOS Bio broke ground on this facility. INEOS Bio completed construction on this facility in June 2012 and began full commissioning of the facility. In August

2012 INEOS Bio received approval from EPA for their yard waste separation plan and successfully registered their Vero Beach, FL facility under the RFS program. In October 2012 the facility began producing renewable electricity. INEOS Bio entered the start-up phase of cellulosic ethanol production in November 2012. During this phase the facility was not run continually as facility modifications continued to be made, however a small volume of cellulosic ethanol was successfully produced. INEOS Bio has reported that they plan to be producing cellulosic ethanol at levels near the facility's capacity of 8 million gallons per year throughout 2013. This reported schedule represents a very aggressive ramp-up period. Due to the many challenges of starting up a first-of-a-kind facility and the history of production delays in the cellulosic biofuel industry, EPA believes a more conservative projection is appropriate. For this proposal we project 6 million gallons of cellulosic ethanol from INEOS Bio in 2013. This volume is consistent with what would be expected from this facility assuming a six month straight-line ramp-up period beginning in January 2013. EPA requests comment on the projected available volume from INEOS Bio's facility in 2013, as well as these assumptions for the appropriate ramp-up period for cellulosic biofuel facilities and expectations for production during this ramp-up phase. EPA will monitor INEOS Bio's production output in the time between this proposal and the final rule and will consider that information, together with public comments received in making a final projection. INEOS Bio is also exploring several opportunities for additional cellulosic biofuel production facilities, both in the United States and internationally. INEOS Bio is targeting sources of inexpensive feedstock, primarily waste materials, and sees a market for plants with production capacities ranging from 8 to 50 million gallons per year.

KiOR

KiOR is working to commercialize a technology capable of converting biomass to a biocrude using a process they call Biomass Fluid Catalytic Cracking (BFCC). BFCC uses a catalyst developed by KiOR in a process similar to Fluid Catalytic Cracking currently used in the petroleum industry. The first stage of this process produces a renewable crude oil which is then upgraded to produce primarily gasoline, diesel, and jet fuel as well as a small quantity of fuel oil, all of which are nearly identical to those produced from petroleum.

KiOR's first commercial-scale facility is located in Columbus, Mississippi and is capable of producing approximately 11 million gallons of gasoline, diesel, and jet fuel per year. Construction on this facility began in May 2011 and was completed in September 2012. KiOR's Columbus facility is currently in the start-up phase. They have produced biocrude from cellulosic feedstocks that is in line with their specifications for upgrading to finished transportation fuels. Cellulosic biofuel RINs from this facility are expected in the first quarter of 2013. This facility is funded, in large part, with funds acquired through private equity raises and supplemented by KiOR's $150 million IPO in June 2011. KiOR's current expectations at their Columbus facility are for a start-up [15] period lasting 9–12 months during which they estimate fuel production will be at 30%–50% of the facility capacity after which they plan to approach full production rates at the facility. KiOR has feedstock supply agreements in place to supply all of the required feedstock for their Columbus facility with slash and pre-commercial thinning. They also have off-take agreements with several companies for all of the fuel that will be produced. KiOR has also announced plans to begin work on their second commercial-scale biofuel production facility in Natchez, Mississippi upon the successful start-up of their first facility. It is unlikely this second facility will begin production of biofuel in 2013. For 2013 our proposed production projection is for 5 million gallons (8 million ethanol-equivalent gallons) of cellulosic biofuel from KiOR's Columbus facility. This volume is calculated assuming KiOR will produce at 30% of the facility capacity for the first nine months of 2013 (consistent with a 12 month line-out period beginning in October 2012) followed by three months of production at the nameplate capacity of the facility.[16] These numbers are relatively conservative estimates based on the low end of KiOR's production guidance. EPA believes this is an appropriate approach for this proposal. We will continue to monitor KiOR's production volume in the period between this proposal and the final rule and will use this information, together with the public comments we receive in preparing an updated projection for the final rule.

Blue Sugars

Blue Sugars, formerly KL Energy, has developed a process to convert cellulose and hemicellulose into sugars and ethanol using a combined chemical/thermal-mechanical pretreatment process followed by enzymatic hydrolysis, co-fermentation of C5 and C6 sugars, and distillation to fuel-grade ethanol. This production process is versatile enough to allow for a wide variety of cellulosic feedstocks to be used, including woody biomass and herbaceous biomass such as sugarcane bagasse. In August 2010 Blue Sugars announced a joint development agreement with Petrobras America Inc. As part of the agreement Petrobras has invested $11 million to modify Blue Sugars' 1.5 million gallons per year demonstration facility in Upton, Wyoming to allow it to process bagasse and other biomass feedstocks. The modifications to Blue Sugars' facility were completed in the spring of 2011. In April 2012 Blue Sugars generated approximately 20,000 cellulosic biofuel RINs, the first such RINs generated under the RFS program. Blue Sugars has indicated, however, that the cellulosic ethanol they produced was exported to Brazil for promotional efforts at the Rio +20 conference in Brazil. These RINs would therefore have to be retired and will not be available to obligated parties to meet their cellulosic biofuel requirements in 2012. The main purpose of the Upton, Wyoming facility is to further refine Blue Sugars' technology in preparation for their first commercial facilities which may be located in the Brazil or the United States.

ZeaChem

ZeaChem successfully completed construction of their demonstration-scale facility in Boardman, Oregon, in October 2012, allowing for the production of ethanol from sugars derived from cellulose and hemicellulose. When fully operational, ZeaChem expects this facility will be capable of producing 250,000 gallons of cellulosic ethanol per year. ZeaChem's production process uses a combination of biochemical and thermochemical technologies to produce ethanol and other renewable chemicals from cellulosic materials. The feedstock is first fractionated into two separate streams, one containing sugars derived from cellulose and hemicellulose and

[15] In conversations with KiOR they refer to this as a ''line-out'' period.

[16] EPA is not assuming that this facility will produce at a 30% rate throughout the entire start-up period, but rather projects that cellulosic biofuel production, when averaged over the entire start-up period, will be 30% of the production capacity during that period. Production will likely be very small in the first few months and will ramp up to near full production capacity by the end of the start-up period.

the other containing lignin. The sugars are fermented into an intermediate chemical, acetic acid, using a naturally occurring acetogen. The acetic acid is then converted into ethyl acetate, which can then be hydrogenated into ethanol. The hydrogen necessary for this process is produced by gasifying the lignin stream from the cellulosic biomass. Work is currently underway to add additional process modules that will enable ZeaChem to convert the cellulosic ethanol to jet and diesel fuel beginning in 2013.

ZeaChem's process is flexible and is capable of producing a wide range of renewable chemicals and fuels from many different feedstocks. They plan to use both agricultural residues and wood waste at their demonstration facility and have contracts in place for these feedstocks, as well as purpose-grown wood, at their first commercial-scale facility. In January 2012 ZeaChem announced that they had received a $232.5 million conditional loan guarantee offer from USDA for the construction of their first commercial-scale facility, which will have a capacity of at least 25 million gallons per year. ZeaChem currently has agreements in place to provide all of the necessary feedstock for this facility. This facility, however, is not expected to begin producing cellulosic biofuel until late 2014 at the earliest.

2. Facilities Not Included in 2012 Projections

In addition to the facilities that were included in our cellulosic biofuel volume projections for the 2012 compliance year, there is one additional facility that we believe will produce volumes in 2013. Several other large production facilities are planning to begin production of cellulosic biofuel in 2014.

Abengoa

Abengoa, a large international biofuels company, is one of two new cellulosic biofuels producers expected to begin the production of cellulosic biofuels and RINs from a commercial-scale facility in 2013. Abengoa plans to use an enzymatic hydrolysis technology to convert corn stover and other agricultural waste feedstocks into ethanol. After successfully testing and refining their technology at a pilot-scale facility in York, Nebraska as well as in a demonstration-scale facility in Salamanca, Spain, Abengoa is now working towards the completion of their first commercial-scale cellulosic ethanol facility in Hugoton, Kansas. Abengoa has contracts in place to provide the majority of feedstocks necessary for this facility for the next 10 years and successfully completed their first biomass harvest in the fall of 2011. Construction at this facility, which began in September 2011, is expected to take 24 months and be completed in the fourth quarter of 2013. All of the major process equipment for this project has been purchased and all of the required permits for construction have been approved. Abengoa's Hugoton facility is being partially funded by a $132 million Department of Energy (DOE) loan guarantee.

When completed, the Hugoton plant will be capable of processing 700 dry tons of corn stover per day, with an expected annual ethanol production capacity of approximately 24 million gallons. Abengoa plans to begin ramping up production at the facility shortly after completing construction in late 2013 and to be producing fuel at rates near the nameplate capacity in the second quarter of 2014. After successfully proving their technology at commercial-scale in Hugoton, Abengoa currently plans to construct additional similar cellulosic ethanol production facilities, either on greenfield sites or co-locating these new facilities with their currently existing starch ethanol facilities around the United States. While this facility could produce up to 1 million gallons of cellulosic ethanol in 2013 even a slight delay would result in no fuel being produced in 2013. Given the history of delays in the cellulosic biofuels industry we are not including any volume from Abengoa's Hugoton, KS facility in our proposed projected available volume for 2013.

Poet

Poet has also developed an enzymatic hydrolysis process to convert cellulosic biomass into ethanol. Poet has been investing in the development of cellulosic ethanol technology for more than a decade and began producing small volumes of cellulosic ethanol at pilot-scale at their plant in Scotland, SD in late 2008. In January 2012, Poet formed a joint venture with Royal DSM of the Netherlands called Poet-DSM Advanced Biofuels to commercialize and license their cellulosic ethanol technology.

The joint venture's first commercial-scale facility, called Project LIBERTY, will be located in Emmetsburg, Iowa. This facility is designed to process 770 dry tons of corn cobs, leaves, husks, and some stalk per day into cellulosic ethanol. The facility is projected to have an annual production capacity beginning at approximately 20 million gallons per year, increasing over time to 25 million gallons per year. In anticipation of the start-up of this facility, Poet constructed a 22-acre biomass storage facility and had its first commercial harvest in 2010, collecting 56,000 tons of biomass.

Site prep work for Project LIBERTY began in the summer of 2011, and vertical construction of the facility began in the spring of 2012. Poet was awarded a $105 million loan guarantee offer for this project from DOE in July 2011, but with the joint venture decided to proceed without the loan guarantee. This project is expected to be completed by the end of 2013, however at this time EPA is not expecting any commercial cellulosic ethanol production from this facility until 2014. After the completion of Project LIBERTY, Poet plans to build cellulosic ethanol facilities at all of their existing corn ethanol plants. They are also planning to license their technology for use at other grain ethanol plants, as well as build additional plants that will process wheat straw, rice hulls, woody biomass or herbaceous energy crops. By 2022 Poet has a goal of producing 3.5 billion gallons of cellulosic ethanol per year.

Other Companies

There are several more companies planning to begin producing cellulosic biofuel from commercial-scale facilities in 2014. Companies such as DuPont, Enerkem, and several others are all currently targeting 2014 for the start-up of their first commercial facilities. These facilities represent approximately 100 million gallons of additional cellulosic biofuel production capacity. As with the companies discussed above, most of these companies have already begun to develop plans for their successive facilities after the successful completion of their initial projects. While they will not contribute any volume in 2013, and have therefore not been included in our proposed volume, they are a further indication of the potential for the significant growth of the cellulosic biofuel industry in the United States in the near future.

3. Other Potential Sources of Domestic Cellulosic Biofuel

Each of the companies listed in the previous two sections is planning to generate cellulosic biofuel RINs using one of the valid RIN-generating pathways listed in Table 1 to § 80.1426. We are also aware of several companies who may be in a position to produce cellulosic biofuel in 2013 but intend to use a production pathway that is not currently approved for RIN generation. Pathways that are currently under evaluation by EPA include transportation fuels derived from

landfill biogas such as CNG and cellulosic ethanol produced from corn kernel fiber. If these or other cellulosic biofuel pathways are approved by EPA, they may be used to generate cellulosic biofuel RINs in 2013. Because the date of any final determination on these pathways is uncertain, however, no volume of cellulosic fuel from these pathways has been included in our proposed 2013 cellulosic biofuel projection.

4. Imports of Cellulosic Biofuel

While domestically produced cellulosic biofuels are the most likely source of cellulosic biofuel available in the United States in 2013, imports of cellulosic biofuel produced in other countries may also generate RINs and participate in the RFS program. While the RFS program does provide a financial incentive for companies to import cellulosic biofuels into the United States, the combination of local demand, financial incentives from other governments, and transportation costs for the cellulosic biofuel has resulted in no cellulosic biofuel being imported to the United States thus far. We believe this situation is likely to continue in the near future and have not included any cellulosic biofuel imports in our projections of available volume in 2013.

As in the United States, the production of cellulosic biofuels internationally is currently limited to small-scale research and development, pilot, and demonstration facilities. This is likely to continue to be the case throughout 2013. Two notable exceptions are facilities built and operated by Beta Renewables and Enerkem. Beta Renewables completed construction of their first commercial-scale facility located in Crescentino, Italy in the summer of 2012. This facility is designed to produce approximately 20 million gallons of cellulosic ethanol per year. Beta Renewables uses an enzymatic hydrolysis process to produce ethanol from local agricultural residues and herbaceous energy crops.

Enerkem is also in the process of building their first commercial-scale facility in Edmonton, Alberta and plans to begin operations in early 2013. Enerkem's facility will use a thermochemical process to produce syngas from MSW and then catalytically convert the syngas to methanol. The methanol can then be sold directly or upgraded to ethanol or other chemical products. At full capacity this facility will be capable of producing 10 million gallons of cellulosic ethanol per year. At this point, neither Beta Renewables nor Enerkem have registered their facilities under the RFS program, a necessary step that must be completed before these companies can generate RINs for any fuel they import into the United States. Both are planning to locate additional plants in the United States in the future and are likely to generate RINs for production from domestic facilities in future years.

5. Projections From the Energy Information Administration

Section 211(o)(3)(A) of the Clean Air Act requires EIA to " * * * provide to the Administrator of the Environmental Protection Agency an estimate, with respect to the following calendar year, of the volumes of transportation fuel, biomass-based diesel, and cellulosic biofuel projected to be sold or introduced into commerce in the United States." EIA provided these estimates to us on October 18, 2012.[17] With regard to cellulosic biofuel, the EIA estimated that the available volume in 2013 would be 9.6 million gallons (13.1 million ethanol-equivalent gallons). A summary of the commercial scale plants they considered and associated production volumes is shown below in Table II.C.5.

TABLE II.C.5—CELLULOSIC BIOFUEL PLANTS EXPECTED TO GENERATE BIOFUEL RINS FOR 2013

Mechanical completion	Company	Location	Product	Design capacity	EIA forecast		
					Utilization (percent)	Production (million gallons)	Ethanol-equivalent production (million gallons)
2012	INEOS Bio	Vero Beach, FL	Ethanol	8	50	4.0	4.0
2012	KiOR	Columbus, MS	Liquids	11	50	5.5	9.0
Various	Various Pilot Plants	Various	Ethanol	1	10	0.1	0.1
Total Capacity and Production for 2013				20	48	9.6	13.1

EIA's projections of cellulosic biofuel production in 2013 are very similar to EPA's projections discussed above and summarized in Section II.C.6 below. The lists of companies that EIA and EPA expect to generate cellulosic biofuel RINS in 2013 are the same. There are, however, differences in the volumes of cellulosic biofuel expected to be produced at the production facilities listed. EPA has higher projections of cellulosic biofuel production for INEOS Bio (6 million gallons vs. 4 million gallons) and lower projections for KiOR (8 million ethanol-equivalent gallons vs. 9 million ethanol equivalent gallons). These variations are a result of different methodologies used by EIA and EPA to project biofuel production in future years. Both INEOS Bio and KiOR are structurally complete commercial scale facilities that plan to operate throughout 2013. In their projections EIA has used a utilization rate of 50% for both of these facilities. Rather than use utilization rates to project production, EPA has estimated ramp-up schedules for the both INEOS Bio and KiOR. The ramp-up schedules estimated for these facilities differ from each other and were developed based on information received from the companies and EPA's knowledge of the production processes used by each company. We believe these different ramp-up schedules, which correspond to different effective utilization rates, are appropriate due to the significant differences in the technologies used by INEOS Bio and KiOR to produce cellulosic biofuel. EPA and EIA both considered the timing of the anticipated start up of these facilities along with anticipated ramp-up schedules/utilization rates in projecting volume production for 2013.

[17] Letter from Adam Sieminski, EIA Administrator to Lisa Jackson, EPA Administrator October 18, 2012.

As both facilities plan to start production at approximately the same time, the difference in the effective utilization rates represented by EPA's projected volumes for these companies is the result of anticipated ramp-up schedules. More information on the ramp-up schedules used by EPA in our projected production volumes for INEOS Bio and KiOR can be found in Section II.C.1 above.

While the cellulosic biofuel volume projections for 2013 provided by EIA are not identical to those being finalized in this rule EPA believes that they are similar enough to support the volumes we are finalizing. Where differences exist they are due to differences in the ramp-up schedules estimated by EPA and the utilization factors used by EIA for the two companies expected to produce cellulosic biofuel in 2013. As discussed above, EPA believes the approach we have taken is appropriate. EPA has interpreted section CAA 211(o)(7)(D) as vesting the authority for making the projection with EPA, and is not re-opening that interpretation for comment in today's proposal. As described in past rulemakings, the statute provides that the projection is ''determined by the Administrator based on the estimate provided [by EIA].'' Congress did not intend that EPA simply adopt EIA's projection without an independent evaluation. EPA's consideration of EIA's estimate in developing this proposal is consistent with EPA's consideration of EIA's estimate in the past rulemakings involving a reduction of the volume standard for cellulosic biofuel. EPA's interpretation and implementation of the obligation to base its projection on the EIA estimate recently was upheld in *API* v. *EPA,* No. 12–1139, slip op. at 5–9 (D.C. Cir. January 25, 2013).

6. Summary of Volume Projections

The information we have gathered on cellulosic biofuel producers, described above, allows us to project production volumes for each facility in 2013. For the purposes of this proposed rulemaking we have focused on commercial-scale cellulosic biofuel production facilities. We believe our focus on commercial-scale facilities is appropriate as the industry transitions from small-scale R&D and pilot facilities to large-scale commercial production. It is likely that several small-scale facilities such as API, KL Energy, ZeaChem, and others will also produce some cellulosic biofuel in 2013. Indeed, EIA's projection from such facilities was only 0.1 million gallons in 2013. This volume is quite small in relation to that expected from the two commercial-scale facilities for which we have projected volumes in 2013 (see Table II.C.6–1 below). Additionally, while RINs may be generated for any cellulosic biofuel produced from these small R&D and pilot facilities, historically many have chosen not to do so for a variety of reasons. We are therefore not proposing to include a volume projection from these facilities. We invite comment on this issue.

In 2013 as many as four domestic cellulosic biofuel production facilities have the potential to produce fuel at commercial scale. Each of these facilities is discussed above, and the facility production targets for each are summarized in Table II.C.6–1 below. Two of the companies that have the potential to produce cellulosic biofuel in 2013, Abengoa and Fiberight, are not planning on beginning fuel production until late in the year. Even a small delay in their expected production timeline could result in their failure to produce any cellulosic biofuel in 2013. For the purpose of this proposal, therefore, we are not projecting production from these facilities in 2013 consistent with EIA.

When added together, the total projected production volume from commercial-scale production facilities in the United States in 2013 is 11 million gallons (14 million ethanol-equivalent gallons). This number represents the expected fuel production from each facility, taking into account the EIA estimates and the many factors described in detail above.

TABLE II.C.6–1—PROJECTED AVAILABLE CELLULOSIC BIOFUEL FOR 2013

Company name	Location	Feedstock	Fuel	Design capacity (MGY)	First production (projected)	2013 projected available volume (MG)
Abengoa	Hugoton, KS	Corn Stover	Ethanol	24	4th Quarter 2013	0
Fiberight	Blairstown, IA	MSW	Ethanol	6	4th Quarter 2013	0
INEOS Bio	Vero Beach, FL	Vegetative Waste	Ethanol	8	1st Quarter 2013	6
KiOR	Columbus, MS	Wood Waste	Gasoline and Diesel	11	1st Quarter 2013	8
Various Pilot/Demo Plants.	N/A	N/A	N/A	N/A	N/A	0
Total				49		14

D. Proposed Cellulosic Biofuel Volume for 2013

In today's NPRM we are proposing a volume for the 2013 cellulosic biofuel standard that is based on EIA's estimate, production volumes developed in consultation with the companies expected to produce cellulosic biofuel from commercial-scale facilities in 2013, and EPA's judgment. Many factors have been taken into consideration in developing these projections, such as the EIA estimate, the current status of project funding, the status of the production facility, anticipated construction timelines, the anticipated start-up date and ramp-up schedule, feedstock supply, intent to generate RINs, and many others. Moreover, all of the companies included in our 2013 volume projections have invested a significant amount of time and resources developing their technologies at R&D and demonstration-scale facilities prior to the design and construction of their first commercial-scale facilities. The projects have solid financial backing; for example the INOES Bio project is backed by federal loan guarantees. By the time of our final rule the facilities owned by KiOR and INEOS Bio are scheduled to have already begun fuel production, making our 2013 projections more reliable than prior year projections. We believe the sum of these individual projected available volumes (14 million ethanol-equivalent gallons) is a reasonable representation of expected production. This projection reflects EPA's best estimate of what will actually happen in 2013.[18]

[18] See *API* v. *EPA,* No. 12–1139, slip op. at 10 (D.C. Cir. January 25, 2013).

It is important to note that the final cellulosic biofuel standard for 2013 may be set at a volume that differs from the proposed volume. This could happen for a variety of reasons, including unexpected project modifications or cancellations or the inclusion of volumes of cellulosic biofuel from sources other than those listed above. For example, the proposed projected available volume of cellulosic biofuel in 2013 discussed above (14 million ethanol-equivalent gallons) does not include potential contributions from cellulosic ethanol produced from corn fiber or transportation fuels derived from landfill biogas such as CNG. Together, these pathways could generate several tens of millions of gallons of ethanol-equivalent renewable fuel. However, since it is uncertain when our evaluation of these pathways will be completed we have not included their volumes in our 2013 projection in this NPRM. If any of these pathways are approved prior to the final rule, additional volume from these sources may be added to the target production volumes listed in Table II.C.5–1 for the final rule.

We will continue to monitor the progress of the cellulosic biofuel industry, in particular the progress of the companies which form the basis of our proposed 2013 volume projection. As time progresses and we are able to track whether or not the cellulosic biofuels producers are able to meet the construction and ramp-up schedules they have presented, and after considering public comments we receive on this proposal, we will have a clearer idea of the appropriate volume of fuel that we can reasonably expect to be produced and made commercially available in 2013.

III. Assessment of Advanced Biofuel and Total Renewable Fuel for 2013

As described in Section I, the volumes of renewable fuel to be used under the RFS2 program each year (absent an adjustment or waiver by EPA) are specified in CAA 211(o)(2). For 2013, the applicable volume of advanced biofuel is 2.75 bill gal and the applicable volume of total renewable fuel is 16.55 bill gal. However, the statute gives EPA the discretion to reduce these volume requirements in the event that the cellulosic biofuel volume requirement is reduced. While we are not proposing to reduce the required volumes of advanced biofuel and total renewable fuel for 2013, we request comment on whether and to what extent a reduction is warranted. We have the discretion to reduce the advanced biofuel volume and the total renewable requirements for 2013 by up to the amount that the cellulosic biofuel volume requirement is reduced (986 mill gal in today's proposal). This section discusses our evaluation of these two volume requirements.

A. Statutory Requirements

According to CAA 211(o)(7)(D)(i), if EPA determines that the projected volume of cellulosic biofuel production for the following year is less than the applicable volume provided in the statute, then EPA must reduce the applicable volume of cellulosic biofuel to the projected volume available during that calendar year. Under such circumstances, EPA also has the discretion to reduce the applicable volumes of advanced biofuel and total renewable fuel by an amount not to exceed the reduction in cellulosic biofuel.

Section 211(o)(7)(D)(i) provides that ''For any calendar year in which the Administrator makes such a reduction, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.'' Thus Congress authorized EPA to reduce the volume of total renewable fuel ''and'' advanced biofuels. This indicates a clear Congressional intention that EPA may reduce both the total renewable and advanced biofuel volume together, not one or the other.

This is consistent with the structure of the national volume standards, where the volume standards are nested and are not separate, unrelated standards. Congress established the advanced biofuel standard and its subsets as integral parts of the total renewable fuel standard. The volume requirements are interrelated and work together to achieve the goals of increasing the displacement of fossil fuel and increasing the use of fuels that reduce greenhouse gases. As described in the NPRM for the RFS2 program, we do not believe it would be appropriate to lower the advanced biofuel standard but not the total renewable standard, as doing so would allow conventional biofuels to effectively be used to meet the standards that Congress specifically set for advanced biofuels. See 74 FR 24915, May 26, 2009. EPA interprets this provision as authorizing EPA to reduce both total renewable fuel and advanced biofuel, by the same amounts, if EPA reduces the volume of cellulosic biofuel. The reductions in total renewable fuel and advanced biofuel can be up to but no more than the amount of reduction in the cellulosic biofuel volume.

Since cellulosic biofuel is also used to satisfy the advanced biofuel standard and the total renewable fuel standard, any reductions in the applicable volume of cellulosic biofuel will also affect the means through which obligated parties comply with these two other standards. Congress established the volume requirements for advanced biofuel and total renewable fuel in conjunction with the specified cellulosic biofuel volumes, as interrelated standards. Therefore it is appropriate to consider a possible reduction in the advanced biofuel and total renewable fuel applicable volumes when EPA reduces the cellulosic biofuel volume below the applicable volume for cellulosic biofuel set forth in the statute.

In 2013 the applicable volume of cellulosic biofuel specified in the statute represents more than a third of the advanced biofuel volume (1.0 bill gal out of 2.75 bill gal), a higher fraction than in any previous year. A substantial reduction in the applicable volume of cellulosic biofuel could potentially also have a substantial impact on the sufficiency of volumes to meet the advanced biofuel and total renewable fuel standards. As described in Section II.D above, we are indeed proposing a projected available volume of cellulosic biofuel for 2013 at significantly below the statutory applicable volume of 1.0 billion gallons. If we were to finalize a cellulosic biofuel applicable volume of 14 mill gallons for 2013, we would have the discretion to reduce the advanced biofuel and total renewable fuel applicable volumes by up to 986 mill gallons (ethanol-equivalent). Therefore, we believe that an investigation into the availability of advanced biofuel and total renewable fuel is warranted.

The statute does not provide any explicit criteria that must be met or factors that must be considered when making a determination as to whether and to what degree to reduce the advanced biofuel and total renewable fuel applicable volumes when we have the discretion under CAA 211(o)(7)(D)(i) to do so. However, in general we believe that it would not be consistent with the energy security [19] and greenhouse gas reduction goals of the statute to reduce the applicable volume of advanced biofuel set forth in the statute if there are sufficient volumes of advanced biofuels available, even if those volumes do not include the amount of cellulosic biofuel that Congress may have desired.

Due to its relevance to RFS volume requirements, we note here that in the summer of 2012 and in light of drought

[19] The energy security analysis took into account both domestic and foreign sources of advanced biofuel.

conditions affecting much of the country, Governors from several States and a number of organizations requested a waiver of the national volume requirements for the RFS pursuant to Section 211(o)(7)(A) of the Clean Air Act. The general waiver authority granted in this part of the statute is different from the authority granted in Section 211(o)(7)(D) that allows the advanced biofuel and total renewable fuels volume requirements to be reduced in the event that the cellulosic biofuel volume is reduced. After extensive analysis, review of thousands of comments, and consultation with the Department of Agriculture and the Department of Energy, the EPA on November 27, 2012 published a **Federal Register** decision denying the requests for a waiver.[20] The **Federal Register** notice contains a detailed description of the analysis EPA conducted in conjunction with DOE and USDA, along with a discussion of relevant comments we received through our public comment process.

B. Assessment of Available Volumes of Advanced Biofuel

Renewable fuels that can be used to meet the standard for advanced biofuel include those with Renewable Identification Number (RIN) codes of 3, 4, 5, or 7. Table III.B–1 shows the number of each of these types of RIN that was generated in 2011. For the final rule, we will update our analysis with estimates from 2012.

TABLE III.B–1—2011 RINS THAT QUALIFIED TO MEET THE ADVANCED BIOFUEL STANDARD[21]

[Million ethanol-equivalent gallons]

D code	Category	Ethanol	Biodiesel	Renewable diesel	Biogas and heating oil
3	Cellulosic biofuel	0	0	0	0
4	Biomass-based diesel	0	1,600	76	0
5	Advanced biofuel	186	0	27	8
7	Cellulosic diesel	0	0	0	0
	Total	1,895			

The total of 1,895 mill ethanol-equivalent gallons is significantly higher than the 1,350 mill gal required in 2011 and nearly as high as the 2012 advanced biofuel requirement of 2,000 mill gal. This result supports our projection in the rulemaking setting the 2012 standards[22] that there was no need to reduce the 2012 advanced biofuel requirement despite the significant reduction in the applicable volume of cellulosic biofuel.

The statutory volume requirement for advanced biofuel in 2013 is 2,750 mill gal, an increase of 750 mill gal over the 2012 requirement of 2,000 mill gal. In order to determine the sufficiency of advanced biofuel volumes to meet a requirement for 2,750 mill gal in 2013, we first accounted for biomass-based diesel and cellulosic biofuels that would be required under the standards we are proposing today. As shown in Table III.B–2, the result is that there would need to be 816 mill ethanol-equivalent gallons of other advanced biofuels in order to meet the total advanced biofuel requirement of 2,750 mill gal.

TABLE III.B–2—NECESSARY VOLUME OF ADVANCED BIOFUEL (MILL GAL ETHANOL-EQUIVALENT)

2013 Advanced biofuel applicable volume	2,750
Cellulosic biofuel requirement	14
Biomass-based diesel requirement	[a] 1,920
Necessary volume of excess biodiesel, other domestic advanced biofuels, and/or imported sugarcane ethanol	816

[a] In 2011, a substantial majority of biomass-based diesel was biodiesel. Moreover, we expect further increases in biomass-based diesel to be met primarily with expanded biodiesel. Therefore, for this analysis we have assumed that the 1.28 bill gal requirement is composed entirely of biodiesel with an equivalence value of 1.5.

We have identified a variety of sources of advanced biofuel that could meet the need for 816 mill gal of additional advanced biofuel, including the following:

- Biodiesel in excess of that required to meet the volume requirement of 1.28 bill gal
- Domestically produced advanced biofuels such as renewable diesel that does not qualify as biomass-based diesel, heating oil and qualifying fuel oil, and ethanol and other qualifying renewable fuels from separated food wastes
- Imported sugarcane ethanol

We have investigated each of these sources as discussed below.

1. Biodiesel

In a separate action, we have finalized a biomass-based diesel volume of 1.28 bill gal for 2013. However, biomass-based diesel volumes above 1.28 bill gal are possible. As of October 2012, the aggregate production capacity of biodiesel plants in the U.S. is estimated to be 2.1 billion gallons per year across 107 facilities.[23] This includes idled plants, those producing at less than full capacity, and those that are producing products other than biodiesel. We expect the time and reinvestment required to ramp up biodiesel production at existing facilities to be likely on the order of 1–2 months, significantly less than the time required to build and begin production at new plants, which takes about a year on average.[24] Thus, restarting idled plants is likely to be a cost-effective way of exceeding the applicable volumes of 1.28 bill gal in 2013 if a demand for such production exists.

Moreover, the biodiesel industry has demonstrated that it can increase production quickly under appropriate circumstances. Total production of biomass-based diesel in 2011 exceeded 1.0 bill gal, compared to a 2010

[20] 77 FR 70752, November 27, 2012.

[21] 2011 data from the EPA-Moderated Transaction System (EMTS)

[22] 77 FR 1320, published on January 9, 2012.

[23] Figures taken from Table 4, ''Monthly Biodiesel Production Report,'' EIA, December 2012.

[24] Based on construction times for new plants listed in Biodiesel Magazine from July 2006 through May 2009.

production of about 380 mill gallons.[25] In response to the NPRM published on July 1, 2011, some stakeholders expressed doubts that such increases could occur by 2012.[26] Nevertheless, based on the single-year increase of more than 600 mill gal in 2011 and the total capacity of existing plants described above, it is possible that the industry could achieve increases in production of both the 280 mill gallon increment that is reflected in the biomass-based diesel requirement for 2013 as well as some ''excess'' production.

Recently, the tax credit for biodiesel was reinstated after having expired at the end of 2011.[27] This tax credit, applicable retroactively to 2012 and through the end of 2013, may provide additional incentives to produce and consume biodiesel volumes in excess of the 1.28 bill gal requirement. EPA is requesting comment on what effect the tax credit will have on the advanced biofuel production volumes and the whether this would affect the incentives to import sugarcane ethanol and to what extent.

Nevertheless, there are a variety of factors that make the potential for 2013 biodiesel volumes in excess of 1.28 bill gal uncertain. For instance, despite the significant excess production capacity, the industry may not make the necessary preparations for excess production above 1.28 bill gal, such as restarting idled plants or establishing contracts for feedstocks supply, until such time as it becomes clear what the demand for excess biodiesel might be. This might not occur until later in 2013. Moreover, biodiesel production rates are currently and will continue to be at a historic high. The industry that supplies feedstocks for biodiesel production will be adjusting supplies and distribution routes to ensure that the 1.28 bill gal volume requirement is met, and biodiesel distribution and blending infrastructure is being upgraded to ensure that those volumes can be consumed. However, it is unclear if those adjustments and upgrades will be designed to accommodate biodiesel production in 2013 of volumes above 1.28 bill gal. We request comment on the degree to which biodiesel volumes in excess of the 1.28 bill gal requirement might be expected.

2. Domestic Production of Other Advanced Biofuel

Pathways that have been approved for the generation of RINs are provided in the regulations in Table 1 to § 80.1426. Apart from ethanol made from sugarcane which is permitted to generate advanced biofuel RINs, there are currently three pathways through which advanced biofuel RINs can be generated. These three are shown in Table III.B.2–1.

TABLE III.B.2–1—PATHWAYS FOR ADVANCED BIOFUEL

Fuel type	Feedstock	Production process requirements
Ethanol	Grain Sorghum	Dry mill process, using only biogas from landfills, waste treatment plants, and/or waste digesters for process energy and for on-site production of all electricity used at the site other than up to 0.15 kWh of electricity from the grid per gallon of ethanol produced, calculated on a per batch basis.
Biodiesel, renewable diesel[28].	Soy bean oil; Oil from annual covercrops; Algal oil; Biogenic waste oils/fats/greases; Non-food grade corn oil.	One of the following: Trans-Esterification. Hydrotreating. Includes only processes that co-process renewable biomass and petroleum.
Ethanol, renewable diesel, jet fuel, heating oil, and naphtha.	The non-cellulosic portions of separated food waste	Any.
Biogas	Landfills[29], sewage waste treatment plants, manure digesters.	Any.

In addition to producers of biomass-based diesel and cellulosic biofuel, there are many companies either producing or developing technologies to produce ''other advanced biofuels.'' In order to estimate the volumes of other advanced biofuels that could be produced by these companies in 2013, we investigated three sources of data:

Production Outlook Reports. Required under § 80.1449 for all registered producers, these reports contain projections of renewable fuel production for each of the next five years.[30]

2011 producers. Data from the EPA-Moderated Transaction System (EMTS) was reviewed to identify parties that produced some RIN-generating advanced biofuel in 2011. Insofar as such parties did not provide a projected 2013 volume in a Production Outlook Report, they were contacted to update their 2013 projected production volume. We will update this analysis with information from 2012 for the final rule.

Additional registered producers. We identified parties that were registered as producers of advanced biofuel under the RFS program, but neither produced RIN-generating volume in 2011 nor provided a projection of 2013 production volume in a Production Outlook Report. We contacted such parties to determine what, if any, volume could be expected in 2013.

Based on these investigations, we identified twenty domestic companies that are expected to produce some other advanced biofuel in 2013. The total projected production volume for these companies in 2013 is about 115 mill

[25] All values from EMTS. 2010 estimate consists of approximately 209 mill gallons as recorded through EMTS for volume produced under the RFS2 regulations in July through December of 2010, and approximately 171 mill gallons as recorded through RIN generation reports submitted by producers for volume produced under the RFS1 regulations in January through June of 2010.

[26] See comments in docket EPA–HQ–OAR–2010–0133 from the American Petroleum Institute, Marathon Petroleum Company, and the National Petrochemical Refiners Association.

[27] ''Congress Votes to Reinstate Biodiesel Tax Incentive,'' January 2, 2013. *http://biodiesel.org/news/biodiesel-news/news-display/2013/01/02/congress-votes-to-reinstate-biodiesel-tax-incentive.*

[28] Our final action on the 2013 biomass-based diesel renewable fuel volume provides further details with regards to which feedstocks we believe will be used to meet that volume. See 77 FR 59458, September 27, 2012.

[29] Biogas from landfills could be generated from separated food waste or yard waste.

[30] While the individual reports have not been published since they include company-specific information that could impact the competitive nature of the industry, we are providing aggregate results in this NPRM.

actual gallons, or 150 million ethanol-equivalent gallons, as shown in Table III.B.2–2.

TABLE III.B.2–2—PROJECTED DOMESTIC PRODUCTION OF OTHER ADVANCED BIOFUEL IN 2013

[Million ethanol-equivalent gallons]

	Ethanol	Renewable diesel	Heating oil	CNG	Total
Production Outlook Reports	31	35	4	0	70
2011 producers	18	18	0	5	41
Other registered producers	0	15	15	9	39
Total	49	68	19	14	150

A projected volume of 150 mill ethanol-equivalent gallons of other advanced biofuel in 2013 is also consistent with a 2011 report released by E2/Environmental Entrepreneurs [31] which estimated that the production capacity of domestic advanced biofuels in 2012 would be about 180 mill gal.

EPA has recently approved an advanced ethanol pathway that is produced from grain sorghum at dry mill facilities using specified forms of biogas for both process energy and most electricity production.[32] Although advanced sorghum ethanol is not reflected in Table III.B.2–2, sorghum ethanol is likely to help meet the 2013 advanced biofuel volume requirements as a number of companies have been making preparations to use this feedstock. We are also currently investigating a variety of other potential RIN-generating pathways for advanced biofuel that could result in additional volumes in 2013. In addition to potential new pathways for cellulosic biofuel that would also count as advanced biofuel as discussed in Section II.D, new pathways for advanced biofuel could include certain butanol processes from corn and certain ethanol processes from barley. We have not yet determined, either through rulemaking or approval of an industry petition, whether these pathways are valid for the generation for advanced biofuel RINs. However, approval of such advanced biofuel pathways could potentially result in 200 million additional ethanol-equivalent gallons of advanced biofuel being qualified to participate in the RFS program. Insofar as any of these pathways are approved in time to be used in 2013, it would increase the volume of domestically-produced advanced biofuels available for 2013 compliance.

3. Imported Sugarcane Ethanol

EPA estimates that if biodiesel production in 2013 does not exceed 1.28 bill gallons, and domestic production of other advanced biofuels is about 150 mill gallons, imports of sugarcane ethanol from Brazil would need to reach 666 mill gal in order for the 2.75 bill gal advanced biofuel requirement to be met. We believe that such volumes can be reasonably expected from Brazil despite some uncertainty in production and export potential.

From the supply perspective, recent production of sugarcane in Brazil has been lower than normally expected due to two factors. First, adverse weather conditions have reduced production.[33] Since the adverse weather conditions are estimated to have reduced cane production by about 4%, a return to normal weather conditions should alone restore approximately 4% of production. Second, the general economic downturn made credit harder to get, delaying the replanting of existing fields. Normally sugarcane fields are replanted every five or six years to maximize yield. However, the lack of available credit caused some growers to delay the expense of this replanting, with the older fields losing production.[34]

Early 2012/13 sugarcane crop year data suggests that, at the very least, production in the 2012/2013 year will not be lower than in 2011/2012. According to UNICA's December 1, 2012 biweekly report of sugar and ethanol production, total ethanol production from the 2012/13 crop in the South Central region was approximately 5.38 billion gallons, up slightly from 5.36 billion gallons this time last year.[35] In September, UNICA projected that the South Central region, the dominant region for ethanol production in Brazil, will produce a total of 5.56 billion gallons for the 2012/13 year.[36] Other regions contributed roughly another 565 million gallons in 2011/12. Based on this, 6.1 billion gallons is a reasonable conservative estimate for total 2012/13 production, assuming no growth at all in production outside the South Central region. By comparison, total ethanol production from the 2011/12 crop was just less than 6 billion gallons.

Some parties expect a more typical trend in sugarcane ethanol production for 2013 and future years, with replanted fields beginning to boost sugarcane production in existing plantations and, in response to increased worldwide demand, a growth in the acres planted with sugarcane. Increased production is supported by the Brazilian government which announced in February 2012 support for a plan to invest over $8 billion annually to boost cane and ethanol production.[37] Private investment in Brazil is also increasing. For example, Usina de Acucar Santa Terezinha, a Brazilian ethanol producer, recently announced plans to invest almost $300 million in a new mill and sugarcane plantation.[38] All of this suggests that sugarcane and ethanol production in the 2013/14 harvest year (which will begin in April of 2013) will be significantly higher than production over the last two years.

[31] Solecki, Mary et al, ''Advanced Biofuel Market Report 2011, Meeting the California LCFS'' August 22, 2011. E2/Environmental Entrepreneurs.

[32] See 77 FR 74592 published on December 17, 2012.

[33] Gain Report BR110016, October 3, 2011, USDA Agricultural Service. See *http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Sugar%20Semi-annual_Sao%20Paulo%20ATO_Brazil_10-3-2011.pdf*

[34] On the margin, the high sugar prices may have also encouraged some growers to divert their crop from ethanol production to sugar production. But most cane growers do not have this flexibility with sugarcane mills designed for fixed amounts of refined sugar or ethanol so high sugar prices was likely a contributing factor but not a major cause of reduced sugarcane ethanol production in Brazil.

[35] UNICA, ''Harvest update: Biweekly Bulletin'', December 1, 2012, *http://www.unicadata.com.br/listagem.php?idMn=63*.

[36] UNICA, ''Estimate for 2012/2013 Sugarcane Harvest of Brazilian South-Central Region'', September 20, 2012, *http://www.unicadata.com.br/listagem.php?idMn=39*.

[37] See *http://www.platts.com/RSSFeedDetailedNews/RSSFeed/Oil/8987702*.

[38] See *http://www.bloomberg.com/news/2012-03-08/santa-terezinha-invests-283-million-in-brazil-ethanol-projects.html*.

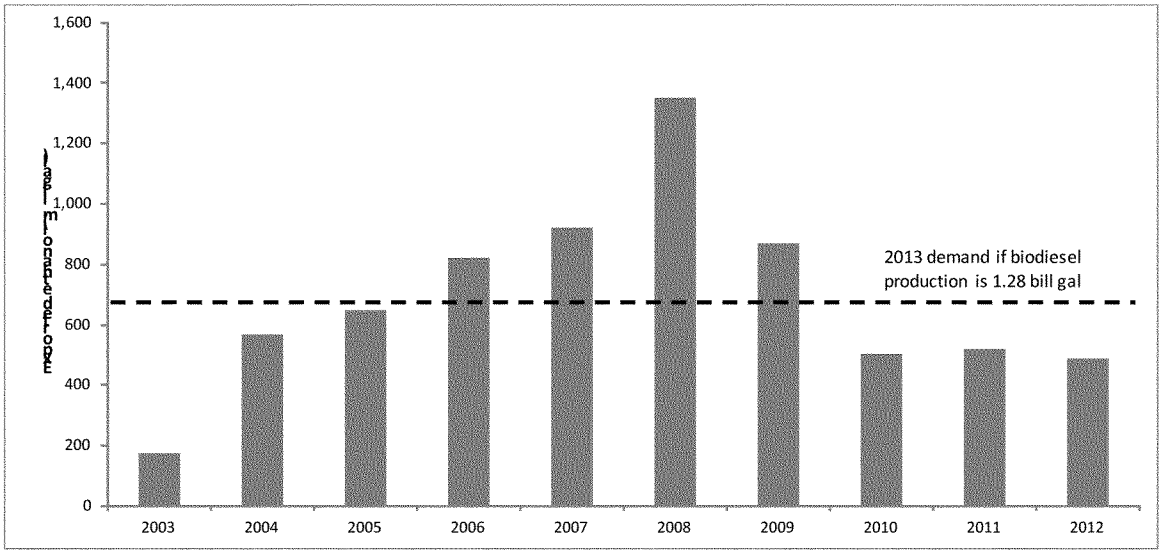
Nevertheless, there remains some uncertainty in the volumes of sugarcane ethanol that could be produced in Brazil in 2013. If weather conditions are unfavorable for another year, ethanol production may not recover from the comparatively low levels in 2011 and early 2012. A study from USDA projects that this may be the case, and concludes that total ethanol exports from Brazil to all countries in 2013 may only reach about 500 mill gallons,[39] well short of the 666 mill gal that would be needed as described above. As a result, it is possible that there could be a shortfall of the total advanced biofuel requirement in 2013 under these circumstances.

Brazil's sugarcane ethanol production serves both its domestic market as well as the export market. The government of Brazil sets a minimum ethanol concentration for its gasoline. In 2011, the Brazilian government lowered this concentration to 20%, reflecting the decrease in domestic production. There have been indications that Brazil may raise the minimum ethanol concentration back up by 25% by May of 2013,[40] but no formal announcement has been made. Projecting this Brazilian domestic demand into the future can be uncertain since the government can reset the minimum ethanol content at any time; in the past this adjustment has largely been influenced by the price of ethanol (high prices leading to a reduction in the minimum percent). While these historical changes have typically varied by a few percent and have only occurred periodically, they do add another element of uncertainty to any projection of the volumes of ethanol that may be available for export to the U.S. in 2013.

Total exports of ethanol from Brazil depend on ethanol production and demand within Brazil, and have varied significantly over the last decade. The historical maximum occurred in 2008 when 1.35 bill gal was exported, and ongoing efforts to upgrade distribution infrastructure mean that Brazil is capable of exporting around 2 bill gal today. However, actual export volumes in 2010–2012 have been significantly below those from previous years. Moreover, imports of ethanol into Brazil also impact the volumes it exports. In both 2011 and 2012 there was significant two-way trade in ethanol between the United States and Brazil. According to current EIA data, in 2011 the U.S. imported 101 million gallons of sugarcane ethanol from Brazil and exported 396 million gallons of corn-based ethanol to Brazil. Total fuel ethanol exports in 2011 were 1.2 billion gallons, and total exports through October 2012 were 646 million gallons. This two-way trade of ethanol engenders additional transport related emissions.

Figure III.B.2-1

Total Worldwide Exports of Ethanol from Brazil



Sources: USDA Foreign Agricultural Service, "Brazil Biofuels Annual, Annual Report 2012", August 21, 2012, BR12013. Constanza Valdez, "Brazil's Ethanol Industry: Looking Forward", BIO-02, ERS, USDA, June 2011

Aside from production capability and domestic demand within Brazil, market conditions generally determine the availability of sugarcane ethanol imported into the U.S. from Brazil. Approved as an advanced biofuel pathway, ethanol produced from sugarcane benefits from the RIN value associated with advanced biofuel but also has to compete with other sources of ethanol used for blending with gasoline in the U.S., most notably ethanol made from corn starch (which does not qualify as an advanced biofuel). The expiration of the tariff

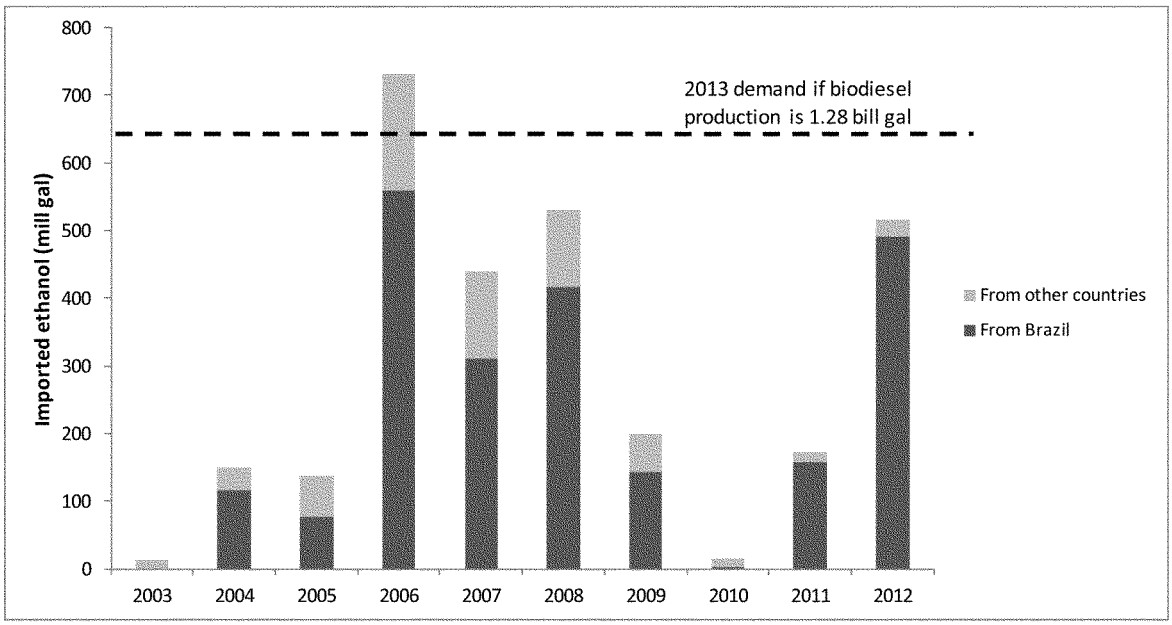
[39] USDA Foreign Agricultural Service, ''Brazil Biofuels Annual, Annual Report 2012,'' August 21, 2012. GAIN Report Number BR12013.

[40] Bloomberg, ''Brazil Said to Plan Higher Ethanol Blend as Early as May,'' December 18, 2012. *http://www.bloomberg.com/news/2012-12-18/brazil-said-to-plan-higher-ethanol-blend-as-early-as-may.html*

applicable to imported ethanol has helped make imported sugarcane ethanol more cost competitive in the U.S., and any volumes of Brazilian sugarcane ethanol imported into California to meet the requirements of their Low Carbon Fuel Standard (LCFS) would also count towards meeting the requirements of the RFS program. However, international demand for Brazilian sugarcane ethanol is expected to continue to create some limitations in what volumes may be available to the U.S. Indeed in 2010 essentially all ethanol exported from Brazil went to other countries, and in 2011 about 70% of ethanol exported from Brazil went to other countries. As a result, imports of Brazilian sugarcane ethanol into the U.S. in 2010 and 2011 were comparatively low. Brazil is on track to meet the need for about 500 mill gal of imported sugarcane ethanol in the U.S. in 2012, but this is below the 666 mill gal that may be needed in 2013 to meet the 2.75 bill gal advanced biofuel requirement. However, since the rate of ethanol imports from Brazil was significantly higher in recent months than at the beginning of 2012, there may be good reason to expect that import volumes in 2013 will be higher than in 2012.

Figure III.B.2-2

Total Imports of Ethanol Into the U.S.



Source: EIA, "U.S. Imports by Country of Origin"

Considering that reinvestment in sugarcane stock is already underway, a considerable resurgence in Brazilian ethanol export potential in the 2013 calendar year seems likely. Any limitations on ethanol exports created by delayed reinvestment in sugarcane stock appear to be waning. While uncertainties exist, on balance there is good reason to believe that Brazil can export at least 666 mill gal of ethanol to the U.S. in 2013.

C. Proposed Volume Requirements for Advanced Biofuel and Total Renewable Fuel in 2013

As shown in Table III.B–2, in order for an advanced biofuel requirement of 2.75 bill gal to be met, there would need to be 816 mill gal of advanced biofuels in addition to the volumes that would need to be produced to meet the biomass-based diesel and proposed cellulosic biofuel requirements. After reviewing the projected availability of advanced biofuel volumes from various sources, we have preliminarily determined that it is likely that there will be sufficient volumes available to produce or import this 816 mill gal. Given our estimate of about 150 mill gal of domestic ''other'' advanced biofuel, the remaining volume of 666 mill gal would likely need to come from imported sugarcane ethanol and/or biodiesel in excess of 1.28 bill gal. As discussed above, we believe that this volume is achievable through a combination of these sources. Therefore, we believe that there is no reason to reduce the required volume of 2.75 bill gal advanced biofuel on the basis of available volumes. As noted above, maintaining the 2.75 bill gal advanced biofuel volume set forth in the statute will result in reduced GHG emissions from the transportation sector and could also contribute to energy security objectives. We do not believe it is appropriate to forgo such benefits when they are physically achievable but we invite comment on this issue, particularly in the context of increasing international trade in biofuels and the blendwall implications for ethanol consumption (see discussion in Section D below).

Nevertheless, we recognize that some uncertainty exists in the projected availability of other advanced biofuels. The single largest source, Brazilian sugarcane ethanol, was exported at lower total volumes in 2010–2012 than the U.S. would need in 2013 to meet the 2.75 bill gal advanced biofuel requirement. Moreover, the need for 666 mill gal of Brazilian sugar ethanol in

2013 exceeds all historical volumes of ethanol imported into the U.S. from Brazil by a substantial margin. In addition, some stakeholders have stated that given a limited supply, sugarcane ethanol imported into the U.S. may be replaced in the exporting country's domestic market by either non-advanced biofuels, or by petroleum, which these stakeholders believe could lead to adverse GHG impacts. There may be enough uncertainty to warrant a more cautious approach to advanced biofuel and total renewable fuel in 2013, for example a reduction of 200 mill gal to approximate the uncertainty discussed above. Therefore, while we are not proposing to reduce the required volumes of advanced biofuel and total renewable fuel for 2013, we request comment on whether and to what extent a reduction is warranted; we have the discretion to reduce the advanced biofuel volume requirement for 2013 by up to the amount that the cellulosic biofuel volume requirement is reduced (986 mill gal in today's proposal). Were we to do so, as discussed in Section III.A, we would also simultaneously reduce the total renewable fuel requirement by the same amount.

The overall cost impact of reducing the advanced biofuel and total renewable fuel volume mandates would depend on a number of factors, such as the future cost of petroleum, 2012/2013 crop production, the number of additional advanced biofuel pathways that are approved over the next year, and the time it would take for facilities using new advanced pathways to begin generating RINs.

In 2014, the advanced biofuel requirement rises substantially to 3.75 bill gal. Thus regardless of whether we reduce the advanced biofuel and total renewable fuel volume requirements for 2013, we also seek comment on whether such a reduction should be considered for 2014, the basis for such a reduction, and the amount of that reduction.

D. Consideration of the Ethanol Blendwall

As the volume requirements of the RFS program increase, it becomes more likely that the volume of ethanol that must be consumed to meet those requirements will exceed the volume that can be consumed as E10. Additional volumes of ethanol must then be consumed as higher blend levels such as E15 or E85. While other non-ethanol biofuels can also be used to meet the RFS requirements, ethanol has predominated and will likely continue to predominate in the near future. As a result, some stakeholders have indicated that the volume of ethanol that can be legally and practically consumed in 2013 is a limiting factor in how much renewable biofuel can be consumed.

In the context of the analyses conducted to support the decision regarding requests for a waiver of the renewable fuel standard, we estimated that the number of excess RINs generated in 2012 that could be carried over to 2013 will be on the order of 2.6 billion.[41] Since this number of carryover RINs falls below the rollover cap imposed by § 80.1427(a)(5), all of them can be used for compliance purposes in 2013. As a result, we expect that the RFS demand for physical gallons of ethanol will be significantly less than the E10 saturation point (the blendwall), and thus there would be no dependence on significant volumes of E15–E85 in 2013. This remains the case regardless of whether EPA were to reduce the advanced biofuel and total renewable fuel volume requirements as described in Section III.C above. Nevertheless, we request comment on whether the blendwall presents any difficulty in terms of compliance with the RFS volume requirements in 2013.

In 2014, the situation could be different. There are a number of factors that will play a role in determining how regulated parties will demonstrate compliance with the applicable RFS volumes. First, the advanced biofuel and total renewable fuel requirements rise substantially to 3.75 bill gal and 18.15 bill gal respectively. This increase in volume, combined with the corn-ethanol volume expected to meet the total renewable fuel standard, could cause the total ethanol volume used to comply with the RFS program to be higher than 16 bill gal. While non-ethanol biofuels are also anticipated to continue to grow to help supply the advanced biofuel standard, this value gives some estimate of the amount of ethanol that might need to be used to comply with the RFS program in 2014. Second, the number of carryover RINs will also be a critical factor in determining whether obligated parties can acquire sufficient RINs to show compliance with the RFS volume requirements. However, the number of carryover RINs into 2014 will almost certainly be lower than for 2013. EPA will continue to engage with stakeholders on this issue as we project the RFS volume requirements for 2014.

[41] 77 FR 70759, November 27, 2012.

IV. Proposed Percentage Standards for 2013

A. Background

The renewable fuel standards are expressed as volume percentages and are used by each refiner, blender, or importer to determine their renewable volume obligations (RVO). Since there are four separate standards under the RFS2 program, there are likewise four separate RVOs applicable to each obligated party. Each standard applies to the sum of all gasoline and diesel produced or imported. The applicable percentage standards are set so that if every obligated party meets the percentages, then the amount of renewable fuel, cellulosic biofuel, biomass-based diesel, and advanced biofuel used will meet the volumes required on a nationwide basis.

As discussed in Section II.D, we are proposing a required volume of cellulosic biofuel for 2013 of 11 million gallons (14 million ethanol-equivalent gallons). The volume we select for the final rule will be used as the basis for setting the percentage standard for cellulosic biofuel for 2013. We are also proposing that the advanced biofuel and total renewable fuel volumes would not be reduced below the applicable volumes specified in the statute. The biomass-based diesel volume for 2013 has been established at 1.28 billion gallons through a separate rulemaking. The volumes used to determine the four proposed percentage standards are shown in Table IV.A–1.

TABLE IV.A–1—PROPOSED VOLUMES FOR USE IN SETTING THE APPLICABLE PERCENTAGE STANDARDS FOR 2013 [a]

Cellulosic biofuel	14 mill gal.
Biomass-based diesel	1.28 bill gal.
Advanced biofuel	2.75 bill gal.
Renewable fuel	16.55 bill gal.

[a] Due to the manner in which the percentage standards are calculated, all volumes are given in terms of ethanol-equivalent except for biomass-based diesel which is given in terms of physical volume.

As with previous years' renewable fuels standards determination, the formulas used in deriving the annual standards are based in part on estimates of the volumes of gasoline and diesel fuel, for both highway and nonroad uses, that are projected to be used in the year in which the standards will apply. Producers of other transportation fuels, such as natural gas, propane, and electricity from fossil fuels, are not subject to the standards, and volumes of such fuels are not used in calculating the annual standards. Since the

standards apply to producers and importers of gasoline and diesel, these are the transportation fuels used to set the standards, and then again to determine the annual volume obligations of an individual gasoline or diesel producer or importer.

B. Calculation of Standards

1. How are the standards calculated?

The following formulas are used to calculate the four percentage standards applicable to producers and importers of gasoline and diesel (see § 80.1405):

$$\mathrm{Std}_{\mathrm{CB,i}} = 100\% \times \frac{\mathrm{RFV}_{\mathrm{CB,i}}}{(G_i - RG_i) + (GS_i - RGS_i) - GE_i + (D_i - RD_i) + (DS_i - RDS_i) - DE_i}$$

$$\mathrm{Std}_{\mathrm{BBD,i}} = 100\% \times \frac{\mathrm{RFV}_{\mathrm{BBD,i}} \times 1.5}{(G_i - RG_i) + (GS_i - RGS_i) - GE_i + (D_i - RD_i) + (DS_i - RDS_i) - DE_i}$$

$$\mathrm{Std}_{\mathrm{AB,i}} = 100\% \times \frac{\mathrm{RFV}_{\mathrm{AB,i}}}{(G_i - RG_i) + (GS_i - RGS_i) - GE_i + (D_i - RD_i) + (DS_i - RDS_i) - DE_i}$$

$$\mathrm{Std}_{\mathrm{RF,i}} = 100\% \times \frac{\mathrm{RFV}_{\mathrm{RF,i}}}{(G_i - RG_i) + (GS_i - RGS_i) - GE_i + (D_i - RD_i) + (DS_i - RDS_i) - DE_i}$$

Where:

$\mathrm{Std}_{\mathrm{CB,i}}$ = The cellulosic biofuel standard for year i, in percent.

$\mathrm{Std}_{\mathrm{BBD,i}}$ = The biomass-based diesel standard (ethanol-equivalent basis) for year i, in percent.

$\mathrm{Std}_{\mathrm{AB,i}}$ = The advanced biofuel standard for year i, in percent.

$\mathrm{Std}_{\mathrm{RF,i}}$ = The renewable fuel standard for year i, in percent.

$\mathrm{RFV}_{\mathrm{CB,i}}$ = Annual volume of cellulosic biofuel required by section 211(o) of the Clean Air Act for year i, in gallons.

$\mathrm{RFV}_{\mathrm{BBD,i}}$ = Annual volume of biomass-based diesel required by section 211(o) of the Clean Air Act for year i, in gallons.

$\mathrm{RFV}_{\mathrm{AB,i}}$ = Annual volume of advanced biofuel required by section 211(o) of the Clean Air Act for year i, in gallons.

$\mathrm{RFV}_{\mathrm{RF,i}}$ = Annual volume of renewable fuel required by section 211(o) of the Clean Air Act for year i, in gallons.

G_i = Amount of gasoline projected to be used in the 48 contiguous states and Hawaii, in year i, in gallons.

D_i = Amount of diesel projected to be used in the 48 contiguous states and Hawaii, in year i, in gallons.

RG_i = Amount of renewable fuel blended into gasoline that is projected to be consumed in the 48 contiguous states and Hawaii, in year i, in gallons.

RD_i = Amount of renewable fuel blended into diesel that is projected to be consumed in the 48 contiguous states and Hawaii, in year i, in gallons.

GS_i = Amount of gasoline projected to be used in Alaska or a U.S. territory in year i if the state or territory opts-in, in gallons.

RGS_i = Amount of renewable fuel blended into gasoline that is projected to be consumed in Alaska or a U.S. territory in year i if the state or territory opts-in, in gallons.

DS_i = Amount of diesel projected to be used in Alaska or a U.S. territory in year i if the state or territory opts-in, in gallons.

RDS_i = Amount of renewable fuel blended into diesel that is projected to be consumed in Alaska or a U.S. territory in year i if the state or territory opts-in, in gallons.

GE_i = Amount of gasoline projected to be produced by exempt small refineries and small refiners in year i, in gallons, in any year they are exempt per §§ 80.1441 and 80.1442, respectively. For 2013, this value is zero. See further discussion in Section IV.B.2 below.

DE_i = Amount of diesel projected to be produced by exempt small refineries and small refiners in year i, in gallons, in any year they are exempt per §§ 80.1441 and 80.1442, respectively. For 2013, this value is zero. See further discussion in Section IV.B.2 below.

The Act requires EPA to base the standards on an EIA estimate of the amount of gasoline and diesel that will be sold or introduced into commerce for that year. The four separate renewable fuel standards for 2013 are based on the gasoline, ethanol, diesel, and biodiesel consumption volumes projected by EIA.[42] We adjusted these nationwide values to represent the 49 states that participate in the RFS program (neither Alaska nor any U.S. territory participates).

2. Small Refineries and Small Refiners

In CAA section 211(o)(9), enacted as part of the Energy Policy Act of 2005, Congress provided a temporary exemption to small refineries (those refineries with a crude throughput of no more than 75,000 barrels of crude per day) through December 31, 2010. In our initial rulemaking to implement the new RFS program[43], we exercised our discretion under section 211(o)(3)(B) and extended this temporary exemption to the few remaining small refiners that met the Small Business Administration's (SBA) definition of a small business (1,500 employees or less company-wide) but did not meet the statutory small refinery definition as

[42] Letter, Adam Sieminski, Administrator, U.S. Energy Information Administration, to Lisa P. Jackson, Administrator, U.S. EPA, October 18, 2012.

[43] 72 FR 23900, May 1, 2007.

noted above. 40 CFR 80.1141, 80.1142. Because EISA did not alter the small refinery exemption in any way, the RFS2 program regulations maintained the exemptions for gasoline and diesel produced by small refineries and small refiners through 2010 (unless the exemption was waived). See 40 CFR 80.1441, 80.1442.

Congress provided two ways that small refineries can receive a temporary extension of the exemption beyond 2010. One is based on the results of a study conducted by the Department of Energy (DOE) to determine whether small refineries would face a disproportionate economic hardship under the RFS program. The other is based on EPA determination of disproportionate economic hardship on a case-by-case basis in response to refiner petitions.

In January 2009, DOE issued a study which did not find that small refineries would face a disproportionate economic hardship under the RFS program.[44] The conclusions were based in part on the expected robust availability of RINs and EPA's ability to grant relief on a case-by-case basis. As a result, beginning in 2011 small refiners and small refineries were required to participate in the RFS program as obligated parties, and there was no small refiner/refinery volume adjustment to the 2011 standards as there was for the 2010 standards.

Following the release of DOE's 2009 small refinery study, Congress directed DOE to complete a reassessment and issue a revised report. In March of 2011 DOE re-evaluated the impacts of the RFS program on small entities and concluded that some small refineries would suffer a disproportionate hardship.[45] As a result, EPA exempted these refineries from being obligated parties for two additional years, 2011 and 2012.[46] The 2012 standards established in the January 9, 2012, final rulemaking reflected the exemption of these refineries. We are seeking comment on whether it would be appropriate to extend the two year exemption for small refineries as discussed in section 211(o)(9)(A)(ii)(II).

EPA may also extend the exemption for individual small refineries or small refiners on a case-by-case basis if they demonstrate disproportionate economic hardship. 40 CFR §§ 80.1441(e)(2), 80.1442(h). EPA has granted some exemptions pursuant to this process that apply in 2011 and 2012. However, at this time, no exemptions have been approved for 2013. Therefore, for this proposal we have calculated the proposed 2013 standards without a small refinery/small refiner adjustment.

Note that if exemptions under Section 211(o)(9)(A)(ii)(II) were granted before finalizing the standards, or if an individual small refinery or small refiner requests an exemption and is approved following the release of this NPRM and prior to issuance of the final rule, the final standards will be adjusted upward to account for the exempted volumes of gasoline and diesel. Any requests for exemptions that are approved after the release of the final 2013 RFS standards will not affect the 2013 standards. As stated in the final rule establishing the 2011 standards, ''EPA believes the Act is best interpreted to require issuance of a single annual standard in November that is applicable in the following calendar year, thereby providing advance notice and certainty to obligated parties regarding their regulatory requirements. Periodic revisions to the standards to reflect waivers issued to small refineries or refiners would be inconsistent with the statutory text, and would introduce an undesirable level of uncertainty for obligated parties.'' Thus, after the 2013 standards are finalized, any additional exemptions for small refineries or small refiners that are issued will not affect those 2013 standards. EPA requests comment on whether it is appropriate for the agency to make changes to the 2013 volumes if small refiner exemptions are granted after the final rule is issued.

We encourage any producers of gasoline and/or diesel who believe that they may be eligible under the small refinery or small refiner exemption provision to send a petition to the EPA under the provisions of § 80.1441 or § 80.1442. We believe that the approach EPA is currently using to assess disproportionate economic hardships for small refineries and small refiners appropriately addresses the intent of the statutory provision and the needs of the affected parties.

3. Proposed Standards

As specified in the March 26, 2010 RFS2 final rule[47], the percentage standards are based on energy-equivalent gallons of renewable fuel, with the cellulosic biofuel, advanced biofuel, and total renewable fuel standards based on ethanol equivalence and the biomass-based diesel standard based on biodiesel equivalence. However, all RIN generation is based on ethanol-equivalence. More specifically, the RFS2 regulations provide that production or import of a gallon of qualifying biodiesel will lead to the generation of 1.5 RINs. In order to ensure that demand for 1.28 billion physical gallons of biomass-based diesel will be created in 2013, the calculation of the biomass-based diesel standard provides that the required volume be multiplied by 1.5. The net result is a biomass-based diesel gallon being worth 1.0 gallon toward the biomass-based diesel standard, but worth 1.5 gallons toward the other standards.

The levels of the percentage standards would be reduced if Alaska or a U.S. territory chooses to participate in the RFS2 program, as gasoline and diesel produced in or imported into that state or territory would then be subject to the standard. Neither Alaska nor any U.S. territory has chosen to participate in the RFS2 program at this time, and thus the value of the related terms in the calculation of the standards is zero.

Note that because the gasoline and diesel volumes estimated by EIA include renewable fuel use, we must subtract the total renewable fuel volumes from the total gasoline and diesel volumes to get total non-renewable gasoline and diesel volumes. The values of the variables described above are shown in Table IV.B.3–1.[48] Terms not included in this table have a value of zero.

TABLE IV.B.3–1—VALUES FOR TERMS IN CALCULATION OF THE STANDARDS

[Bill gal]

Term	Value
$RFV_{CB,2013}$	0.014
$RFV_{BBD,2013}$	1.28
$RFV_{AB,2013}$	2.75
$RFV_{RF,2013}$	16.55
G_{2013}	133.70
D_{2013}	52.26
RG_{2013}	12.85
RD_{2013}	1.23

[44] DOE report ''EPACT 2005 Section 1501 Small Refineries Exemption Study'', (January, 2009).

[45] ''Small Refinery Exemption Study: An Investigation into Disproportionate Economic Hardship,'' U.S. Department of Energy, March 2011.

[46] Since the standards are applied on an annual basis, the exemptions are likewise on an annual basis even though the determination of which refineries would receive an extension to their exemption did not occur until after January 1, 2011.

[47] 75 FR 14670, March 26, 2010.

[48] To determine the 49-state values for gasoline and diesel, the amounts of these fuels used in Alaska is subtracted from the totals provided by DOE. The Alaska fractions are determined from the most recent (2010) EIA State Energy Data, Transportation Sector Energy Consumption Estimates. The gasoline and transportation distillate fuel oil fractions are approximately 0.2% and 0.7%, respectively. Ethanol use in Alaska is estimated at 11.2% of its gasoline consumption (based on the same State data), and biodiesel use is assumed to be zero.

Using the volumes shown in Table IV.B.3–1, we have calculated the proposed percentage standards for 2013 as shown in Table IV.B.3–2.

TABLE IV.B.3–2—PROPOSED PERCENTAGE STANDARDS FOR 2013

Cellulosic biofuel	0.008%
Biomass-based diesel	1.12%
Advanced biofuel	1.60%
Renewable fuel	9.63%

V. Public Participation

We request comment on all aspects of this proposal. This section describes how you can participate in this process.

A. How do I submit comments?

We are opening a formal comment period by publishing this document. We will accept comments during the period indicated under the **DATES** section above. If you have an interest in the proposed standards, we encourage you to comment on any aspect of this rulemaking. We also request comment on specific topics identified throughout this proposal.

Your comments will be most useful if you include appropriate and detailed supporting rationale, data, and analysis. Commenters are especially encouraged to provide specific suggestions for any changes that they believe need to be made. You should send all comments, except those containing proprietary information, to our Air Docket (see **ADDRESSES** section above) by the end of the comment period.

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. If you wish to submit Confidential Business Information (CBI) or information that is otherwise protected by statute, please follow the instructions in Section VI.B below.

B. How should I submit CBI to the agency?

Do not submit information that you consider to be CBI electronically through the electronic public docket, *www.regulations.gov,* or by email. Send or deliver information identified as CBI only to the following address: U.S. Environmental Protection Agency, Assessment and Standards Division, 2000 Traverwood Drive, Ann Arbor, MI 48105, Attention Docket ID EPA–HQ–OAR–2012–0546. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comments that include any information claimed as CBI, a copy of the comments that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

The economic impacts of the RFS2 program on regulated parties, including the impacts of the required volumes of renewable fuel, were already addressed in the RFS2 final rule promulgated on March 26, 2010 (75 FR 14670). With the exception of cellulosic biofuel, this action proposes the percentage standards applicable in 2013 based on the volumes that were analyzed in the RFS2 final rule.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Burden is defined at 5 CFR 1320.3(b). This proposed rule does not impose any additional reporting requirements on regulated parties beyond those already required under the RFS program; therefore, there will not be any additional reporting burdens on entities impacted by this regulation. This action merely proposes, as required by section 211(o) of the Clean Air Act, the RFS annual standards for 2013.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, we certify that this proposed action will not have a significant economic impact on a substantial number of small entities. This rule proposes the annual standard for cellulosic biofuel for 2013 at 14 mill gal. Since small refiners and small refineries collectively comprise about 11.9% of gasoline and 15.2% of diesel production[49], for an average of 12.9% for the entire gasoline + diesel pool, small refiners and small refineries would only be required to collectively meet a cellulosic biofuel requirement of about 1.8 mill gal (14 x 12.9%). At a projected cellulosic biofuel waiver credit price of $0.42, the cost of complying with this requirement would total about $0.76 million for the approximately 60 obligated parties that would be affected, or about $12,600 per facility on average.

The impacts of the RFS2 program on small entities were already addressed in the RFS2 final rule promulgated on

[49] Estimates from RFS2 final rule, 75 FR 14867.

March 26, 2010 (75 FR 14670), and this proposed rule will not impose any additional requirements on small entities. However, we continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This proposed action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. This action implements mandate(s) specifically and explicitly set forth by the Congress in Clean Air Act section 211(o) without the exercise of any policy discretion by EPA. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This proposed rule only applies to gasoline, diesel, and renewable fuel producers, importers, distributors and marketers and merely proposes the 2013 annual standards for the RFS program.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action proposes the 2013 annual standards for the RFS program and only applies to gasoline, diesel, and renewable fuel producers, importers, distributors and marketers. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This proposed rule will be implemented at the Federal level and affects transportation fuel refiners, blenders, marketers, distributors, importers, exporters, and renewable fuel producers and importers. Tribal governments would be affected only to the extent they purchase and use regulated fuels. Thus, Executive Order 13175 does not apply to this action.

EPA specifically solicits additional comment on this proposed action from tribal officials.

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

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks and because it implements specific standards established by Congress in statutes (section 211(o) of the Clean Air Act).

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

This action is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action simply proposes the annual standards for renewable fuel under the RFS program for 2013.

I. National Technology Transfer and Advancement Act

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

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

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

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

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This action does not relax the control measures on sources regulated by the RFS regulations and therefore will not cause emissions increases from these sources.

VII. Statutory Authority

Statutory authority for this action comes from section 211 of the Clean Air Act, 42 U.S.C. 7545. Additional support for the procedural and compliance related aspects of today's proposal, come from Sections 114, 208, and 301(a) of the Clean Air Act, 42 U.S.C. 7414, 7542, and 7601(a).

List of Subjects in 40 CFR Part 80

Administrative practice and procedure, Air pollution control, Diesel fuel, Environmental protection, Fuel additives, Gasoline, Imports, Oil imports, Petroleum.

Dated: January 31, 2013.

Lisa P. Jackson,

Administrator.

For the reasons set forth in the preamble, Environmental Protection Agency proposes to amend 40 CFR part 80 as follows:

PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

■ 1. The authority citation for part 80 continues to read as follows:

Authority: 42 U.S.C. 7414, 7521(1), 7545 and 7601(a).

■ 2. Section 80.1405 is amended by adding paragraph (a)(4) to read as follows:

§ 80.1405 What are the Renewable Fuel Standards?

(a) * * *

(4) *Renewable Fuel Standards for 2013.*

(i) The value of the cellulosic biofuel standard for 2013 shall be 0.008 percent.

(ii) The value of the biomass-based diesel standard for 2013 shall be 1.12 percent.

(iii) The value of the advanced biofuel standard for 2013 shall be 1.60 percent.

(iv) The value of the renewable fuel standard for 2013 shall be 9.63 percent.

* * * * *

[FR Doc. 2013–02794 Filed 2–6–13; 8:45 am]

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